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ARGUED AND DETERMINED IN

THE SUPREME COURT OF SOUTH CAROLINA

COVERING

ALL THE CASES (LAW AND EQUITY) FROM THE ORGANIZATION OF THE COURT (BAY'S REPORTS) UP TO AND INCLUDING VOLUME 25 OF THE SOUTH CAROLINA REPORTS

ANNOTATED EDITION

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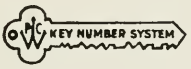

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REPORTS OF CASES

HEARD AND DETERMINED BY

THE SUPREME COURT

OF

SOUTH CAROLINA

VOLUME V

FROM NOVEMBER, 1873, TO NOVEMBER, 1874, INCLUSIVE

BY J. S. G. RICHARDSON

STATE REPORTER

COLUMBIA, S. C.
REPUBLICAN PRINTING COMPANY, STATE PRINTERS
1876

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LAW

JUDGES AND OTHER LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS VOLUME

JUSTICES OF THE SUPREME COURT.

Hon. F. J. MOSES, Chief Justice.
Hon. J. J. WRIGHT, Associate Justice.
Hon. A. J. WILLARD, Associate Justice.

JUDGES OF THE CIRCUIT COURTS.

1st	Circuit—	Hon.	R. F. GRAHAM.
2d	"	"	JOHN J. MAHER.
3d	"	"	JOHN T. GREEN.
4th	"	"	C. P. TOWNSEND.
5th	"	"	R. B. CARPENTER.
6th	"	"	T. J. MACKEY.
7th	"	"	M. MOSES.
8th	"	"	T. H. COOKE.

ATTORNEY GENERAL.

S. W. MELTON, Esq.

CLERK OF SUPREME COURT.

A. M. BOOZER, Esq.

TABLE OF CASES REPORTED

	Page
Aiken v. Western Union Tel. Co.	358
Armstrong v. Humphreys	128
Bachman v. Sulzbacher	58
Bacot v. Heyward	441
Bennett v. Mathewes	478
Bischoff v. Ward	140
Bratton v. Anderson	504
Brothers v. South Carolina R. Co.	55
Brown v. Kirkpatrick	267
Bull v. Lambson	284
Bull v. Lambson	288
Burge v. Willis	212
Carson, Ex parte	117
Central Nat. Bank of Columbia v. Charlotte, C. & A. R. Co.	156
Chalk v. Patterson	290
Chandler v. Geraty	501
Charles v. Jacobs	348
Charleston, City of, v. People's Nat. Bank	103
Cochran v. Darcy	125
Cohrs v. Fraser	351
Columbia Water Power Co. v. City of Columbia	225
Converse v. Evins	52
Davis v. Winsmith	332
De La Howe v. Harper	470
Dudley v. Odom	131
Dunn v. Spears	17
Earle v. Stokes	336
Garaty v. Du Bose	493
Green v. Jacobs	280
Hand v. Savannah & C. R. Co.	182
Hewett, Ex parte	409
Horde v. Landrum	213
Hubbell v. Courtney	87
Jenkins v. City of Charleston	393
Jones v. Hammett	41
Keller v. Myers	11
Kibler v. Bridges	335
Kirby v. Woods	1
Kirkpatrick v. Chesnut	216
Knox v. South Carolina R. Co.	22
Knox v. South Carolina R. Co.	73
Lesesne v. Witte	450
Lucken v. Wichman	411
McCullough v. Kibler	468
McKeown v. Carroll	75
Magwood v. Southwestern R. Bank	379
Miles v. King	146
Miller v. Simonton	20
Moore v. Richardson	142
Muller v. Wadlington	342
Nettles v. McCown	43
Parker v. Wilson	485
Pickett v. Lyles	275
Pope v. Frazee	269
Redding v. South Carolina R. Co.	67
Russell v. Cantwell	477
Sampson v. Singer Mfg. Co.	465
Shumate v. Powell	286
Smith v. Lake	341
Southern Porcelain Mfg. Co. v. Thew	5
State v. Cardozo	297
State v. Green	65
State v. Hall	120
State v. McQuaige	429
State v. Walker	263
Stewart v. Blease	433
Stokes, In re	71
Stolbrand v. Hoge	209
Thew v. Southern Porcelain Mfg. Co.	415
Watson v. Citizens' Sav. Bank	159
Welsh v. Kibler	405
Whaley v. Bank of Charleston	189
Whaley v. Bank of Charleston	262
Willis v. Knox	474
Wilson v. Harper	294
Winsmith v. Walker	473
Wise v. Hardin	325
Zeigler v. Northeastern R. Co.	221
Zorn v. Savannah & C. R. Co.	90

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF SOUTH CAROLINA

JUSTICES PRESENT.

HON. F. J. MOSES, CHIEF JUSTICE.
HON. J. J. WRIGHT, ASSOCIATE JUSTICE.
HON. A. J. WILLARD, ASSOCIATE JUSTICE.

5 S. C. *1

*KIRBY v. WOODS.

(Columbia. Nov. Term, 1873.)

[*Sheriffs and Constables* ⇐120.]

Rule on a Sheriff to compel him to sell land which had been assigned as a homestead under an execution issued before 1868: *Held*, That, under the circumstances set forth in the return, the Sheriff was not in contempt, and rule dismissed.

[Ed. Note.—Cited in Charles v. Charles, 13 S. C. 388; Corry v. Tate, 48 S. C. 552, 26 S. E. 794.

For other cases, see Sheriffs and Constables, Cent. Dig. § 206; Dec. Dig. ⇐120.]

[This case is also cited in Charles v. Charles, 13 S. C. 385, and distinguished therefrom.]

Before Green, J., at Sumter, May term, 1873.

Evander Kirby recover judgment against Andrew W. Woods, administrator of R. F. Hickson, deceased, before the year 1868, and issued execution thereon. Hickson was seized, at the time of his death, of a tract of 535 acres of land, which was subject to the lien of the judgment, and this was a rule upon John M. Tindal, Sheriff of Sumter, to compel him to sell the land under the execution.

The Sheriff made return to the rule, and stated that he levied upon the tract of 535 acres of land, and advertised the same for sale on sale day in April, 1873, under Kirby's execution, and also under another execution which was older; that on the 25th March, 1873, the widow of Hickson claimed the ben-

*2

efit of the homestead *exemption for herself and the minor children of Hickson, and thereupon he issued the usual papers to have the homestead assigned; that Kirby gave notice in writing that he objected to the allowance of a homestead; that on the 4th April the appraisers made their return, whereby they stated that they had assigned to the widow and minor children of Hickson 250 acres, part of said tract of 535 acres, as a homestead; that Kirby filed exceptions to the return of the appraisers, and thereupon it was agreed that the residue of the tract should not be sold until the right to the homestead exemption had been decided by the Court. He further stated that the papers had been filed with the Clerk of the Court, and he submitted that he was not in contempt, under the circumstances stated, and that the rule should be discharged.

His Honor held that Kirby had the right, under the Constitution of the United States, to have the whole tract sold for satisfaction of his judgment; that the Sheriff was in contempt for not obeying the process of the Court; and he ordered that the Sheriff do proceed to sell the land, and failing to do so by the first Monday in October, that he be attached for contempt.

The Sheriff appealed upon the ground that under the circumstances stated in his return, he was not in contempt of the process of the Court, for that, in having the homestead assigned, he had only obeyed the law as interpreted by the Supreme Court of the State in a decision which had not been overruled, and which, until overruled, he was bound to regard.

J. S. G. Richardson, for appellant.

No counsel appeared for respondent.

Dec. 18, 1873. The opinion of the Court was delivered by

MOSES, C. J. Under the practice prescribed by the Code of Procedure, a rule against the Sheriff is to be regarded as a

special proceeding. It is not an action wherein the "enforcement or protection of a right or the redress or prevention of a wrong" is to be determined between the parties before the Court. It lies as against a Sheriff, where he has willfully disregarded the mandate or direction of a competent authority, or has been guilty of a neglect of duty in some culpable manner.

The Court will not, in this summary way, settle a complex question in regard to the right to money in a Sheriff's hands, but will

*3

*leave the party to his action. There is a difference where the proceeding is not for an actual contempt, but is only resorted to as a private remedy.—Thomas v. Aitken, Dud., 293; Cannady v. Odum, 2 Rich., 528; Conduct v. Same, Ibid; Brown v. Furze, 2 Rich., 531.

In Dawson v. Dewan, 12 Rich., 499, it was held "that disputed questions of fact, proper to be submitted to a jury, will not be decided by a Judge upon the return of a rule on the Sheriff to show cause." The principle applies with equal, if not greater force, where the determination involves questions affecting the rights of property, where the parties, though directly interested in the result, are not before the Court. The Sheriff should not be made the mere medium through which the claimants to property may seek to enforce their supposed rights, much less where no notice has been given to the parties against whom they are demanded.

In the case before us he was commanded, by the execution against the administrator of Hickson, to levy upon the lands, &c., of the intestate, out of which the money due on the judgment was to be made. He proceeded in March, 1873, to levy upon the land described in his return, and advertised it in due form for sale on the succeeding sale day. So far he had performed every duty which the mandate of the Court had enjoined. On the 25th of March the widow of Hickson claimed that a homestead in the same land should be assigned to her and the minor children of her deceased husband, by virtue of and under the Act approved 22d February, 1873. The Sheriff, on the third of April following, issued the precept necessary for the purpose, strictly complying in all particulars with the Act, and returned to the Circuit Court all the proceedings of the Commissioners in regard to their allotment, as by law required. The plaintiff in execution did file a notice of objection or protest with the Sheriff before he issued the precept for the homestead, and, after its judgment, notice of exception was also given to him on behalf of the plaintiff. The interposition of the homestead claim prevented the sale of the land on the first Monday of April.

The Sheriff surely did no wrong to the plaintiff by delaying the sale until the question made on his exception could be heard and decided by the Circuit Court, which, under the Act, had the power of passing on the question at issue between the parties. If he had sold, before it was determined, the cloud

*4

which thus rested on the *title to the land would, in all probability, have materially prejudiced the price which it would have brought at public outcry.

It is difficult to perceive how the Sheriff is to be held in contempt for not selling in April, when Kirby had actually resorted to the course provided by the Act for testing the right of the widow and children to a homestead in the very land which was, under the levy, to be the subject of the sale. He complied with all the requisitions of the law in returning the papers and reporting his proceedings in the matter to the Court, thus facilitating, and in no way retarding the opportunity of Kirby to be heard on his exception by that tribunal. Kirby should have consummated the proceeding he had initiated by applying to the Court, at its following May Term, to set aside the assignment. That was the jurisdiction to which he had appealed, and properly so, for it had full power to pass judgment on the question. The rights of the respective parties would have then been determined. If Kirby had succeeded, all of the land would have been subject to sale under his execution. If preference had been given to the homestead, the remainder of the land only would have been thus liable. There is not such a wilful and culpable disobedience as shows a contempt of the authority, under which the process to the Sheriff issued, which should subject him to this summary mode of proceeding. The rules which bind the ministerial officers of the Court to a strict and proper performance of all duties enjoined by law are not to be relaxed, but at the same time they are not to be so harshly construed as to provoke punishment where it is clear that there is no wrongful disobedience.

The motion to set aside the order of the Circuit Court is granted.

WRIGHT, A. J., and WILLARD, A. J., concurred.

---

5 S. C. *5

*SOUTHERN PORCELAIN MANUFACTURING CO. v. THEW.

(Columbia. Nov. Term, 1873.)

[*Action* ⇐25, 32.]

An action does not lie under the Code of Procedure unless a cause of action exists which would have maintained an action at law, or a bill in equity, before its adoption, or where a writ of scire facias or quo warranto, or information in the nature of a writ of quo warranto was then the remedy, or where the action is brought by the Attorney General against a corporation on some one of the grounds enu-

merated in Chapter II, Section 13, of the second Part of the Code

[Ed. Note.—Cited in Vaughan v. Hewitt, 17 S. C. 444.

For other cases, see Action, Cent. Dig. §§ 158, 257; Dec. Dig. ⟸25, 32.]

[*Judgment* ⟸68.]

An action does not lie by a corporation to set aside a judgment by confession against it on the ground that the confession was not in form valid and binding—that the debt was not a legal debt of the corporation, and that the person who made the confession had no authority to make it; the remedy, it seems, is by application to the Court in which the confession is entered to vacate or modify the judgment.

[Ed. Note.—Cited in South Carolina R. Co. v. Barrett, 12 S. C. 175; Darby & Co. v. Shannon, 19 S. C. 533, 535; Crocker v. Allen, 34 S. C. 458, 461, 13 S. E. 650, 27 Am. St. Rep. 831.

For other cases, see Judgment, Cent. Dig. §§ 113, 116, 118, 120, 123, 125, 127; Dec. Dig. ⟸68.]

[*Judgment* ⟸68.]

An allegation in the complaint that the party taking the confession knew that the officer by whom it was made had no authority to bind the corporation by a confession of judgment, is not a sufficient charge of fraud to maintain the action on that ground.

[Ed. Note.—Cited in Thew v. Porcelain Mfg. Co., 5 S. C. 427.

For other cases, see Judgment, Cent. Dig. §§ 113, 116, 118, 120, 123, 125, 127; Dec. Dig. ⟸68.]

[*Judgment* ⟸301.]

Where a confession does not state a cause of action, an amendment cannot be allowed after trial, unless the evidence shows a sufficient cause of action.

[Ed. Note.—Cited in Hogg v. Pinckney, 16 S. C. 395; Kennerty v. Etiwan Phosphate Co., 17 S. C. 416, 43 Am. Rep. 607.

For other cases, see Judgment, Cent. Dig. § 589; Dec. Dig. ⟸301.]

[*Appeal and Error* ⟸856.]

On the argument of an appeal the respondent may show that the judgment below should be sustained on grounds not noticed by the Circuit Judge, or mentioned in an exception.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3406; Dec. Dig. ⟸856.]

Before Maher, J., at Aiken, May Term, 1873.

Action by the Southern Porcelain Manufacturing Company, plaintiff, against George M. Thew, Cashier of the National Bank of Augusta, defendant.

The complaint was as follows:

"The complaint of the Southern Porcelain Manufacturing Company, a body corporate and politic by the laws of the State of South Carolina, plaintiffs, respectfully shows, that the said company was incorporated on the twentieth day of December, one thousand eight hundred and fifty-six, under the name and style aforesaid, with George M. Newton, William W. Davies, Thomas Barrett, James Hope, William H. Farrar, Holman Curtis & Company, Charles J. Jenkins, and such other persons as might thereafter be associated with them, and their successors, as members thereof, with power to have, use and alter, at their pleasure, a common seal, to make all needful rules, by-laws and regulations for their government, and to sell and manufacture porcelain clay in the District, and to purchase, hold and enjoy such real estate as might be necessary and proper for the procurement of porcelain clay, and other earths and minerals used in the manufacture thereof, and for the convenient and certain supply of fire-wood. The

*6

plaintiffs *further show that the said company were soon thereafter duly organized, and began and carried on business under said charter, with George M. Newton as President thereof; that after several mutations in the offices of said company, Rufus B. Bullock was elected President thereof on the first day of March, one thousand eight hundred and sixty-four, and on the nineteenth day of May, one thousand eight hundred and sixty-eight, without any authority whatsoever, he, the said Rufus B. Bullock, confessed (or attempted to do so,) a judgment to George M. Thew, Cashier of the National Bank of Augusta, the defendant, in the sum of fifty-six thousand three hundred and eighty three dollars and ninety-eight cents, with interest thereon from the 15th May, 1868, as President and Treasurer of said company, and this without even the formality of the company seal; that said judgment was lodged in the office of the Clerk of said County on the same day, and execution thereon in the Sheriff's office at the same time; that the Sheriff of said County has made a levy under said execution, upon all the real and personal estate of said company, and has advertised the same for sale on the first Monday in March next, to satisfy said judgment. The plaintiffs assert, so far as the company is concerned, that said judgment is null and void; that the charter of said company gives no authority to the President, or any other officer of said company, to confess judgment for said company; that neither the charter nor by-laws authorizes any such officer to go in debt and bind the company therefor, except in cases where he may be so authorized by a vote of the stockholders or directors, and then only to the extent specifically authorized by such vote; that there never was a vote of the stockholders or directors of said company authorizing said confession, nor have they in anywise ratified it; that neither the stockholders nor directors of said company have ever had any knowledge when said debt was contracted, and they assert that it was not incurred on account of the company, nor was the money used for its purpose; that said company had a common seal to authenticate all solemn instruments and acts executed and performed by it, which said seal is now in the possession of the said Rufus B. Bullock, or has been lost; that the said company, in September, 1866, by vote of the stockholders, assessed

a contribution of fifty thousand dollars, to be paid by the stockholders, or by such of them as were willing so to do, for the purpose of paying all indebtedness of said company, and putting their works in efficient or-

*7

der: and *that on the twentieth day of October, 1866, the said Rufus B. Bullock, then being President and Treasurer of said company, announced as such that he had received, and then had, for the purpose before stated, forty-eight thousand dollars, in the notes of the various stockholders, available for that purpose; that from and after the 29th day of October, 1866, no meeting of the stockholders or directors was ever called by the said Rufus B. Bullock as President, nor does it appear by the company books or minutes that any such meeting was ever held, at which alone he could have received authority to contract said debt or confess said judgment. In consideration of the premises, the plaintiffs pray your Honors may adjudge the said confession null and void, and order the same to be vacated and set aside, or, at least, they ask that the said George M. Thew, Cashier of the National Bank of Augusta, and all persons claiming any interest in said judgment, together with the Sheriff of Edgefield, be peremptorily enjoined from selling the property of said company, or in anywise interfering with the same; and that your Honors do grant a temporary injunction against all parties seeking to enforce said execution, to remain of force till a hearing of the cause. And the plaintiffs pray for such further and other relief as the circumstances of the case require, and as are conformable to justice and equity."

The answer admitted that the plaintiff was a corporation duly organized as such, as stated in the complaint, and that Rufus B. Bullock, as President and Treasurer of the plaintiff, gave the confession of judgment mentioned therein. All other allegations and charges were denied.

The case was heard upon the pleadings and proofs, and His Honor made a decree upon the merits, dismissing the complaint.

The plaintiff appealed upon numerous grounds, none of which it is deemed necessary to state.

[For subsequent opinion, see 5 S. E. 415.]

Addison & Addison, Carroll, for appellant.
Aldrich, Bonham, contra.

Dec. 22, 1873. The opinion of the Court was delivered by

WILLARD, A. J. A difficulty exists in the case of the plaintiffs below, the appellants here, that would under any circumstances preclude their obtaining the relief demanded

*8

by their complaint, and *which is not removed by the nature of the issue presented to the Circuit Court, the decision of that Court, or the character of the exception raised to the Circuit decree. No sufficient cause of action appears by this complaint, nor is there ground laid in the process or proceedings either to enlarge the sphere of the complaint or to serve as the basis of an amendment of the complaint that would obviate such objection.

An action under the Code of Procedure only lies where the subject-matter of such action furnished ground previous t e adoption of the Code for the maintainance of either an action at law or a bill in equity, or where the object of the action is to attain that which, previous to the Code, was attainable by means of the writ of scire facias, of quo warranto, or by information in the nature of quo warranto, or where the action is brought by the Attorney General against a corporation on some or one of the grounds enumerated in Chap. II, Title XIII, of the second part of the Code (§§ 443, 444, 445, et. seq.) Sec. 92 assumes to change merely the forms of action, but not to affect their substantial characteristics. That Section is as follows: "The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished, and there shall be in this State, hereafter, but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action." What rights shall be enforced and what wrongs shall be redressed by a civil action is not determined by the Code, except in the case of proceedings formerly taken by scire facias, quo warranto, and information in the nature of quo warranto, and when instituted on certain grounds by the Attorney General against a corporation.

These matters are therefore to be determined according to the law as it stood previous to the adoption of the Code.

In order, then, to ascertain whether a complaint under the Code sets forth a sufficient cause of action, except in the special instances above enumerated, the inquiry must be whether, under the former practice of this State, the matters set forth were sufficient either to support an action at law or a bill in equity, or would, in part, support an action, and, in part, a bill, then the cause of action is sufficient. On the other hand, if such matters would have been held insufficient, either as the foundation of an action or of a bill in equity, then the cause of action is not sufficient.

*9

*We will look, in the first place, into the pleadings, to see whether any sufficient cause of action is there presented; and, in the second place, into the proofs and proceedings, in order to see whether anything has occurred subsequently to issue joined tending to cure the defect appearing in the pleadings.

The complaint seeks to set aside a judgment entered by confession, in behalf of the

defendant below, and against the plaintiffs, on the three-fold ground: that the confession was not in form valid and binding; that the demand allowed by the confession was not a legal debt of the plaintiffs; and that such confession was made by a person not having the authority, either of law or derived from the plaintiffs, to make such confession.

It is clear that such averments, standing by themselves, would neither support an action at law nor a bill in equity.

A judgment entered by confession has the characteristics of an ordinary judgment in invitum. It is equally conclusive in its operation on the rights of the parties involved and by way of estoppel. It is true that, under the equitable powers of a Court of law, whose judgment it is, or through the intervention of general equitable powers, it may be looked into, in certain cases, in furtherance of the agreement and intentions of the parties to it or the equities affected by it; but, independently of the exercise of this mode of affecting its binding force, it stands with all the force and conclusiveness due to a judgment in invitum.

Hence it follows, that no action at law can be brought to do away with its force, for the mere fact of its existence destroys the basis of right on which such subsequent action would have to rest. If the confession is insufficient in form, or by any reason void, advantage must be taken of such fact by a motion in the Court in which the judgment was rendered, having for its direct object the vacation or modification of the judgment, and by appeal from the decision of the Court on such motion. If no such direct proceeding is taken, the validity of the judgment cannot be collaterally called in question in any subsequent action at law. These principles are so familiar to the practitioner that they need not be enforced by citations of authority or precedent.

It follows, then, that unless the complaint in the present case furnishes ground sufficient to support a bill in equity, the complaint must be adjudged insufficient.

The complaint does not allege matters ei-

*10

ther directly imputing a *fraud implicating the defendant, or of which he was cognizant, nor from which the Court would be justified in inferring the existence of fraud as affecting the defendant. The averment that the defendant knew that the judgment was confessed without adequate authority on the part of the President of the company to make the confession, is not sufficient to give rise to an inference of fraud on his part. This is the only averment that approximates a charge of fraud as affecting the conduct of defendant. Nor does it appear that any equity exists, arising out of accident, mistake, or any of the grounds of equitable jurisdiction, warranting an interference with the proceedings and process of a Court of law. Unless, therefore, something has occurred since issue joined having the effect to cure the inherent defect of the complaint, it is evident that it would not have supported any judgment that might have been rendered by the Circuit Court in the plaintiffs' favor.

The provisions of the Code, as to amendments, are of the most liberal character, and if evidence had appeared upon the trial, introduced by the plaintiffs without objection on the part of the defendant tending to show that ground existed, such as would have constituted a sufficient cause of action if stated in the complaint, it might well be that the Court would disregard the want of due averment in the complaint, in view of the fact that the defendant had not taken advantage of such defect by demurrer. But the evidence in the case does not tend to charge the defendants with fraud, nor to support any distinct ground of equitable relief. On the contrary, the whole tendency of the plaintiffs' testimony is directed towards the points made by the complaint.

It follows that the defect of the complaint remains uncured by the proofs and proceedings subsequent to issue joined, and the defects of the complaint preclude any relief as to the matters alleged, and therefore there is no sufficient ground to set aside the judgment dismissing the complaint.

The fact that the objection above stated does not appear in the grounds of appeal does not preclude the objection from being taken at the present time. The judgment dismissing the complaint was placed by the Circuit Judge on a quite different ground from that stated above.

The plaintiffs being the appellants, the grounds of appeal are confined to matters embraced in the view of the case taken by the Circuit Judge. The defendant is not an ap-

*11

pellant, and is not lim*ited by the grounds of exception raised by the appeal, but is at liberty to allege that a good ground for the dismissal of the complaint existed independently of that considered and passed upon by the Circuit Court.

The appeal must be dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

---

5 S. C. 11

KELLER v. MYERS.

(Columbia. Nov. Term, 1873.)

[*Homestead* ⇨182.]

A defendant in execution is not entitled, as part of his homestead exemption, to money arising from sales of his real estate, as allowed by the Act of March 13th, 1872, where his homestead had been claimed and set off to him

before the passage of that Act, though such homestead was appraised at less than $1,000.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 359; Dec. Dig. ⟸182.]

[This case is also cited in Charles v. Charles, 13 S. C. 387, as an example of the custom of proceeding by rule requiring sheriff to enforce process.]

Before Graham, J., at Orangeburg, May Term, 1872.

On the 8th day of February, 1872, Joseph A. Keller obtained judgment, and on the next day entered execution thereon in the office of the Sheriff of Orangeburg County, against Ann Myers, Levi Myers and Capers Myers. The judgment was for $5,436.60, on a bond given in 1863. On the 10th day of the same month and year the Sheriff levied, under the execution, upon two separate tracts of land as the property of Levi Myers, one containing 205 acres and the other 103 acres. Levi Myers claimed his homestead, and appraisers were appointed to assign and set it off, who, on the 22d day of February, 1872, did assign and set off as his homestead the tract containing 205 acres, valued at $500. The tract of 103 acres was not appurtenant to the dwelling house and outbuildings of Levi Myers, but was entirely separate therefrom, and on the 1st day of April, 1872, the Sheriff sold this tract for $350. He also sold, at the same time, the remainder in the homestead tract for $55. The net proceeds of both sales amounted to $389.

Levi Myers claimed the sum in the Sheriff's hands on the ground that he was entitled to it under the Act "to reduce all Acts and parts of Acts to determine and perpetuate the homestead into one Act, and to amend the same," approved March 13th, 1872, and this was a rule upon the Sheriff to compel him to apply the money to the execution of Keller.

*12

*The decision of His Honor the Circuit Judge is as follows:

Graham, J. This was a motion made by the plaintiff for an order to direct the Sheriff of Orangeburg to pay over to the plaintiff the sum of three hundred and eighty-nine (389) dollars, which are in his hands, under the following state of facts:

An execution was lodged in the case the 9th of February, 1872; levy was made on the 10th (the day on which the General Statutes were enacted,) upon two tracts, one containing 205 acres, and the other 103. On the 22d of February the 205 acre tract was set off to the defendant, Levi Myers, one of the defendants in the cause, valued at $500. On the 13th of March, 1872, the Act to consolidate the homestead law was approved.

On the 1st of April, 1872, the 103 acre tract of Levi Myers was sold for $350, and the remainder in homestead in the 205 acre tract for $55, making $405. The affidavit of the Sheriff's deputy shows that the costs of sale reduces the amount to $389.

The defendant, Levi Myers, claims that sum as an addition to the homestead, under the Act of 13th March, 1872, and the plaintiff claims it by his motion:

1. Because he says the Act of 13th March is unconstitutional in this particular.

2. Because it did not operate upon this case, the execution and levy having been made prior to its passage.

I. This Court must regard the Act of the Legislature constitutional until the Supreme Court decides otherwise.

II. And is of opinion that the Act of the 13th March applies to this case.

The motion is therefore dismissed, the plaintiff to pay the costs of the motion. As, however, the plaintiff has given notice of an intention to appeal, such appeal shall operate as a supersedeas, provided the notice and grounds are served, and the bond for costs given within the time prescribed by law; otherwise the Sheriff shall pay the money to the defendant, or he may pay it to him at once upon sufficient security to refund in case the appeal is sustained.

Keller, the plaintiff in execution, appealed.

Taylor & Dibble, for appellant:

The 3d Section of the Act of 13th March, 1872, is unconstitutional—

*13

*1. It impairs the obligation of contracts. —McCracken v. Heyward, 2 How., 608; State v. Carew, 13 Rich., 509; Gunn v. Barry, U. S. Supreme Court, 1873.

2. The State Constitution prescribes that the homestead shall consist of "dwelling house, outbuildings and lands appurtenant," and specifies the kinds of personal property, and the maximum amount of such property, to be exempted from execution "to secure the full enjoyment of said homestead." This excludes, by the words "secure the full, &c.," any additional kinds or amount of property, as a homestead exemption. Money is not specified, nor are lands not appurtenant to the dwelling house.

3. If not a homestead exemption, it is not embraced in the title of the Act.—Const., Art. II, Sec. 20.

Section 3 of Act of 13th March, 1872, does not apply to this case—

1. The homestead was set off and assigned, and the levy made, before the passage of the act of 13th March, and the rights of the parties and of the Sheriff were ascertained and vested under homestead laws of 1868 and the General Statutes.—Taylor v. Miller, 13 How., 293; Frierson v. Wesberry, 11 Rich., 355; Gassoway v. Hall, 3 Hill, 289.

2. Section 3, Act of 13th March, is not retrospective in its terms, and a statute will never be interpreted as retrospective or as divesting vested rights by implication.—15 Stat., 230; Cooley's Cons. Lim., 62; Dash v. Van Kleech, 7 Johns. R., 502, 509; Osborn v. Nicholson, 13 Wallace, 662; Broom Leg.

Max., 35, et seq.; Ex Parte Graham, 13 Rich., 277.

3. Section 3, Act of 13th March, in its terms explicitly confines its own application to the case of a "homestead assigned under Section 1 of this Act."—15 Stat., 230.

4. In order to authorize the Sheriff to pay the defendant, Levi Myers, the proceeds of sale in his hands, it is necessary to decide that the homestead of Levi Myers was assigned under Section 1 of the Act of March 13, which is not the fact: or to decide that Section 3 of said Act divests a vested right, a construction which can only be supported in rare instances, when the words of the statute leave it beyond doubt.

5. Gunn v. Barry, U. S. Supreme Court, 1873—Error to the Supreme Court of Georgia: "In this case the Court hold that an Act of the Legislature of Georgia of 1868, increasing the amount of homestead exemption,

*14

was not applicable to pre-existing debts *and judgments, and reverse a judgment below, refusing the writ of mandamus to compel the Sheriff to levy on certain property of Barry, that officer having declined to make the levy on the ground that the property was exempt under the Act cited." Mr. Justice Swayne delivered the opinion.

The constitutional provisions and statutes of this State concerning the homestead are void as to pre-existing contracts.—Gunn v. Barry.

Hutson v. Hutson, contra:

As appellant's brief states no ground of appeal, the appellee is confined to the points decided by the Circuit Judge—

1. That the Act of 13th March, 1872, so far as the 3d Section is concerned, is not unconstitutional.

2. That the 3d Section of said Act is applicable to the case made in the statement of facts.

I. The appellee contends that the ruling below on the constitutional question is right—

1. That the 1st Section of third Article of the Constitution gives all the legislative power of the State to the General Assembly.

2. That under this wide grant the General Assembly has no limit as to the enactment of homestead laws, save as it is restricted by the 32d Section of Article II.

3. That the restrictions of that Section are five only, to wit: 1. That the value of land assigned shall not exceed $1,000. 2. That of the personalty $500. 3. That the exemption shall not avail against the purchase money, nor the money expended in improvements. 4. Nor to taxes. 5. Nor to the yearly proceeds, so far as the debts were incurred in the production thereof.

4. That the 3d Section of A. A. 1872 does not violate any of these restrictions.

II. And the provisions of the 3d Section of the A. A. 13th March, applied to the sale made in April, 1872—

1. The 1st Section of that Act only continues of force the same Section of the Acts of 1868, and of the 10th February, 1872, and the 3d Section is as if it was written: "That if the homestead hitherto provided" shall not amount to the value of $1,000.

2. When the sale took place, and the Sheriff received the money, it was subject to the operation of this Act, by which he was bound

*15

*to pay it to the person claiming the homestead, in preference to all other claims.

3. It was a constitutional enactment that the homestead, whenever the land was of sufficient value, should only be limited by the first constitutional restriction; and it came in time to affect this case, notwithstanding the levy and set-off of homestead were made prior to the Act.

4. Was the fact that the homestead had already been set off any better reason why the Legislature could not make this subsequent provision than that a judgment entered up, long before the war and the adoption of the Constitution, is no bar to a claim of homestead? The judgment creditor's lien on the property, over and above what had been set off, was of no greater force than it had been before. If the Legislature had the power and the intention to grant a homestead against the vested rights of a judgment creditor, (and this Court has so decided,) why should they not have the power and intention of taking the money arising from the sale of land, on which he had no higher claim than he originally had on the whole of the land?

5. That the Legislature intend that the homestead in land shall only be restricted by the constitutional limit is evident from the last Act, for while it leaves of force the 3d Section of the A. A. 13th March, (for it is neither inconsistent with, nor supplied by it,) it provides, in every case of excess of value and a sale, that $1,000 shall be applied to the purchase of a homestead, without reference to the size of the family or leaving it to appraisers to fix.

For these reasons the appellee submits that the appeal should be dismissed.

Jan. 7, 1874. The opinion of the Court was delivered by

MOSES, C. J. Joseph A. Keller, the appellant, on the eighth February, 1872, obtained in the Circuit Court for Orangeburg County a judgment against Levi Myers and others, which was duly entered on the same day, and, on the next, execution thereon was lodged in the Sheriff's office, on which, on the tenth, a levy was made of two several tracts of land—the one containing two hundred and five acres (more or less), and the other one hundred and three acres (more or less), as the property of the said Myers.

Proceedings under the Homestead Act

*16

were instituted by Myers, *and on the 23d of February, 1872, the appraisers, duly appointed for the purpose, assigned and set off to him as a homestead the tract containing two hundred and five acres, valued at $500. The other tract, not appurtenant to the dwelling house and out-buildings, but entirely separate therefrom, was sold by the Sheriff, under the said levy, on 1st of April, 1872, for the sum of $350, and the remainder in the homestead tract for $55. Myers claiming the said proceeds under the Act of the General Assembly "to reduce all Acts and parts of Acts to determine and perpetuate the homestead into one Act, and to amend the same," approved March 13, 1872, (15 Stat., 229), Keller, the appellant, sought by proceedings below, to have the money in the hands of the Sheriff applied in satisfaction of his judgment; the Circuit Judge refusing, he asks, by appeal to this Court, to reverse his order.

When Myers claimed his homestead it was by virtue of the provision of the Constitution and the Act of 1868 "to determine and perpetuate the homestead," (14 Stat., 19). He acquired no further nor more extended rights in regard to it than were thereunder given, and if any succeeding Legislature in any manner changed or varied the laws in respect to the homestead privilege, either by increasing or diminishing its extent, his rights, as established and confirmed, could not be thereby affected. His claim of homestead had been administered; there was nothing further to be adjudicated, and subsequent change in the law could not operate on a transaction which had been consummated through judicial proceedings.—See Taylor v. Miller, 13 How., 293 [14 L. Ed. 149]; Frierson v. Westberry, 11 Rich., 353.

It seems to have been the express intention of the Act of March 13, 1872, to extend the provisions, under its third Section, only to cases of homestead assigned under it. Its language admits of no other conclusion, and Myers having already accepted the 205 acres of land as his homestead under the Act of 1868, although it was assessed at only five hundred dollars, has no right to any further extension under the Act of March, 1872, for, by its own avowal, the benefit which he now seeks applies only to assignments of homestead through the force of its first Section.

In the consideration of the case below it would seem that the Constitution and the Act of 1868 were construed as securing a right of homestead in real estate to the full value of one thousand dollars. A reference to both will, however, show that it is not

*17

to *exceed that value, and, in the view of the Constitution, "is to consist of dwelling house, outbuildings and lands appurtenant." The Act of 1868 declares that when the homestead is set off "no further proceedings shall be had against it, but the residue of the lands and tenements of the head of the family, if any more or other he shall have, shall be liable to levy, attachment and sale." The third Section of the Act of March, 1872, only makes further provision where the real estate assigned as a homestead under it was in value less than one thousand dollars, and, in that event, the difference was to be paid to the claimant, out of sales of any other land, in preference to the creditor. How far it may involve a constitutional objection, by including in the homestead exemption lands other than "the dwelling house, outbuildings and lands appurtenant," it is not necessary for us now to consider or determine. For the other reasons expressed we hold the judgment of the Circuit Court erroneous, and the motion to reverse it is granted.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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5 S. C. 17

DUNN v. SPEARS.

(Columbia. Nov. Term, 1873.)

[*Landlord and Tenant* ⇐242.]

Rent cannot be secured by a lien on the crop, taken under the Act to secure "advances either in money or supplies."

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 981; Dec. Dig. ⇐242.]

Before Moses, J., at Union, ——— Term, 1873.

Action by Philip Dunn, Sheriff of Union County, against A. D. Spears, James D. Sartor, Nelson Kelly, Samuel Sims and George Gallman, to compel the defendants to interplead under § 145 of the Code of Procedure.

The case was briefly as follows: Under an order of Judge Thomas, made in February, 1870, directing the Clerk of the Court to lease certain lands and secure the payment of the rent by the bond of the lessee and a lien on the crops to be grown on the lands, the defendant, Spears, then Clerk of the Court, leased for the year 1871 a tract of land to one McJunkin, and, to secure the

*18

rent *agreed to be paid, took from McJunkin a lien on the crops to be made that year on the demised premises. The lien bore date February 20th, 1871, and was recorded the same day. On March 20th, 1871, McJunkin gave to the defendant, Sartor, a lien on the same crops, to secure advances in money or supplies not to exceed $1,000. This lien was recorded April 6th of the same year. The defendants, Kelly, Sims and Gallman, were laborers employed by McJunkin to

make the crop, under a contract entitling them to one-half the cotton and corn made.

Under warrants issued to enforce the liens of Spears and Sartor the plaintiff seized the crops and afterwards sold them for $1,073.10, an amount insufficient to satisfy the claims of the defendants. This action was then brought to compel the defendants to interplead and submit their rights to the adjudication of the Court.

His Honor the presiding Judge made a decree that the money should be applied: (1) To the payment of the laborers; (2) to the satisfaction of the lien of Sartor; and, (3) if any balance remained, that it should be paid on the claim of Spears.

Spears appealed, but before the appeal was heard the claim of the laborers was settled by consent of all parties, and the only question that remained for decision was, as between the liens of Spears and Sartor, which of the two was entitled to priority of payment.

Bobo, for appellant, contended that rent came within the meaning of the term "supplies," as used in the "Act to secure advances for agricultural purposes," and could, therefore, be secured by a lien on the corps.

Wallace, contra: The crops were not in esse when the contract with Spears was made. That contract, therefore, cannot be supported as a chattel mortgage valid at common law, for such a mortgage can only be given of chattels existing at the time and enumerated therein. Nor is it valid as a lien under the Act to secure advances for agricultural purposes. That Act provides for a lien on crops to be made, to secure advances on "money or supplies." Rent comes within the meaning of neither term, as used in the Act, and cannot, therefore, be secured by a lien thereunder. It follows that Sartor's lien, which is a valid one, is entitled to priority of payment. The Judge so held in the Court below, and the appeal must be dismissed.

*19

*Jan. 8, 1874. The opinion of the Court was delivered by

MOSES, C. J. The question in the case before us is to be confined to the relative rights of Spears and Sartor, under their respective contracts. The claims of the laborers, it is conceded, have been satisfied.

It is immaterial, for the solution of the points raised, whether Spears, the Clerk of the Court, had authority, under the order of Judge Thomas, of 23d February, 1870, to rent out the plantation for the year 1871. The whole difference between the parties, as understood at the argument, consists in the construction which they severally give to the 55th Section of the 120th Chapter of the General Statutes, p. 557. They aver no rights independent of it. Both recognize its validity, by claiming priority under it, and that side is to prevail in whose favor such priority may be determined.

The Act refers, in its language, to "advances, either in money or supplies, to any person or persons who are engaged, or about to engage, in the cultivation of the soil. The person or persons making such advances shall be entitled to a lien on the crop which may be made during the year upon the land, in the cultivation of which the advances so made have been expended, in preference of all other liens, existing or otherwise." It really does appear that the mere recital of the statute at once settles the question. It contemplates the possession of the land by the person engaged in its culture, and proposes to secure the money and supplies necessary to its proper cultivation, by a lien on the crop which may be thereon made. The advances are supposed to be expended in the cultivation of the crop, both by affording the labor necessary for the purpose and the means of sustaining the labor itself.

Rent cannot enter into the lien as an incident, for it is neither money nor a thing supplied. The Act gives no lien for the use of the land—but only for what is necessary for the cultivation of the land itself. So far from rent being a supply, it is "a profit issuing yearly out of the land." It cannot be "expended in the cultivation of the soil," and the Act clearly refers only to such advances as can be so expended.

The motion is dismissed.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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5 S. C. *20

*MILLER v. SIMONTON.

(Columbia. Nov. Term, 1873.)

[*Estoppel* ⇦22.]

A deed by a trustee to his cestui que trust, reciting that all the personal assets of the trust estate had been previously transferred to the latter, and conveying to her the real estate, *held* to be a bar to an action by the cestui que trust against the trustee for account.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 30; Dec. Dig. ⇦22.]

Before Graham, J., at Charleston, September, 1872.

Action by Caroline L. Miller, plaintiff, against Charles H. Simonton, defendant.

In the year 1860 the defendant was appointed trustee of the plaintiff, then the wife of William Miller, under a deed dated 31st December, 1842, by which certain real and personal estate was settled to her sole and separate use during the joint lives of herself and husband, and from and after his death, if she should survive him, to her sole and absolute use, freed and discharged of and from all trusts whatsoever. Miller, the husband, died in July, 1862, and at that time

the trust estate consisted of a house and lot in the city of Charleston, five negro slaves, and forty shares of the capital stock of the Bank of the State of Georgia. In August, and again in November, 1862, the plaintiff wrote to the defendant, requesting him to transfer the legal estate in the trust property to her. This he declined doing, giving as his reason that he was under the impression her children were included in the settlement, and adding, in substance, that when he had an opportunity he would examine the deed, and if he found they were not included, he would make the transfer. The defendant was at that time in the Confederate army and absent from home. He did not return until 1866, when having ascertained that the plaintiff had become entitled, by the terms of the deed, to the absolute use of the property, he executed a release to the plaintiff, by which, reciting that he had previously transferred the bank stock and other personal estate to the plaintiff, he conveyed to her the house and lot.

The plaintiff had always had the possession and enjoyment of the real property and slaves, and had received the dividends on the bank stock. The stock was worth $100 per share until 1865, when the bank failed, and it became worthless.

The action was for account, the plaintiff contending that she was entitled to recover from the defendant the value of the personal estate, and especially of the bank stock, in

*21

1862, when her estate *became absolute, and the defendant refused to transfer it to her, as he was requested to do.

The defendant, among other defenses, pleaded the Statute of Limitations, contending that the settlement made by him with the plaintiff in 1866 gave currency to the statute. His Honor sustained this and other defenses, and gave judgment for the defendant.

The plaintiff appealed.

Corbin & Stone, for appellant.
Pressley, Lord & Inglesby, contra.

Jan. 23, 1874. The opinion of the Court was delivered by

WILLARD, A. J. The terms of the deed between the plaintiff and defendant, bearing date twenty-eighth day of February, 1866, are decisive of a question on which the right of the plaintiff to recover depends. That deed conveys the real estate held by the defendant as trustee, and contains recitals by which it would appear that all the trust assets, including the shares of bank stock, specifically named and not transferred in terms by that deed, had been previously transferred from the defendant to the plaintiff. No attempt has been made by the plaintiff to give any other account of the nature of the transactions attending that deed than that which is declared by the deed or fairly to be inferred from its terms. Looking to the deed, we must infer that it was part of a final settlement between the parties in which all matters of difference between them were adjusted.

The condition of the estate, as it regards the bank stock, does not appear to have undergone any change since the date of the deed in question, as, previous to that time, the bank had failed; nor is any other reason furnished by the pleadings or proofs for disturbing any settlement then made between them.

It is not essential that the deed in question should operate as a final release in order to produce the effect ascribed to it. If it evidences, in any way, the fact of a settlement between the parties, it is conclusive until the presumptions arising from its terms are properly rebutted, and this has not been done. The recital in the deed of a previous delivery of the shares of bank stock stands unexplained and uncontradicted, and must be assumed as true.

*22

*This view of the case fully supports the judgment below, and renders it unnecessary to examine the other questions presented on the record.

The appeal must be dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

5 S. C. 22

KNOX & GILL v. RAILROAD COMPANY.

(Columbia. April Term, 1873.)

[*Carriers* ⇐⇒12.]

The charter of a railroad company authorized it "to charge for the transportation of passengers at a rate not exceeding 7½ cents per mile, and for the transportation of goods by weight, not exceeding 50 cents per 100 pounds per 100 miles:" *Held*, That for heavy articles the company could only charge for the actual distance of transportation at a rate not exceeding 50 cents per 100 pounds per 100 miles.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 7; Dec. Dig. ⇐⇒12.]

[This case is also cited in Whaley v. Bank of Charleston, 5 S. C. 262, without specific application.]

Before Melton, J., at Kershaw, October Term, 1872.

This was an action by Knox & Gill, plaintiffs, against the South Carolina Railroad Company, defendants, to recover back money paid for freight under protest.

The case was briefly this: Between the 22d September, 1869, and the 20th May, 1870, the defendants transported for plaintiffs, over defendants' railroad, from Kingsville to Camden, a distance of thirty-seven miles, a quantity of goods, and charged for the same

by weight at a rate which was not in excess of that allowed by their charter, if they were entitled to charge for thirty-seven miles of transportation at a rate not exceeding 50 cents per 100 pounds, but which was in excess of the rate allowed by the charter, if they could only charge for the actual distance at a rate not exceeding 50 cents per 100 pounds per 100 miles; and during the same period they transported for the plaintiffs, from Camden to Kingsville, over the same road, four hundred and eighty-eight bales of cotton, of the average weight of 450 pounds, and charged for the same, by weight, at $1.50 per bale. The plaintiffs paid the amounts charged under protest, and brought this action to recover back the excess, if any, over and above such amounts as the defendants were entitled to charge by the provisions of their charter.

By the terms of the charter the defendants were entitled to charge "for the transportation of goods by weight, not exceeding

*23

*fifty cents per one hundred pounds per one hundred miles," and the question was whether the defendants, as they contended, had the right to charge 50 cents per 100 pounds for any distance less than 100 miles, or whether, as plaintiffs contended, the rate should be in proportion to the actual distance, but not to exceed 50 cents per 100 pounds per 100 miles.

The case was tried by the Judge without a jury.

His Honor sustained the construction of the charter contended for by the plaintiffs, and referred it to a Referee to ascertain the amounts paid by plaintiffs in excess of the amounts the defendants were entitled to charge according to his construction of the charter. The Referee reported the amount due to plaintiffs, inclusive of costs, at $955.-71, and the report having been confirmed, judgment was entered thereon for plaintiffs.

The defendants appealed on the following grounds:

I. Because, it is respectfully submitted, that His Honor erred in deciding that "the statutes prescribe a rate of freight to which defendants are limited per hundred pounds per hundred miles, (fifty cents,) and at the same rate for any greater or less distance," when, in fact, such restriction was only imposed by the original charter, which has been repealed in this behalf, and appears in none of the amendments thereof.—8 Stat., 380, 384, 484.

II. Because His Honor erred in deciding that the charge of fifty cents per hundred pounds per hundred miles "applies to distances under 100 miles, as was explicitly enacted in the original charter, (8 Stat. 354,) above recited," which is "nowhere explicitly repealed in that particular," since the A. A. 1828, Sec. 11, (8 Stat., 360,) establishes a different tariff of charges, and expressly repeals the original charter in this behalf, "so far as the provisions thereof are in anywise repugnant to this Act."—Sec. 20, 363.

III. Because, therefore, His Honor erred in deciding that the original charter is still of force, as to the pro rata charges established thereby.

[For subsequent opinion, see 5 S. C. 73.]

Shannon, for appellants:

His Honor the Circuit Judge finds, as matter of law, "that the statutes prescribe a rate of freight per hundred pounds per hundred miles, and at the same rate for any

*24

greater or less distance." *Having before found the fact that the appellants had exceeded these rates in their dealings with respondents, and that respondents had paid those charges under protest, his natural conclusion was the further finding that the amount in excess so paid should be refunded.

Is it true that the statutes prescribe such a rate of freight? His Honor admits that the question "is not free from difficulty," but proceeds, thereupon, to solve it by two propositions, neither of which, it is respectfully submitted, are tenable. He says "the reason of the thing would seem to apply to distances under one hundred miles." I entirely dissent; all the difference exists in full force —universally recognized—between wholesale and retail business. The original charter (A. A. 1827, 8 Stat., 354) was a hurried, short and imperfect statute, so much so that in forty days the same Legislature substituted another Act (8 Stat., 360) for this Act—repeals everything in the prior Act repugnant to this Act. The freight clause is re-enacted almost totidem verbis—markedly omitting the words "and at the above rate for any greater or less distance." Now, in the construction of this clause, it is important to remember that the same Legislature passed both Acts; that they meant to express something, when they used these words, and, when they were re-enacting the same clause, meant to withdraw that expression when they omitted them; and they make that more clear when they declared the repeal of the first mentioned statute. And for what reason? Because, in the hurried preparation of the original charter, the mind of the Legislature was directed to the towns of Hamburg, Columbia and Camden, the three termini, then the three important towns of the interior of the State, at the head of navigation, respectively, of the Savannah, Congaree and Wateree, and distant from Charleston 135, 125 and 140 miles, and not expecting the important increase of way-side towns and way-side freights. When reflection suggests these things, the restriction is omitted, and is never again repeated in all the subsequent changes of freight charges.

Kingsville was then, and for many years, a wilderness. It could not be anticipated

that a railroad from Baltimore would pour its freights out there, and demand of these appellants that they should load and run cars at an enormous expense, to carry freight at a loss to the company, for the benefit of cities and railroad corporations out of the State.

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*Is there no reason that the rate of charges should be higher for expense of loading and unloading cars, getting up steam, and the countless items of expense, which are but little increased by a little additional distance?

But, however unreasonable it might be to say so, if these appellants live, move and have their being under the original charter, (8 Stat., 354,) which says "at the same rates for any greater or less distance," reason would be silent, for the law would compel obedience.

It is recognized in English law that, under their statutes which limit tonnage for railway trains pro rata, according to distance, the company may still charge something reasonable, in addition, for loading and unloading goods, when they perform that service. (Parker v. Western Railroad, note 151, Red. on Rail., Vol. 2, p. 70.) It is universal with railroad companies to charge higher rates for shorter distances.

It was proved at the trial that the schedule of through rates conformed to the statutory requirements, and that the way rates were published by the appellants, and it is evident that respondents were informed of them, for they were protesting against them all the while.

Even now a railroad, running to this capital, advertises to carry cord-wood at $3 for the first ten (10) miles, and 25 cents for every additional ten miles. The respondents could have carried their goods and wares to and from Baltimore via Charleston as cheaply and expeditiously for themselves, and with convenience to appellants; but they unreasonably demand that appellants shall load and unload for them at Kingsville, and receive an insignificant portion of compensation.

His Honor holds that the provision prescribing the same rates of freight "for any greater or less distance" is "nowhere explicitly repealed in that particular." The "difficulty," just alluded to, does not seem to be avoided; why all these qualifying words accompanying a negation of repeal? If repealed at all, it answers our purpose, whether done generally or particularly. It is certain that "an Act to amend" the Act of December, 1827, (8 Stat., 354,) was passed on the 30th January, 1828; that in Section 11, (8 Stat., 360,) the charges allowed were re-enacted, and the restricting words omitted, and in Section 20 (8 Stat., 363,) the former Act was repealed, so far as repugnant, and such words

*26

of restriction are never *again introduced in any of the changes of freight tariffs. (8 Stat., 380, 384, 484.)

Section 11, 8 Stat., 360, the additional charge for loading, storage, &c., is recognized clearly and explicitly.

Rion, for appellants:

The points involved in the appeal are of great importance to many of the railroads in the State, so much so that it is thought by many that an adverse decision on one of the points raised would cause the local business of railroads to become a heavy expense instead of a revenue to them. As the Charlotte, Columbia & Augusta Railroad Company is one of the corporations especially affected, their interest constitutes the motive of my participation in this case.

I. I would suggest to the Court that the construction of the Section of the charter ought to be made in the light of the usage of the commercial world, and of the carrying business that obtained at the time of its enactment.

In this case the Court has not this light.

To explain my meaning, and to illustrate the importance of the suggestion, I would state that at the trial of another case, involving precisely the same issues as this, certain issues of fact were submitted, and the following were the findings, based on the testimony of witnesses, one of whom had been engaged in the carrying trade for some thirty years in different parts of the world, another for some twenty years in the United States, and a third had been President of railroads for years. I call attention especially to the 12th and 13th findings:

1. "That a cotton bale is an article easily capable of being measured in cubic feet."

2. "That eighteen bales of cotton, averaging 417 pounds, were measured at the Chester depot, in April, 1871, and averaged 29 2–10 cubic feet measurement."

3. "That the cotton shipped at Chester, of the crop of 1870, would average at least 27 cubic feet measurement, certainly over 24 cubic feet."

4. "That cotton is not safely transported, on railroads, except in box cars."

*27

*5. "That a box car will only contain from 26 to 28 bales, which, at an average of 433⅓ pounds, would weigh from 11,267 to 12,133 pounds."

6. "That the weight capacity of a box car is, 16,000 pounds; and 18,000 pounds not an unusual load."

7. "That cotton not in 'compressed bales' is, by commercial usages, regarded rather as an article of bulky freight than heavy freight."

8. "That the usage of the Charlotte, Columbia & Augusta Railroad, and of connecting railroads and steamer lines, is to charge on all freights, with a few exceptions, (such as lumber, live stock, brick, coal, tan bark, wheeled vehicles, and a few other articles,) by weight,

but assigning different articles to different classes, for which different rates are charged, according to the bulk or measurement of said articles; and this classification is almost identical on said railroads and steamers."

9. "That the usage last mentioned has virtually obtained before and since the year 1847."

10. "That this usage obtains generally throughout the United States."

11. "That the defendant's road and its predecessor, the Charlotte & South Carolina Railroad, has always charged on cotton with reference to its bulk or measurement, the practice having been at first to charge so much per bale, without regard to weight, and afterwards, when it was found that the bales were being increased in weight and bulk, to adopt 425 pounds as the standard weight of a bale, and to charge for excess of weight proportionally."

12. "That the cost in transporting freight is not in proportion to the distance, but depends chiefly upon the receiving, storage, loading and unloading, provision of adequate motive power, rolling stock, train hands, depot agents, laborers, clerical force, and blanks and books, which are nearly as great for distances under a hundred miles as for a hundred miles; the commercial usage being for connecting roads to allow for the transfers of freight the compensation of from forty to sixty miles transportation."

13. "That the cost of transportation by the Charlotte, Columbia & Augusta Railroad from Chesterville to Charlotte, N. C., a distance of 45 miles, is not much less than the cost of transporting the same article from Columbia to Charlotte, a distance of 110 miles."

*28

*14. "That at the time of the shipment of the cotton, the subject-matter of these actions, one dollar of gold was worth at Chesterville one dollar and twelve cents paper currency."

That the Courts should have had this light in the construction of the Statute, vide Sedgewick on Stat. and Cons. Law, pp. 355, 356, 358; 1 Term, 728; 1 La. Anna, 419; Harper L., 102; 5 Iredell Eq., 71.

II. The Section of the Act presented for construction is as follows, (8 Stats., 360):

"And be it further enacted, by the authority aforesaid, That the said South Carolina Canal and Railroad Company shall at all times have the exclusive right of transportation or conveyance of persons, merchandise and produce over the railroad and railroads and canals to be by them constructed, while they see fit to exercise the exclusive right: Provided, That the charge of transportation or conveyance shall not exceed thirty-five cents per hundred pounds on heavy articles, and ten cents per cubic foot on articles of measurement, for every one hundred miles, and five cents per mile for every passenger."

This Act (p. 363) repeals provisions of former Act "so far as the provisions thereof are in any wise repugnant to this Act."

The former Act provides (8 Stats., 354):

"The said company shall, at all times, have the exclusive right of transportation on all the several railroads to be by them constructed: Provided, The charge for the transportation of goods, produce, &c., shall not exceed thirty-five cents per hundred pounds on heavy articles, and ten cents per cubic foot on articles by measurement, for every one hundred miles, and five cents per mile on every passenger, and at the above rates for any greater or less distance."

The omission of the words "and at the above rates for any greater or less distance," is clearly significant of the intention of the Legislature to relieve the company from the duty of prorating.

This omission operates as a repeal of the words omitted.—Moore v. Mausert et al., 4 Sickles, (49 N. Y.,) 335; 1 Pickering, 45; 31 Maine, 34.

III. The construction contended for by the respondents is not reasonable.

This would only allow about one-third of a cent for 100 pounds for one mile for transportation, stoppage of car, loading, unload-

*29

ing, *clerical labor, &c., or about 55 cents for a full car load. Many stations are from four to ten miles apart. This construction would become more glaringly unreasonable when the weight would be less than 100 pounds.

IV. The words of the Section do not plainly express that a prorating for each mile is required as to freights, while they do as to passengers. Expressio unius est exclusio alterius.

The reason of the difference is obvious, for the passenger loads and unloads himself, and requires no weighing or listing; and, yet, on many railroads, (as in 11 Stats., 536,) "an extra charge of fifty cents for taking up and putting down each person" is allowed.

V. If the construction contended for by the respondents be correct, then the Legislature would be guilty of the gross injustice of providing rates for the South Carolina, and some other railroads, that would make their local business a ruinous one, while other railroads are allowed reasonable compensation, and some expressly from four to twenty-five times as much as the South Carolina Railroad Company.

If the Court will look at the Sections in the different Acts providing rates, this will be very striking. I give the length of each road where is has a bearing upon the question of construction:

Colleton R. R., (25 miles), 11 Stat., 495.
Kings' Mt. R. R., (22 miles), 12 Stat., 94.
Barnwell R. R., (13 miles), 11 Stat., 477.
Barnwell R. R., (13 miles), 8 Stat., 426.
Edgefield R. R., (24 miles), 8 Stat., 401.

Sumter and Darlington R. R., (45 miles), 8 Stat., 445.

Spartanburg and U. R. R., (68 miles), 11 Stat., 484.

Spartanburg R. R., 11 Stat., 565.

Greenville and Columbia R. R., 11 Stat., 328.

Pendleton R. R., 12 Stat., 109.

Savannah River Valley R. R., 12 Stat., 190.

Blue Ridge R. R., 12 Stat., 205.

Newberry and Chester R. R., 12 Stat., 263.

Branchville and Savannah R. R., 12 Stat., 270.

Charleston and Savannah R. R., 12 Stat., 276.

N. E. R. R., 12 Stat., 131.

Chatham R. R., 14 Stat., 71.

Junction R. R., 12 Stat., 282.

Manchester and Augusta R. R., 14 Stat., 365.

*30

*Greenville and French Broad R. R., 12 Stat., 493.

Air Line R. R., 12 Stat., 510.

S. C. Central R. R., 14 Stat., 260.

Port Royal R. R., 12 Stat., 661.

Wateree and N. C. R. R., 14 Stat., 262.

Georgetown R. R., 12 Stat., 727.

Buford's Bridge R. R., 12 Stat., 892.

Bennettsville and S. H. R. R., 12 Stat., 949.

The conclusions to which these Sections bring the mind is irresistible, and against the construction contended for by respondents.

That "the general system of legislation upon the subject-matter of a statute may be taken in view, in order to aid the construction of a particular statute relating to the same subject, vide Fort v. Burch, 6 Barbour, 60–74; 3 Mass., 17, 296, 418; 10 Pickering, 235; 2 Bailey L., 554; 9 Cowen, 507; 15 Johns, 380; 19 Vt., 230; 4 Flor. 445; 12 N. H., 284.

VI. Our rejorts contain no case where any one has made the points raised in this case, and acquiescence in the practice (which is notoriously as that now complained of) under a statute, is good evidence of its construction. —McKeen v. De Lancey's Lessee, 5 Cranch, 22; Fort v. Burch, 6 Barbour, 73.

VII. The reason why the Legislature should limit rates for 100 miles, and not for less distances, becomes plain, if we consider—

a. Finding 12 and 13, ante.

b. That this limit applies, though not ratably, to all less distances, e. g. 90, 80, 70, or 60 miles.

c. That for short distances, if the railroad charge excessively, wagon transportation will come in competition, and relieve shippers; while for distances like 100 miles, and approaching thereto, this competition of wagon transportation would not protect shippers, and hence the Legislature provides a limit of charges that will afford the desired protection for such shippers.

Kershaw, for respondents:

The original charter of the South Carolina Canal and Railroad Company grants the exclusive right of transportation on the several roads to be constructed by them: "Provided, The charge for transportation of goods, produce, &c., shall not exceed thirty-five cents per hundred pounds on heavy articles, and

*31

ten cents per *cubic foot on articles by measurement, for every one hundred miles, and five cents per mile on every passenger, and at the above rates for any greater or less distance."—No. 2,417, 8 Stat., p. 354, § 4, year 1827.

This Act was amended in the following year, (No. 2,442, Idem, p. 355,) and the same language quoted above, from the original charter, was employed to define the rates of freight, except the concluding words, "and at the above rates for any greater or less distance," which were omitted.—Idem, p. 360, § 11.

The same Act contains a repealing clause in these words: "The said Act," (meaning the original charter,) "so far as the provisions thereof are in anywise repugnant to this Act of incorporation, shall be, and the same is hereby, repealed."—Idem, p. 363, § 20.

The question made is: Did the Legislature intend, by the Act of 1828, to overturn the principle so plainly established in 1827, that the rates of freights established should apply to a greater or less distance, and to establish a limit to the rates to be charged which should only apply when the distance could be divided into even hundreds of pounds and miles?

The Section under review, (§ 11, p. 360,) gives the company power to farm out their right of transportation, "subject to the rates above mentioned." Also, to "use and employ any sections of their railroad," subject to the rates before mentioned, before the whole shall be completed, "and in any part thereof which may afford public accommodation for the conveyance of persons, merchandise or other produce." "Also, to lay off and construct * * * branches so as to communicate with the waters of the Savannah River, or navigable waters of the Edisto or its branches, subject to the aforesaid rates of transportation."

It is evident, from these extracts, that the Legislature intended to establish rates of transportation of passengers and goods: that such rates were to be limited. That the measure of such limitation was made "35 cents per hundred pounds per hundred miles, on heavy articles, &c."

And, that this measure of limitations should apply to "any sections" of the road, before the whole was completed, whether the same should be long or short, or to any branches to the Savannah or Edisto Rivers, which were, of necessity, to be less than one hundred miles in length.

*32

*In what sense is the word "rate" employed in the statutes?

"Rate, from ratus, p. p. of reri—to reckon,

degree, standard, proportion, ratio, value, price, rank, movement, as fast or slow and the like."—Webster's Dictionary.

"Ratio, from reri, ratus, to reckon. In mathematics, the relation which one quantity or magnitude has to another of the same kind as expressed by the quotient of the second divided by the first. Thus: the ratio of 3 to 6 is expressed by 6–3 or 2. Of a–b by b. Some writers, less properly, consider ratio as the quotient of the first quantity divided by the second. The term ratio is sometimes applied to the difference between two qualities, as, to their quotient, in which case, the former is called arithmetical ratio, and the latter geometrical ratio. The name "ratio" is sometimes given to the Rule of Three in arithmetic."—Id.

"2. Hence, fixed relation of number, quantity or degree, rate, proportion, as ratio of representation."—Id.

"Pro-rate, according to a certain part in proportion, to divide or distribute proportionally, to assess prorata."—Id.

It is evident, from these definitions, that the primary and most obvious meaning of the word rate is that of proportion or ratio. It is not price or value, but the rule or means whereby price or value may be computed. Charges for transportation are called rates, because they are fixed according to certain proportions between quantity and distance. They are charged according to a certain ratio between quantity and distance. That ratio or rate becomes a standard whereby to ascertain the price to be paid for transportation of any given quantity to any given distance—a rate or proportion required to be observed by the railroad company in ascertaining the amount to be charged for such service in any given case.

This is further evidenced by the consideration that the Act of 1827, the first railroad charter ever granted, laid the foundation of a system, and established for the first time the principle by which railroads should be governed in their charges for freights. That principle necessarily required to be stated in the most exact and plain terms, because it was a new subject, and could not be interpreted by reference to any thing that had preceded it in the legislation or usage of the State. The principle established was, that the charges for freight should be according to a certain proportion or ratio of weight and distance—a price percentum of pounds, per centum of miles, and it was distinctly de-

*33

clared that the same propor*tion should be observed in assessing the price of freight for a greater or less distance. The principle having been thus clearly defined in 1827, in the following year, in an Act amendatory of the former, amplifying and defining the powers and duties of the company, the Legislature re-enacted the clause granting exclusive rights of conveyance, and the proviso limiting the charges for freight, in the same language as before, but omitting the words, "and at the above rates for any greater or less distance." If the word rate means what we have assumed to be its original and proper signification, (and there is nothing to show that it was used in any other sense,) then the words contained in the former and omitted in the latter were surplusage, and properly omitted, without any purpose of changing the sense of the language employed to define the rate. The language is, "thirty-five cents per hundred pounds for every hundred miles." If, in the first Act, there had been nothing else, the meaning of the expression might have admitted of argument, but when the Legislature went on to define exactly their meaning by adding the words "at the same rates for any greater or less distance," they left no room for doubt. In the next year they simply omitted the words last quoted, and repealed the former Act only so far as the same was repugnant to this. Were the words last quoted repugnant to the sentence that preceded them, and which it was their office more distinctly to define? Clearly not. The Legislature, in the first Act, using a new form of expression in relation to a subject, thought it best to add a note, as it were, clearly defining the meaning of the form of expression used. Is it to be held, that in their subsequent use of the same language, in relation to the same subject-matter, they used them in an entirely different sense, because they omitted the note of explanation added in the former instance? Such a rule would violate the laws of reason as well as the rules of construction, as contained in the following authorities.

Where the Legislature substitutes one Act for another on the same subject, it is not to be presumed that they intended to use terms in a sense different from that in which they were used in the prior Act.—Roosevelt v. Maxwell, 3 Blatchford, C. C. Rep., 391.

Several Acts, in pari materia, are to be construed as one statute in explaining their import.—Patterson v. Winn, 11 Wheaton, 385; U. S. v. Hewes, Crabbe, 307; DuBois v. McLean, 4 McL., 489; U. S. v. Collier, 3 Blatchford, C. C. 325; Black v. Scott, 2 Brock, 325.

*34

*Recourse may be had in construing a statute to a proviso which has been repealed by a subsequent Act.—Bank for Savings v. Colleton, 3 Wall, 495.

If the grant of a franchise admits of two constructions, that is to be taken which least restricts the public rights.—Miller v. St. Clair Co., 8 Howard, 569; Perrine v. Chesapeake and Del. Canal, 9 H., 172; Rice & Minn v. N. W. R. R. Co., 1 Bl., 360; Griffing v. Gibb, 1 McAlister's Rep., 212; Minturn v. Lance, Ibid, 370.

The cases are cited from Brightly's Dig., Tit. Stat., 4.

The latter Act, in the same clause, enacts

that the company may "use or employ sections of their intended railroad, subject to the rates before mentioned, before the whole shall be completed, and in any part thereof, which may afford public accommodation for the conveyance of persons, merchandise or produce; and to lay off and construct and put in operation and use any branch or branches of the said railroad, so as to communicate with the waters of the Savannah River, or navigable waters of the Edisto or its branches, subject to the aforesaid rates of transportation." Inasmuch as any such section of the road as the Legislature contemplated in the passage quoted might have been made under a hundred miles, and any branch to the navigable waters of the Edisto must be under a hundred miles in length, and as the same rates of transportation were to apply to such shorter distances, it is certain that the Legislature, in the last Act, meant precisely what they did in the first Act, to wit: That the same rates or proportions of freight should be observed for a longer or shorter distance, and there was, consequently, no repugnance in this particular, between the two Acts, and the former remained quoad hoc unrepealed, the latter only repealing the former so far as they were repugnant.

The last Act on this subject, No. 2,764, 8 Stats., 484, year 1838, fortifies the construction contended for. It is entitled "An Act to increase the rates of transportation in certain cases," &c., and enacts that the said company be "authorized to charge for the transportation of passengers at a rate not exceeding 7½ cents per mile, and for the transportation of goods, by weight, not exceeding fifty cents per hundred pounds per hundred miles." The purpose of the Legislature, in this Act, was declared to be to increase the then existing rates of transportation, and it was accomplished by declaring the rate of compensation to which they should be limited for the transportation of passengers per mile, and of goods, by weight, per

*35

hun*dred pounds per hundred miles. In this there is no repealing clause, and the former statutes stand with this, unless repealed by necessary implication, and none such arises; but, on the contrary, the language employed shows that the Legislature understood that they had established a pro rata system of charges adapted to all distances and all weights, with which they propose to interfere merely by increasing the compensation, leaving the mode of assessing the charges unchanged. A statute can be repealed only by an express provision of a subsequent law, or by necessary implication; the two must be so repugnant that they cannot stand together or be consistently reconciled.—See Brightly's Dig., Tit. Stat., 2, § 17, 8.

The argument on the other side leads to the absurdity that the Legislature limited charges for freight only in those cases where the transportation was of even hundreds of pounds over even hundreds of miles, and left them unlimited in all other cases. The reasoning leads inevitably to this conclusion.

As to the assumption that the company can charge 50 cents per hundred pounds for any distance less than one hundred miles, it has no foundation in anything in the Act, but is fanciful entirely. It would be just as reasonable to say that the company could charge 50 cents for one pound carried one hundred miles. The Legislature either established a rate, upon a uniform principle of proportion of weight and distance, applicable to all distances and all weights, or they provided only a rate for the transportation of even hundreds of pounds weight, over even hundreds of miles distance, which is an absurdity.

It is argued that the rate imposed would be unreasonably small compensation for transportation over short distances; that it would not pay for the loading and unloading. Without admitting the statement, it is sufficient to say, that if the construction be clear, the Court cannot control it by any considerations of expediency. Moreover, the Legislature furnished the company ample powers to protect itself against the supposed inadequacy of compensation for loading and unloading, by giving them power in the same Section of the Act of 1828 (8 Stat., 360,) to "charge such just and reasonable terms of compensation for storage and labor as they may by rule establish (which they shall cause to be published,) or as may be fixed by agreement," &c.

As to the point that the company may have charged cotton by measurement instead of by

*36

weight, there is no such point in the *case at all, and the Court cannot assume facts and supply the omission, but it is sufficient to say the company did choose to classify cotton otherwise, and must stand to it.

Having established that the amount of freight exacted of him for the services rendered by the company were in excess of the limits imposed by law, and that they were paid under protest, the plaintiff is entitled to the judgment.—Kenneth & Gibson v. S. C. R. R. Co., 15 Rich., 306.

Rion, for appellants, in reply:

The word "rates" simply means an amount arrived at after thinking, and is equivalent to "amount," "charges," or "amount of charges." The word rate, ordinarily, and in common usage, implies a multiplication or a multiplier, and the multiplier is generally characterized by having the latin word per prefixed to the unit of the denomination of the multiplier. In some cases there are two multipliers, in which case the "per" is repeated, as in "interest at the rate of 7 per centum per annum." It is frequently used, however, in statutes where there is no multiplication implied.—Webster's Dictionary; Acts to establish certain Roads, Bridges and Ferries—

No. 2,790, 11 Stats., p. 82, year 1839, read pp. 83 and 85; No. 2,818, 11 Stats., p. 124, year 1840; No. 2,841, 11 Stats., p. 157, year 1841; No. 2,869, 11 Stats., p. 226, year 1842; No. 2,905, 11 Stats., p. 267, year 1843; No. 2,936, 11 Stats., p. 299, year 1844; No. 2,971, 11 Stats., p. 347, year 1845; No. 2,984, 11 Stats., p. 369, year 1846; No. 3,026, 11 Stats., p. 453, year 1847; No. 3,062, 11 Stats., p. 530, year 1848, read p. 532; No. 3,099, 11 Stats., p. 611, year 1849; everywhere "rates" of toll = charges for toll; Act of 24th May, 1870, 16 U. S. Stats. at Large, p. 133, (1870), "with right to run public carriages thereupon, drawn by horse power, receiving therefor a rate of fare not exceeding six cents a passenger for any distance on said road."

8 Stats., p. 401, "charge" and "rates."
8 Stats., p. 412, "the charge" and "rates."
8 Stats., p. 426, "charge" and "rates."
8 Stats., p. 445, "charge" and "rates."
8 Stats., p. 470, "rates."
11 Stats., p. 391, "rates."
11 Stats., p. 477, "rates" and "charge."
12 Stats., p. 94, "rates."

*37

*In this Section the word rates has its full signification given when the statute says "per hundred pounds" and "per cubic feet."

Sept. 13, 1873. The opinion of the Court was delivered by

WILLARD, A. J. It is conceded that the authority of the appellants to charge as common carriers for the conveyance of merchandise is limited by statute. The limitation stood under the Act of 1828, (8 Stat., 355, Sec. 11,) as follows: "Provided, That the charges of transportation or conveyance shall not exceed thirty-five cents per hundred pounds on heavy articles, and ten cents per cubic foot on articles of measurement, for every hundred miles, and five cents per mile for every passenger." These provisions were substantially re-enacted in 1835, (8 Stat., 412, Sec. 20,) but were modified in 1838, (8 Stat., 484, Sec. 1,) as follows: "That the South Carolina Canal and Railroad Company be, and they are hereby, authorized to charge for the transportation of passengers at a rate not exceeding seven and one-half (7½) cents per mile, and for the transportation of goods, by weight, not exceeding fifty cents per hundred pounds per hundred miles."

The appellants claim that these provisions authorize them to charge the rate fixed by law for one hundred miles for any distance less than one hundred miles.

The Circuit Court held the contrary, placing its decision on the ground that the statute intended that the rate should be applied to the actual number of miles of carriage, a portion of one hundred miles entitling them to a corresponding portion of the statute allowance. The force of the appellants' argument rests on the idea that the design of the statute was to fix a fair price for the carriage of goods and passengers. If such was the intent of the statute there would be some force in their argument as to the inequality of applying the same rate of charge to short distances that is applicable to long, for it is evident that whatever may be the distance carried, the cost of shipment and discharge must be deducted from the sum chargeable for carriage, before the actual compensation for carriage can be ascertained, and as the cost of shipment and discharge may be assumed to be the same for all distances, the net result shows a less amount per mile for short distances than for long, and a consequent diminution of profit.

But, evidently it was not the intent of the statute to fix the charge for carriage as between the carrier and shipper, but merely

*38

*to prescribe a limit beyond which the carrier should not go in making a contract of carriage. There is nothing in the statute in question to distinguish it from a large class of statutes limiting the amount chargeable by persons exercising callings subject to legislative regulations, and the policy of such statutes is to prevent excessive charges, but to leave the actual sums charged to be affected within the prescribed limits by the economic rule of supply and demand.

It must be assumed that the Legislature took into consideration, in fixing the limit of charge, all that properly appertains to the nature of such an inquiry. It must, therefore, be assumed that they fixed the rate in question in full view of, and with full allowance for, the fact that exigencies would arise, either as affecting the carrier peculiarly or the community at large, rendering it necessary and proper that charges should be made at such times in excess of what would be reasonable in ordinary times, and the further fact that cases would arise where the carrier would not make his calculated profit, but might realize a loss, owing to the small quantity of freight carried, the shortness of the carriage, or some other unfavorable circumstances. In a word, it must be assumed that the rate fixed was considered, at the adoption of the statute, as in excess of the rate that under ordinary circumstances should be paid for such services. If it could be shown that since the adoption of the statute the cost of carrying merchandise had increased, that fact would not affect the construction of the statute, but would be a matter for legislative consideration solely.

It is evident, therefore, that, in construing the statute, in any case that may arise under it, we need not consider whether its operation in the given case works favorably or unfavorably for the parties concerned, but we must assume the rule to be arbitrary, and confine our inquiries to the question whether it has been violated in respect of the terms in which it is laid down.

What we have to consider in the present case is, what is the unit to which the statute intended the rate should be applied? Is it, in the case of freight, the mile, or the one hundred miles? In the case of passengers, the mile is made the unit by the terms of the statute. Was there, then, a different intention as it regards merchandise? It is true that the rate as to merchandise is fixed relatively to one hundred miles, but it does not necessarily follow that one hundred miles is to be regarded as the unit.

*39

*The natural and ordinary conclusion from the terms, apart from any particular intent that would control such conclusion, would be that the mile was intended as the unit. We are accustomed to refer in all matters involving transportation, whether of passengers or merchandise, to the mile as the unit or standard of measure. It is both a legal standard and convenient in a commercial point of view. A rate per mile is intelligible and convenient, and at once suggests the result of carrying for a greater distance. Fractions of a mile are of so little importance that they do not give rise to controversies. On the other hand, making one hundred miles the unit at once makes the questions arising out of fractions of that distance of sufficient pecuniary importance to give rise to legal questions, as illustrated by the present case. The object of a rate, in such cases, is to proportion charges according to distance. As the distance between any two of the termini of the defendants' road is less than two hundred miles, the assumed unit will only enter once into any of those distances, having a variable fraction. It so happens, on that assumption, that there are but two possible charges on one hundred pounds of merchandise, on that road, for any distance carried, namely, fifty cents and one dollar. If one hundred miles, or a less distance, is traversed, it is fifty cents; if that distance is exceeded, it is one dollar, and cannot exceed that sum. Now, when it is considered that the defendants' road connects cities, villages and stations varying in distance from each other from a few miles to upwards of a hundred, it is obvious that, if the intention of the statute was to proportion charges for carriage according to the distance carried, that object is wholly defeated by a construction that adopts one hundred miles as the unit to which to apply the rates. On the other hand, assuming a mile to be the unit, the object of the statute is completely attained, and the charge of the defendants is measured by the distance carried.

The reference to one hundred miles may be readily accounted for without assuming that that distance was intended as the unit to which the rate was to be applied. If the rate for merchandise, of one hundred pounds weight, had been stated in terms of one mile instead of one hundred miles, it would have amounted to a fraction of a cent, and in a form far less convenient for readily computing the cost of carriage. The statute, in this respect, follows a very common method suggested by commercial convenience.

That such was the sense intended is evident

*40

from the mode in *which the rate as to quantity is stated. It would not be contended that because a rate is given in terms of one hundred pounds that the unit was not a pound. Such a construction would be impracticable and unmeaning. It is obvious that, in the last named instance, the quantity indicated for the purpose of stating the rate was not intended to ascertain the unit for applying the rate. It is clear that the same intention guided the Legislature in the employment of the terms by which they express that rate relative to distance that influenced them in stating it relative to pounds.

Such being the direct meaning of the statute, it is not necessary for us to consider the effect of the omission of certain words contained in a previous statute on the same subject, which, if retained, would have obviated the necessity of a resort to construction, for such an omission cannot weigh against the clear language and intent of the statute.

It is evident, by a reference to other parts of the statutes above referred to, that the Legislature regarded the sums allowed by way of charge for transportation as indicating a rate of charge. The title of the Act of 1858, which increased the rate on heavy merchandise from thirty-five to fifty cents, expresses this idea by declaring the purpose of the Act to be "to increase the rates of transportation on the Charleston and Hamburg Railroad in certain cases." Section 1 of that Act assumes in terms to establish a rate in the very provisions increasing the charge to fifty cents; the same intention is made apparent by the following clause of the eleventh Section of the Act of 1828, (8 Stat., 360): "And it shall be lawful for the said company to use or employ any section of their intended railroad, subject to the rates before mentioned, before the whole shall be completed." It also authorizes certain branch roads, "subject to the aforesaid rates of transportation."

It is there evident that the provisions in question were intended to establish a rate of charge, and as that rate is based on distance, it must afford means of proportioning charges according to distances. It is evident, therefore, that these provisions cannot support the constructions attempted to be put upon them by the appellants.

The construction of the Circuit Court was free from error, and the appeal must be dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

5 S. C. *41

*JONES v. HAMMETT.

(Columbia. April Term, 1873.)

[*Executors and Administrators* ⇐451.]

Where, after action commenced against an executor and answer filed by him, he obtains, from the Judge of Probate, a discharge under the Act "to regulate the manner of granting a final discharge to executors," &c., and no mention of such discharge is made in any pleading in the case, it is error, upon mere proof of the discharge at the trial, to non-suit the plaintiff.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1877; Dec. Dig. ⇐451.]

Before Orr, J., at Greenville, ——— Term, 1871.

This was an action against the defendant, as executor of Jesse Hammett, deceased. The issues made by the pleadings, and the facts, as set forth in the brief, are stated in the opinion of the Court. His Honor the Circuit Judge ordered a non-suit, and the plaintiff appealed.

——— ———, for appellant.

Easley & Wells, contra.

Sept. 13, 1873. The opinion of the Court was delivered by

MOSES, C. J. We do not propose to decide how far, under the Act of March 26, 1869, "to regulate the manner of granting a final discharge to executors, administrators, trustees, guardians, or committees," (14 St., 263, Gen. Stat., 189,) the order of a Probate Judge, discharging an executor, may avail to protect him, either against the creditors or the devisees and legatees of the testator. Nor is it our purpose to decide whether the Act has reference to an executor, or was intended only to apply to such personal representatives as are required to give bond in the Court of Probate before they are allowed to exercise the duties of their respective offices, which the law imposes by their appointment. It is a statute involving important interests, in which infants are usually concerned, and we are not disposed to give a construction to it until demanded by the occasion, which may bring it up in a direct way for our consideration, when we will have, too, the benefit of a discussion, and will, therefore, be better prepared to pass upon it.

It appears that the complaint here was filed on the 15th, and served on the 16th December, 1870. The answer was filed on January 2, 1871, denying the debt demanded, and setting up, substantially, the plea of plene administravit in fact, averring that

*42

"the *only goods and chattels of the testator, which had come to his hands, together with his real estate, had been set apart for the use of his widow under the Homestead Act." On the 28th January, 1871, the plaintiff filed his reply, alleging "that the account for which the action was brought was for medical services and medicines furnished the testator in his last illness—a preferred debt, of which the defendant had notice before he paid any of the debts of his testator,"—controverting the plea of plene administravit, and averring that the setting apart of the real and a portion of the personal property of the testator, as a homestead, did not bar his recovery.

It further appeared that the defendant, on 4th December, 1870, filed his petition in the office of the Judge of Probate for Greenville County for a final discharge, and that, upon the 10th day of January, 1871, the said Judge "ordered and decreed that the said executor be finally discharged from further accounting to this Court, and that he be relieved from all further responsibilities or liabilities on account of his administration of said estate."

It will be remembered that the petition of the executor was filed on the 4th December, 1870; that his answer to the complaint was filed on the 2d of January, 1871, some days before the alleged discharge, and no reference to the proceeding was made in it. The presiding Judge held that it discharged the defendant from the complaint, and ordered a non-suit.

It is difficult to ascertain from the brief what proof was adduced on either side. The discharge, however, of January 10, 1871, made after the complaint was brought and the answer filed, was held conclusive in favor of the defendant.

Is it, of itself, sufficient to show that he had no assets at the time when the action was brought, the proceeding before the Judge of Probate then pending? It is clear that the personal property, when action was commenced, was in the possession of the defendant, and never set apart as a homestead to the widow until December 30, 1870. When the complaint was filed, the defendant did have assets of the estate of his testator, and had not then "fully administered all the goods and chattels which were of the said Jesse Hammett, at the time of his death, which had ever come to his hands as executor, as aforesaid, to be administered," as he alleged in his answer, and he cannot have the benefit even of a discharge afterwards obtained, unless the same is, in proper form of pleading, brought to the notice of the opposite party, as well as the Court.

*43

*If he intended to rely on the discharge, as a bar to the action, he should have filed a further answer in the nature of a plea puis darrien continuance, so far as the effect of it was to avail. There was nothing in the way of testimony to show that, when the complaint was filed, he had no assets of the testator in his hands to be administered, nor

can any such conclusion be necessarily drawn from the fact of the discharge. The case has been imperfectly developed, and determined without a due regard to the pleadings, which the parties will have an opportunity of perfecting before another trial.

The motion to set aside the non-suit is granted, and the case remanded.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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5 S. C. 43

NETTLES v. McCOWN.

(Columbia. April Term, 1873.)

[*Executors and Administrators* ⇐313.]

An administrator deposited in bank, in March, 1860, $442.20 in bank bills, which he held for a distributee, and allowed them to remain on deposit until 1863, when he took them into his own possession, and having made use of some, retained $200 thereof until his death, in 1868, when they were sold by his administratrix at 27 cents on the dollar: Held, That his estate was liable for the $442.20, with interest from March, 1860, and the fact that the fund was claimed by an assignee of the distributee, and that no demand was made for the money until 1867, was not sufficient, with the other circumstances, to excuse the estate from the payment of interest.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1271; Dec. Dig. ⇐313.]

Before Rutland, J., at Darlington, October Term, 1871.

The case is stated in the following brief prepared for this Court:

This was a bill of revivor, filed April 15th, 1869, by Samuel J. Nettles, trustee, against Harriet B. McCown, administratrix (with the will annexed) of James McCown, setting forth the filing of an original bill against her said testator, in which it was stated that, on the 2d January, 1855, a post-nuptial settlement of certain negroes was made by John F. DeLorme to Isaac D. Wilson, trustee, for the benefit of Adeline O. DeLorme (wife of John F.) and her children; that, on the 28th February, 1860, the said John F. and Adeline O., executed a deed of assignment, con-

*44

veying to *the said Isaac D. Wilson all the right and interest of Adeline O. in certain negro property, then recently recovered, under a proceeding of John D. Pritchett et al. v. Robert Harllee et al., and other property named, in trust; that said Wilson should appropriate sufficient of the funds arising from said property to replace the value of a slave, contained in the first deed, sold by them without the knowledge of Wilson, to hold the same, and the residue, subject to like trusts created in the first deed; that James McCown was administrator of Robert Nettles, deceased, grandfather of Adeline O. DeLorme, who was a distributee of the property recovered by said suit, and from whom the interest of Adeline O. was derived; that, as administrator, said James McCown had received large sums of money, in which said Adeline O. was interested; that, on the 4th day of August, 1866, Samuel J. Nettles, plaintiff, was duly substituted trustee under both of said deeds, instead of Isaac D. Wilson (with Wilson's consent); that James McCown had paid over none of the moneys received by him to Mrs. DeLorme's trustee, Isaac D. Wilson, or to plaintiff, though plaintiff had often called on him and required him so to do, and prayed an account and decree for their payment.

The original bill was filed 12th December, 1867, and taken pro confesso against James McCown, 28th January, 1868. No answer was filed to the original bill or to the bill of revivor, and the statements of the bill were not controverted.

It did not appear, in the pleading or evidence, that Wilson had ever appropriated sufficient of the funds arising from the interest of Mrs. DeLorme in the negro property of her grandfather, referred to in the bill, to replace the value of the slave sold, as stated.

A Referee was appointed to state the accounts of James McCown, and report the amount of Mrs. DeLorme's interest in his hands.

At the reference it appeared that Mrs. DeLorme's interest in the amount received by James McCown, as administrator of Robert Nettles, in March, 1860, was $442.20. A paper was submitted in evidence, by defendant, of which the following is a copy, viz.:

"Mr. James McCown, administrator of estate Robert Nettles:

"Take notice, that Col. I. D. Wilson has an assignment of the interest of John DeLorme and Adeline O. DeLorme in the funds now in your hands.

"6th March, 1860. J. A. Dargan,
"Attorney for I. D. Wilson."

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*It did not appear, at the hearing, that this notice had ever been waived or withdrawn.

It appeared that when Mr. McCown received the money, as administrator, he deposited it in the agency of Georgetown Bank, at Darlington Court House, and paid out the same to the other distributees as they called for their shares; paid all, except Mrs. DeLorme, in March, April and May, 1860; that her share remained on deposit till 1863, when, there being some talk, by Mrs. DeLorme's father, of arranging the papers so that McCown could pay over said share, and of going to his house for the purpose, Mr. McCown drew it out, but did not pay it when her father went down, "as no one was present who was authorized to receipt for the money," and never returned it to the bank. He used some of the money, which was in

bills of South Carolina banks, convertible into specie when deposited; and about $200 in bank bills, which the witness supposed to be of the sum deposited, remained on hand when Mr. McCown died, the last of the year 1868. Joseph J. McCown, son and agent of the administratrix, sold the bills remaining at twenty-seven cents on the dollar in 1870.

It did not appear in the pleading or evidence that Mr. McCown ever gave notice to Mrs. DeLorme or her trustee of the deposit, or of his readiness to pay her share; nor did it appear that Mrs. DeLorme claimed adversely to Wilson, her trustee.

Demand was made on James McCown by Samuel J. Nettles, trustee, for Mrs. DeLorme's money in the spring of 1867. The parties all lived in Darlington County up to the death of Mr. McCown.

The referee held, as matter of fact, that the deposit by Mr. McCown was special, and that there did not appear to have been any steps taken by which he could pay Mrs. DeLorme's portion until 1863; that $200 in the bills first deposited by McCown remained on hand at his death, which were sold at twenty-seven cents on the dollar.

As matter of law, that, the money being held on deposit by McCown, he was not liable for interest on it until formal demand was made, which was not until the filing of the bill, 12th December, 1867; that the loss of the money deposited was the loss of the trustee, or cestui que trust, not of McCown; and that the amount due by McCown was $242.20 plus $54, the amount for which the bills on hand sold, making $296.20, with interest from 12th December, 1867, to date of report, October 13th, 1871, amounting to $375.24.

*46

*To this report exceptions were filed by plaintiff, bringing the questions before the Court as to the liability of Mr. McCown for the whole fund belonging to Mrs. DeLorme in his hands, and for interest thereon.

After argument His Honor decreed as follows:

"This case was heard on exceptions to the report of M. A. Huggins, Esq., the Referee appointed by the Court. James McCown was the administrator of Robert Nettles, one of whose distributees, in the events that have occurred, is Adeline O., wife of John F. DeLorme. About the first of March, 1860, McCown, as administrator, received the fund, to which under proceedings in equity, his intestate was entitled. He made a deposit of the entire fund at the time he received it with the agent of the Bank of Georgetown, at Darlington Court House. Out of that fund, in March and April of that year, he paid the full shares of all those entitled to participate, except the share of Mrs. DeLorme.

"In January, 1855, John F. DeLorme executed a deed to Isaac D. Wilson, as trustee, conveying to him certain negro property. Thereafter DeLorme and wife sold one of the negroes covered by the said deed, and to replace the value thereof, in February, 1860, they executed another deed to Wilson, conveying their interest in certain negroes, the possession of which was then sought by bill in equity. A recovery was had in this last case; the negroes were sold, and McCown came into possession of the fund already alluded to."

A notice was served on McCown in these words, to wit:

[Here follows a copy of the notice signed by J. A. Dargan, attorney for I. D. Wilson.]

"The share of Mrs. DeLorme in those funds was $442.20.

"On the 4th day of August, 1866, the plaintiff was substituted, by order of Court, trustee instead of I. D. Wilson, and in December, 1867, filed his bill against McCown, calling on him to account for the share of Mrs. DeLorme, to wit, the sum of $442.20, with interest.

"Before a hearing, McCown died intestate, and the plaintiff revived his bill against the defendant, as administratrix of McCown. So far as I can see and have heard, this fund, in McCown's hands, was not covered by the first deed above mentioned. How, then, can the substituted trustee be entitled to claim it?

*47

*"The Referee reports that McCown received the whole fund in bills of specie paying banks; that these bills remained with the bank agent till the year 1863, (counsel agreed till July 1st, 1863,) when he withdrew them, in order to pay or turn them over on some arrangement which Mrs. DeLorme's step-father was to make, but he failed to give Mr. McCown a proper voucher. About that time McCown used $242.20 of the money; that $200 of them were found intact at his death. That, after his death, Joseph J. McCown, agent of the administratrix of James McCown, sold these $200 in bills at 27 cents on the dollar.

"The Referee held, as law, that McCown was not liable for interest until formal demand was made; that this was made December 12th, 1867, when the bill was filed against him; that the loss of the fund must be the loss of Mrs. DeLorme or her trustee; that the amount due by McCown was $242.20 and $54, the sums used by him, and the product of $200 in bills, sold by Joseph J. McCown, with interest from December 12th, 1867.

"I can find no sufficient error as to facts, on the part of the Referee, as to warrant my interposition, and, therefore, overrule the exceptions, so far as the facts are involved.

"As to the law, I think the loss must fall on the trust estate. The trustee, I conceive, acted faithfully. Wilson was alone entitled

to Mrs. DeLorme's share, either as her trustee or her assignee, and he is not before the Court. It was his act that locked up the fund, kept it idle, caused the delay and subsequent depreciation in value; let her, or her present trustee, look to him.

"Counsel for the defendant insists that the estate of McCown should not be forced to pay the sum of $54, brought by the sale of the $200 in bank bills by the administratrix, after her intestate's death. If I could lay my hands on those bills, and found them in the possession of any one affected by the trust, I would order them to be specifically delivered up; but, as it is, I cannot hold the estate liable for the devastavit of the administratrix.

"I am in doubt whether the plaintiff has any right to an account; but as counsel knows more than I do as to the matter, and do not object, I adjudge that the estate of James McCown is due to the plaintiff, as trustee, the sum of two hundred and forty-two 20-100 dollars, with interest from the 1st July, 1863—this latter date having been fixed by consent of both counsel. In all other respects the report is confirmed.

"October 24th, 1871."

*48

*(The consent referred to by the Judge was as to the time the money was drawn from deposit.)

We consent to the foregoing as a correct statement of the case.

[Signed by counsel for plaintiff and defendant, and dated September 11, 1872.]

The plaintiff appealed on the following grounds:

1. Because it appears, by the evidence, that steps were taken by which Mr. McCown could have paid over Mrs. DeLorme's portion of the estate of Robert Nettles in March 1860, and the finding of the fact that no steps were taken contains an error in law.

2. Because the deposit of the money by Mr. McCown was at his own risk, and retaining it in hand his own laches, and he is liable, as administrator, for the whole amount, with interest, from March, 1860; and the Judge erred in holding otherwise.

3. Because, if $200 of the money first deposited by Mr. McCown remained on hand at his death, and (as erroneously held) belonged to the trust estate it was error to hold that the sale of the bank bills, found in the possession of the deceased, by the administratrix, was a devastavit. If a devastavit, she, being the defendant, could take no advantage of it.

4. Because, in other respects, the judgment of His Honor is contrary to the law and the evidence of the case.

Edwards, for appellants:

The only steps necessary to be taken, by which Mr. McCown could pay Mrs. DeLorme's money, were taken.—Chesnut v. Strong, 2 Hill Ch., 150; McAlister v. Brice, McM. Eq., 275; Duncan v. Dent, 5 Rich. Eq., 7.

The fund was not locked up by Wilson, nor the loss occasioned by him; it was unnecessarily held by McCown at his own risk, and he is liable for the whole amount, with interest from March, 1860.—Darrell v. Eden, 3 DeS. Eq., 241; Lafont v. Ricard, Bail. Eq., 487; Howard v. Schmidt, Rich. Eq. Cas., 452; McAlister v. Brice, McM. Eq., 275; Duncan v. Dent, 5 Rich. Eq., 7; Frierson v. Graham, 7 Rich. Eq., 95; 2 Williams on Ex'rs. Amer. note to page 1567, (D) Merrick's Est., and page 1568.

If $200 of the money deposited remained on hand at McCown's death, and belonged to the trust estate, the trustee can recover its value in this action and interest.

McIver & Boyd, contra:

*49

*1st. It does not appear that the fund in question is covered by the deeds under which the plaintiff holds his trusteeship, and until this is made to appear the plaintiff cannot maintain this action.

2d. If the action be maintainable at all, it should have been brought against Wilson, the original trustee, for it was by his default, and by his act, that the fund was not paid over when the other distributees of Robert Nettles received their shares.

3d. At all events Wilson should be made a party before any decree can be made in this action, he holding an assignment of the fund in question.

4th. The defendant in this action is not the representative of the estate of Robert Nettles, and is not liable for interest until demand, except for so much as was actually used by James McCown.—Davis v. Wright, 2 Hill, 560; Mouk v. Pinckney, 9 Rich. Eq., 291.

5th. The rule in reference to interest is this: "If a fund in the hands of an executor be claimed by two or more persons, and he holds it in his hands without using it, or making interest upon it, until they have legally settled their rights, he is a mere stakeholder, and not liable for interest.—Oswald v. Givens, Rich. Eq. Cas., 350; Bulows & Pope v. O'Neall, 4 DeS. Eq., 394; Pace v. Burton, 1 McC. Ch., 247; Notes to Selleck v. French, 1 Am. Lead. Cas., 3d Ed., 510–514–16; Fitzsimmons v. Fitzsimmons, 1 S. C., 412.

6th. If James McCown, as administrator, had the right to retain the fund in his hands, he having made a special deposit of it, the money deposited became the property of the party for whom it was deposited, and for the sale of that portion of it which remained, the $200 in bank bills, the estate of James McCown cannot be made liable, but the plaintiff must look to the party who sold it. —City Council v. Duncan, 3 Brev., 386; Morton v. Smith, 1 DesS. Eq., 123; Fitzsimmons v. Fitzsimmons, 1 S. C., 412.

Sept. 13, 1873. The opinion of the Court was delivered by

WRIGHT, A. J. It is not so certain that if the plaintiff, Samuel J. Nettles, was substituted only as trustee under the deed of 2d January, 1855, he could not properly maintain the bill. The purpose of the deed of 28th February, 1860, was to protect the trust created by the first, so far as it provided means to repair the loss occasioned by the act of the cestui que trust, in selling one of the slaves which passed under it, and, after appropriating therefor a sufficient sum for such purpose, to hold the remainder, sub-

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ject to *the same trusts which were established by the first deed, to which it appears to have been only subsidiary. Nettles, by virtue of his substitution as trustee under the first, might well require that the second should be applied to the object proposed by it. It is not necessary, however, to consider that question, for the original bill and bill of revivor both allege the fact that Nettles was substituted as trustee under the two deeds, and both bills were taken pro confesso. Besides this, it is admitted in the brief, with the signature of counsel, that it "is a correct statement of the case," and this allegation of the bill forms part of it.

Strict pleading would require that Wilson should have been a party. No objection to this omission was made by demurrer or otherwise, although, in the argument here, it was alleged that to his default the non-payment of the demand now claimed is attributable. If the interest of the respondent required it, she should have taken the proper course to have made him a party, and cannot now complain of what she could so easily have remedied. We do not see any ground upon which she can maintain her defense. Her intestate received a fund of which the cestui que trust, Adeline O. DeLorme, was a distributee. There is no dispute of the fact that he so knew, for it is claimed, as a bar to his liability, that he retained, until 1863, her share of the bank bills, which he had received on the recovery, on behalf of his intestate, Robert Nettles; and added to this, he had notice on 6th March, 1860, shortly after the fund came to his hands, that Wilson held an assignment of her share. He therefore had the ready means of ascertaining which of the parties he was bound to pay; indeed, no adversary rights existed, or were set up between them.

The Circuit decree, while it admits that his estate is liable for the $242.20, the amount of the bills used by the intestate, relieves him of all responsibility as to the remaining $200, on the ground that the sale of them by his administratrix was a devastavit by her, for which his estate is not liable. It is enough to say that the liability of the intestate arose as early as March, 1860, when, having the funds belonging to this distributee, he failed to pay them over. Her right to receive did not depend on any demand to be made by her or on her behalf. All he could require was an acquittance, and this it was in the power of Wilson to give. If the deed of assignment was void, or inoperative, he could have had a full discharge by the receipt of herself and husband.

*51

*We fail to discover any difference between the admitted liability of the intestate for the $242.20 used by him, and the bills of the State Bank for $200, afterwards converted by the administratrix into National currency, at 27 cents on the dollar. If they had been retained and tendered, still the plaintiff was not bound to accept them in their depreciated character.

His claim is not for the identical bills so converted, but for the amount due the distributee from the estate of Nettles, in the hands of McCown, his administrator, whose use of them, or a portion of them, for his own individual purpose, is inconsistent with the idea that they were specially retained and held as the property of the distributee.

We can see nothing in the case which can exclude the application of the general rule as to interest in regard to administrators. Even if the claims of the plaintiff and Wilson had been conflicting, it was the duty of the intestate to invest the fund, so that it could be productive until the proper right of ownership was established.

In Duncan et al. v. Dent, 5 Rich. Eq., 7, it was held that "an administrator keeping funds after the payment of debts in his hands without profit will not be excused from the payment of interest merely because various persons claim the estate in different rights, and suits have been instituted."

It is a misconception to suppose (as is alleged under the fourth head of the argument of the respondent) that, as administratrix of McCown, she is not liable for interest on the money not actually used by him until demanded, as she is not the representative of the estate of Robert Nettles, from which the fund was derived. Though "an administrator of a deceased administrator does not represent the estate on which his intestate administered, and is not bound to make interest on any fund of that estate in the hands of his intestate at his death," as was held in Davis, Adm'r, v. Wright, Adm'r., 2 Hill, 563, the facts do not support the application of the rule to the case in hand.

When McCown received the fund as administrator of Nettles, he held for his creditors and distributees.

It is conceded that a specific sum was in his hands for the distributee, Mrs. DeLorme, for which he was liable to her, or those who represented her in regard to it. As the administrator of Nettles, he held it for her use, and unless he can excuse himself for

*52

*the non-payment of it by some more adequate reason than he has presented, he must be held bound for the interest. The decree of the Circuit Judge must be modified, and the defendant, as administratrix of McCown, is held liable to pay the plaintiff, as trustee, the sum of $442.20, with interest from 6th March, 1860.

This might dispose of the whole case, but it appears from the decree that an account is asked. It is, therefore, remanded to the Circuit Court.

MOSES, C. J., and WILLARD, A. J., concurred.

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5 S. C. 52

CONVERSE v. EVINS.

(Columbia. Nov. Term, 1873.)

[*Contracts* ⇐133.]

An action cannot be maintained upon a sealed note given in 1863 for Confederate States bonds—the consideration being illegal, the note is void.

[Ed. Note.—Cited in Wallace v. Lark, 12 S. C. 579, 32 Am. Rep. 516.

For other cases, see Contracts, Cent. Dig. § 675; Dec. Dig. ⇐133.]

Before Moses, J., at Spartanburg, April Term, 1873.

Action by D. E. Converse, plaintiff, against John H. Evins, as administrator of S. H. Evins, deceased, defendant, upon a sealed note as follows:

"Three years after a treaty of peace between the Confederate States and the United States, or cessation of hostilities for the same time between the same, I promise to pay D. E. Converse, or order, the sum of three thousand dollars in specie or bills of then specie paying banks; and I herein pledge myself to pay this when due, notwithstanding any Act of Congress or Legislature that might excuse me from so doing, either as to time or otherwise, for value received; as witness my hand and seal, this 17th day of October, 1863.

"S. N. Evins. [Seal.]

"Witness:

"J. Bomar,

"A. H. Twichell."

The defense was that the note was given for Confederate States eight per cent. bonds, sold or loaned by the plaintiff to the intestate; and the fact that such was the consideration of the note was proved at the trial on the part of the defendant.

The counsel for the defense requested His Honor the presiding Judge to instruct the jury, inter alia, that

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*"If, in point of act, the note sued on was given for the purchase or loan of Confederate bonds, then, in law, the note was illegal and void."

His Honor declined so to charge, and the defendant excepted.

Under the instructions of His Honor, the jury found for the plaintiff $4,001.56.

A motion for a new trial was made and overruled, and defendant appealed on the ground of error in the refusal to charge as above stated.

Duncan & Clevelan, Simpson, for appellant, relied upon Hanauer v. Woodruff, 15 Wal., 437, as decisive of the point made by the appeal.

Bobo & Carlisle, contra:

The contract was made by parties able to contract, was reduced to writing with care, and fully explains itself.

In the defense it is contended that there was no consideration passed between the parties.

Were Confederate bonds a consideration? The bonds were in circulation as money and for investment, bearing eight per cent. interest. The intestate had the use of them during the war, and for three years after. By that contract that difference, in his favor, was, in the judgment of the intestate, full compensation for him to risk the result of the war—had it been successful—then he would have got eight per cent. in the way of interest for five years and his money back, and the plaintiff preferred to let him have it—hence the trade.

This Court has recognized investments in these bonds.—Hinton v. Kenneday, 3 S. C., 457, 490; Cureton v. Watson, 3 S. C., 451.

Confederate notes were given for the bonds without stint, and such investments were actually sought. It has not been denied but that they were a good consideration—both emanated from the same authority. The United States and Confederate States were at war. The latter, for the time being, were independent, and had a lawful right to do anything that they deemed necessary to carry on the war and to sustain their people.—Vattel, 425–7, §§ 293–5; Morgan v. Keenan, 1 S. C. 327. The cases of Texas v. White and Thorington v. Smith sustained this view.

Hanauer v. Woodruff decided that a State

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in rebellion could *not issue bonds. The State never stood in an independent relation to the United States, and their bonds were issued expressly in aid of the war. Bills issued by the Bank of the State, during the war, are held good for payment of taxes.

This, we insist, sustains the right of the Confederate States to issue the bonds. But suppose we should be mistaken in this, and that the bonds were illegally issued, does that prove that this contract was in aid of the war, and, therefore, void? The bonds were in actual being. Neither of these parties is-

sued them, they found them in circulation. It did not aid the war to change them out of the hands of Converse and put them in the hands of Evins; they were in circulation, and were the legitimate subjects of traffic.—Random v. Toby, 11 How., 398; Naffa v. Crauford, 3 Law Times, 301, and cases cited.

The contract was entered into with care and precision, to be paid in specie, and with a pledge to pay, notwithstanding any Act of Congress or Legislature that would excuse him. There was no pretence that both powers should continue to exist; on the contrary, it provides for a treaty of peace or cessation of hostilities—had it stopped with "treaty of peace," the argument may have been worth something, but the other contingency was certain to happen, and did happen, and was, we contend, inserted to avoid any contingency.

The paper sued on is sealed and payable in specie. The seal implies a consideration, and the word specie indicates what kind of dollars were meant.—Bobo v. Goss, 1 S. C., 162; Browson v. Rhodes, 7 Wallace, 229; Briten v. Harwitz, 7 Wallace, 258.

Jan. 28, 1874. The opinion of the Court was delivered by

MOSES, C. J. The decision in Hanauer v. Woodruff, 15 Wallace, 439 [21 L. Ed. 224], is so conclusive of the case before us that our own convictions must yield to its authority. It declares that a consideration formed on Confederate bonds is illegal and void under the Constitution and laws of the United States. On a question involving these, the authority of the Supreme Court is binding, not only on every Court, but on every department of the General Government and the several States. Our duty is to follow its judgment whenever rendered in cases which, in its view, are to be controlled and determined by that instrument, or the laws of Congress made in conformity with it. So holding we

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have no alternative but to *grant the motion, as the appeal proceeds upon the same principle which governed the Supreme Court of the United States in the case referred to.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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5 S. C. 55

BROTHERS v. RAILROAD COMPANY.

(Columbia. Nov. Term, 1873.)

[*Railroads* ⇐407.]

Where a horse feeding near a railroad track became frightened at the noise of an approaching train, and jumping upon the track ran along ahead of the train until he fell into an open culvert over which the road passed, and was killed, and all proper means were used by the engineer to prevent a collision: *Held*, That the company was not liable.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1403; Dec. Dig. ⇐407.]

Before Graham, J., at Orangeburg, January Term, 1873.

Action against the South Carolina Railroad to recover damages for a horse killed upon the road of the defendant.

It appeared, by the evidence, that the horse was grazing near the road as a freight train was approaching from below, and, becoming frightened, ran by the side of the road for some distance, when it turned suddenly, jumping upon the track and ran upon it ahead of the train, some two hundred yards or more, until it fell into an open culvert over which the track passed, and was killed. The culvert was about four hundred and fifty yards above a pump, at the side of the road. At the culvert, and for some distance below, the track ran upon an embankment which gradually increased in height until, at the culvert, it became about six feet high. Between the pump and the culvert two streets or crossings passed over the road, at one of which, certainly, if not at the other, the horse might have left the road after he jumped upon it. The train did not stop at the pump, but went on at a moderate speed until the horse fell. It was stopped within about thirty yards of the culvert.

The engineer, firemen and others testified that as soon as the horse was seen running by the side of the road the engineer let off steam and used every proper means to stop the train. The engineer's attention was called to the horse by the fireman.

His Honor charged the jury "that the cul-

*56

vert had nothing to do *with the question of negligence, and that they need not embarrass themselves by considering it; that, if from the time the engineer was notified by the fireman of the position of the horse, the engineer was guilty of any neglect of duty, they must find for the plaintiff, otherwise, they must find for defendant." To this charge the plaintiff excepted. The plaintiff then requested His Honor to charge, "that if the jury should be of opinion that, had the engineer slackened his train properly, in approaching and passing the station, he could have taken up his train so as not to have pressed the horse to the culvert, they should find for the plaintiff." This His Honor declined to do, and the plaintiff excepted.

The jury found for the defendant, and the plaintiff appealed.

Izlar & Dibble, for appellant.

Glover & Glover, contra.

Jan. 31, 1873. The opinion of the Court was delivered by

WRIGHT, A. J. It is difficult to prescribe any fixed and general rule, which can apply in all cases where it is sought to make a railroad company liable in damages by reason of the loss of property by the negligence of their agents in running their train. The time, the

place, the character of the property, must all be considered as elements through which the result is to be determined. To these there must be added such other incidents as may be developed by the evidence—the whole to be regarded and weighed by the jury, in determining whether such negligence is shown as must make the company liable. The same rule should not apply where a horse suddenly jumps upon the track, and where he is observed upon it by the engineer in full time to afford him opportunity to slacken his speed, so as to avoid contact with him. So, too, greater caution would be required where there is no mode of egress or escape from the track by an animal upon it, by reason of embankments on both sides, than where public or used cross-roads over the track, or a level opening on both sides of it, extend the means of escaping out of reach of all danger.

The first ground of error assigned is so much of the instruction of the Circuit Judge to the jury as charged, "That the culvert had nothing to do with the question of negligence, and that they need not embarrass themselves with considering it." The right of the company to establish open culverts was not ques-

*57

tioned. In*deed, from the evidence, it is clear that it was proper and prudent that the culvert, at the point indicated, should be open. When the Judge charged "that if, from the time the engineer was notified, by the fireman, of the position of the horse, the engineer was guilty of any negligence of duty, they must find for the plaintiff." It appears that he left the fact of negligence entirely to their decision. If, as the testimony shows, there was a way used by persons on horseback, which the horse in question might have taken, "and not a particle of difficulty in getting off at the last street," laid down in the diagram, we do not think that the case should be sent back, because the presiding Judge said to the jury, "they need not embarrass themselves about the culvert." If there had been no possible way for the animal, after being discovered, from getting off the track without encountering the culvert, all reference to the culvert should not have been disregarded, but when it appeared by the testimony that, as soon as the horse was seen, the speed was slackened and collision avoided, it was left to the jury to say whether there was any neglect of duty on the part of the engineer. We do not regard the charge, not to consider the culvert, as amounting to such error in law as would justify us, looking to the whole case, to remand it for a new trial.

The second exception we do not regard as well taken. If the injury had occurred at the station, then it would have been proper to consider the speed of the train at the time, so that the jury might determine whether the loss was imputable to the fast rate at which it was running. The speed might have been slackened at the station, and yet the same consequence might have followed; for, after passing it, a higher force of steam might have been employed before the horse was seen. We think the charge was conformable to what was said in Murray v. The South Carolina Railroad Company, 10 Rich., 232 [70 Am. Dec. 219]: "That from the time the horse could first have been seen, until he was killed, all proper means and appliances were used to avoid him, and used in vain, a case of accident would have been made out."

The motion must be dismissed.

MOSES, C. J., and WILLARD, A. J., concurred.

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5 S. C. *58

*BACHMAN v. SULZBACHER.

(Columbia. Nov. Term, 1873.)

[*Execution* ⇐112.]

Where two executions are levied by the Sheriff on personal property on the same day, but at different hours of the day, the first levied is not entitled to preference, but the liens of both attach as if levied at the same instant of time.

[Ed. Note.—Cited in Steffens & Werner v. Wanboeker, 17 S. C. 477.

For other cases, see Execution, Cent. Dig. § 230; Dec. Dig. ⇐112.]

[*Execution* ⇐326.]

The proceeds of the sale, if insufficient to satisfy both executions, must be distributed pro rata between them.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 966–973; Dec. Dig. ⇐326.]

[*Courts* ⇐78.]

[To change a practice in judicial proceedings which has been accepted and followed for over half a century, positive enactment must be shown, or such action of the legislative authority as leaves no doubt of its intended purpose.]

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 277; Dec. Dig. ⇐78.]

Before Carpenter, J., at Chambers, Columbia, July 3, 1873.

On February 15, 1873, Simon S. Bachman entered in the office of Jesse E. Dent, Sheriff of Richland County, an execution against Jacob Sulzbacher for $1,076.85, and on the same day, at 11½ o'clock, A. M., the Sheriff levied the execution on the personal property of the defendant therein. On the same day, at 1:25 o'clock P. M., Simon Benary entered in the same office another execution against Sulzbacher for $2,530.55, which the Sheriff levied on the same property at the instant it was entered. The property was afterwards sold by the Sheriff, and the net proceeds amounted to $1,334.49.

This was a rule, on behalf of Bachman, against the Sheriff to show cause why he had refused to apply the proceeds of the sale to the satisfaction of his (Bachman's) execution. The Sheriff made a return, in which he stated the facts and submitted the questions of law to the Court.

After argument His Honor filed a judgment as follows:

Carpenter, J. In this case a rule was issued requiring the Sheriff of Richland County to show cause why he should not pay to the plaintiff the moneys in his hands, arising from the levy and sale of the property of the defendant by virtue of the judgment and execution herein. The rule shows that the levy, under this execution, was made on the 15th day of February, 1873, at 11½ o'clock A. M., and that, on the same day, at 1:25 o'clock, P. M., a levy was made upon the same property, under an execution against the same defendant at the suit of one Simon Benary; that the proceeds of sale are insufficient to satisfy both executions, and that, in obedience to a notice served upon him by the attorneys of Simon Benary, he holds the fund subject to the order of the Court.

*59

*The facts of the return are admitted, and the question is presented whether, in the case of two or more levies made upon the same day, that first in time should take priority of lien. Argument was heard thereon, at Chambers, on the 3d day of July, Mr. LeConte for the rule and Mr. Samuel W. Melton for the respondent. In general the law does not regard fractions of a day, and, heretofore, in this State, judgments and executions lodged on the same day have uniformly taken the same rank without regard to the precise hour of the lodgment. In Ex Parte Jacob D. Stagg, 1 N. & McC., 405, it is said: "The general rule that the law will not allow fractions of a day, it is believed, will be found upon examination to apply rather to legal proceedings or to legal diligence than to questions of right unconnected with them. Thus, when two judgments or executions are of the same day, neither shall have the preference, (Wakeman v. Haskin, 11 John., 228; Welsh v. Murray, 4 Dallas, 320, Note 2 [1 L. Ed. 850].) because, in natural justice, neither party should be preferred if equal diligence has been used on both sides; the law will not impute negligence to him who is only the fraction of a day, perhaps a few hours or minutes, later than the other." It was contended that this rule would not apply, because the lien is now created, not by judgment, but by actual levy on the property of the defendant, and in analogy to the law of attachment the fraction of a day should be observed. I do not see, however, that the character of the Act by which the lien is created, whether by delivery, lodgment, levy or otherwise, can operate to take the case out of the operation of the rule. If it had been designed thus to depart from a long and clearly established practice, the statute should have so provided in terms. "When fundamental principles are overthrown—when the general system of laws is departed from—the legislative intention must be expressed with irresistible clearness to induce a Court of justice to suppose a design to effect such objects."—2 Cranch, 390. But, upon this point, the statute is silent. But, whilst the practice has been derived from and must be referred to the maxim of the common law, it will be observed that the law of attachment, existing under the custom of London, and having its origin rather in the code of civil law, is anomalous, eccentric, entirely foreign to, and, in many respects, at right angles with, the common law; and the rule which required that several attachments levied on the same property, on the

*60

same day, should stand according to the *actual time of service, incorporated, very generally, into the statutes of the several States, is regarded as exceptional.—Drake on Attachment, § 261. It may not be necessary to add, that this anomaly is not now in force in this State, the statutes now providing that "all attachments lodged upon the same day shall take rank together."—General Statutes, Code of Procedure, Ch. CXXII, § 255. It is ordered that the rule be discharged, and that the Sheriff of Richland County do apply the proceeds of the sale, returned by him, to the executions of Simon S. Bachman and Simon Benary, in ratable proportions.

Bachman appealed to this Court.

LeConte, for appellant.

The single question presented is whether the Court will regard the fractions of a day in order to distinguish between the executions.

Admitting that a vigilant creditor may gain a preference simply by priority of action, it is the fact of such priority, and not its extent, as measured by time, that becomes important; and the Court will look to this fact, unless there is some positive principle of law which limits the inquiry.

There is no such principle of law. The rule that Courts take no notice of fractions of a day is never applied "in cases where there are conflicting rights, for the determination of which it is necessary to do so."—Broom Leg. Max., *143.

What was said by Johnson, J., in Ex Parte Stagg, was obiter. The decision in that case was that the fraction of a day should be regarded; and the dictum is deprived of all weight when the character of the authorities cited in its support, and the strange neglect of more direct and important authorities, is considered. Thus Waterman v. Haskin, 11 Johns., 228, involved no question concerning the fraction of a day at all, nor was such question even considered by the Judge who pronounced the opinion; and the other decision referred to (Note in 4 Dall., 370), was by "the Court of Common Pleas of Philadelphia County," and has nothing about it to entitle it to the respect of this Court.

Lord Porchester's case is cited by Buller, J., in Pugh v. Robinson, 1 Dunf. & East., 116,

as a case concerning judicial proceedings, while the latter case holds that where, as here, the act of a party is in question, fractions of the day must be considered. In

*61

Smallcombe *v. Buckingham, 1 Salk., 320, this distinction is applied by Lord Holt, C. J., to the case of two executions delivered on the same day, in which case there is a "prius and posterius in the same day;" and so in the text books, 2 Tidd. Pract., 1001; Lewell on Shffs., 199; and the current of English authorities is uniform in this direction; Johnson v. Smith, 2 Burr., 962; 3 Burr., 1434; Ib., 1243; 3 Wils., 274. The American authorities settle the rule in the same way—Lemon v. Staats, 1 Cowen, 592; Marvin v. Herrick, 5 Wend., 109; Clute v. Clute, 4 Denio, 243; 2 Watts, 303; Walker, 430; 1 How., (Miss.) 234.

If, then, the fractions of a day are noticed where the question is only of the lodgment of the execution, a fortiori, the rule applies when to the act of lodgment is added the specific appropriation of the property by levy.

But, since the Code, the proceeding under execution finds an exact analogy in the law of attachments, and the rule of this case should be sought there—"ubi eadem ratio ibi idem jus." It is no objection that attachments are not of common law origin, for, as between writs executed on the same day, a discrimination is made by all authorities, not on the ground that the remedy is "at right angles" with the common law, but because the common law does admit of fractions of a day "where it is necessary to distinguish who has priority."—Callahan v. Hallowell, 2 Bay, 8; Brainard v. Bushnell, 11 Conn., *17, (a leading case); 4 Kent, 91, note; and cases cited in Drake on Attachments, § 258, et seq.

By Section 310 of the Code, it is the act of levy that gives priority. By this act a special property in the goods vests in the Sheriff for the purposes of the execution, and no subsequent act of the Sheriff can divest this right of property on pain of a second execution. And even if the dictum in Ex Parte Stagg, with respect to the lodgment of executions, is good law, "it is certainly otherwise in relation to vested rights acquired by operation of law or contract."—Ex Parte Stagg, 1 N. & McC., 406.

Vigilantibus et non dormientibus jura subveniunt.

Qui prior est in tempore potior in jure.

Where the rights of parties are in question, these are the maxims to be applied, and not de minimis lex non curat.—Broom Leg. Max., *143 and *352.

If the levies were made at the same instant, the distribution should be by equal division of the proceeds and not pro rata.—

*62

Campbell v. *Roger, 1 Cowen, 215; 2 Tidd's Pract., *1001, note a; Drake on Attachments, § 260, and authorities cited in note, page 215.

Melton, Attorney General, contra, cited Broom Max., 143; 9 East., 154; Stark. Ev., 1406; 3 Cowen, 19; 3 Denio., 263; 1 Ld. Raym., 281; Ex Parte Stagg, 1 N. & McC., 405; P. L., 379; Cranch, 390; Code, §§ 316, 317, 355; Williamson v. Farrow, 1 Bail., 611; Drake on Attach., §§ 4, 261; Callahan v. Hallowell, 2 Bay, 8.

Feb. 2, 1874. The opinion of the Court was delivered by

MOSES, C. J. There are two questions involved in this appeal: First, whether, in determining the lien of an execution upon personal property, regard is to be had to fractions of a day. Second, if not, is the distribution of the fund from the same levy, made on two executions, on the same day, to be by equal divisions of the proceeds, and not pro rata?

While it is true that the common law, as a general rule, will not notice fractions of a day, unless to give effect to a right which would be defeated, but for their recognition, yet the exceptions by the English decisions in regard to their application to judicial proceedings have not been uniform. While Mr. Tidd, in his second volume, at page 1001, refers to several authorities to sustain his text, that "as between different plaintiffs, if two writs of execution be delivered to the Sheriff on the same or different days, he ought to execute that first which was first delivered," in Lord Porchester's Case, Tr., 23, G. 3, cited by Justice Buller in Pugh v. Robinson, 1 T. R., 157, it was held that where there were two judgments, both referring to the same day, priority of one could not be averred.

The mode and manner by which liens are to be created on real estate by judgment, and on personal property by executions, the extent of their binding efficacy, the effect of the disposition of levies under the latter, their operation, and all the incidents attaching to them as the medium through which satisfaction of the debts on which they issued is to be made, depend on the statutes of the State, and the construction which has been given to them by the Courts charged with their exposition. There is probably not a State in the Union which has followed the course of the common law in regard to the enforcement of judgments and executions. It would be almost impossible, from the nature of our government, and the condition of our people, to conform our practice to that

*63

*which prevails in England in respect to final process. Our comparative infancy, the abolition of all distinction between the liability of land and other property for the payment of debts, and various other considerations, preclude the application of all the rules, through the origin and enforcement of which

the course of the English Courts has been established.

The doctrine of liens, through the writ of fi. fa., prevailing in South Carolina, owes its origin to the 16th Section of the Statute of Frauds, 2 Stat., 528, and the 37th Section of the Act of 1785, 7 Stat., 229. As to the binding effect of the writ, the language of both is almost identical. They both require the Sheriff, or other officer to whom it may be delivered, to endorse on the back of it the day of the month and year of its receipt. It would thus appear, that while regard was to be had to the day, as fixing the time from which its binding efficacy was to begin, all reference to the particular hour at which it was lodged, as the period from which any rights under it were to arise, was precluded. The endorsement of the day was to afford evidence of the time to which its binding effect was to relate; and if any advantage as to priority, through the hour of lodgment, was to be attained, the statutes failed in a material requisition in not directing the officer to note it on the process.

In Ex Parte Stagg, 1 N. & McC., 405, it was said that the law will not allow fractions of a day to affect legal proceedings, and that, of two executions of the same day, neither shall have preference. Whether this was a mere dictum, or the recognition of a principle accepted and expressed by the whole Court, for over fifty years the practice has conformed to it in every particular, and we are bound to enforce it, unless something may be found in the Code of Procedure, lately adopted, which compels a departure.

To change a practice in judicial proceedings which has been accepted and followed for over half a century, positive enactment must be shown, or such action of the legislative authority as leaves no doubt of its intended purpose. Inferences from doubtful implications will not suffice.

The 316th Section of the Code only changes the act which is to give binding efficacy to the execution. It is no longer to follow from the mere lodgment with the Sheriff, but from the actual "levy" or "attachment." The succeeding Section preserves "the existing provisions of law, not in conflict with this

*64

Chapter re*lating to executions and their incidents, the property liable to sale on execution, the sale thereof, the powers and rights of officers, their duties thereon," &c.

No aid is derived to the argument on behalf of the motion from the use of the word "attachment" in the same connection. It was not intended to apply to what was formerly known in the State as a writ of foreign attachment, now provided for by the fourth Chapter, Title VII, of the Code, Gen. Stat., 622. It cannot be taken in the connection in which it is found in any other sense than as synonymous with "levy." If the term is to be there understood as referring to the process provided against absent debtors who have property subject to the jurisdiction of the Court, its lien now "ranks," not from the hour, but "from the day" when it is lodged with the Sheriff, (Gen. Stats., 624.) Before the adoption of the Code the lien of the fi. fa. was referred to the entry in the Sheriff's office—now it takes effect from the levy; but all the other incidents attaching to or consequent upon it, except as directly, or by irresistible inference, provided by the Code remain unchanged.

Holding that the levy under each of the two executions, on the same day, prevented a preference or priority in favor of that on which it was first made, we are not disposed to change the long established rule of the Court, that the proceeds of the levies must be divided between the two executions in ratable proportions. Doubtless a different practice may obtain in New York, and probably in some other of the States, by which the funds would be required to be equally divided between them, regarding the levies as made at the same time. We are not disposed to depart from the course so long adopted, and followed by our Courts, accepted by the bar, and understood by the community, and not requiring any change, as is manifest by their long acquiescence without complaint in the practice as it exists. The motion is dismissed.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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5 S. C. *65

*STATE v. GREEN.

(Columbia. Nov. Term, 1873.)

[*Embezzlement* ⇐35.]

Indictment under the Act declaring a fraudulent breach of trust to be larceny, charged the trust to consist in safely keeping certain lumber of A, and the proof was that it consisted in running a mill by sawing lumber on A's place and shipping it to market for sale. Variance held fatal.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 55–59; Dec. Dig. ⇐35.]

[*Criminal Law* ⇐762.]

The Constitution of the State providing that "Judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law;" it is error for a Judge to state to the jury his conclusion upon a question of fact, though he may review the evidence and present the different views that may be taken of it.

[Ed. Note.—Cited in State v. White, 15 S. C. 391; State v. James, 31 S. C. 235, 9 S. E. 844; Norris v. Clinkscales, 47 S. C. 512, 513, 514, 25 S. E. 797.

For other cases, see Criminal Law, Cent. Dig. § 1731; Dec. Dig. ⇐762.]

In the Criminal Court, Charleston, April Term, 1872.

Indictment against Tappin G. Green under the Act of 1866, (13 Stat., 406, § 6,) providing

that any person committing a breach of trust, with a fraudulent intention, shall be held guilty of larceny. The indictment charged that the defendant, "being entrusted by one Michael O'Dowd with" certain lumber, &c., "upon a trust," &c., that he "would safely keep the said lumber," &c., did, &c. The proof, as to the trust, was that the defendant was employed by Michael O'Dowd as his overseer on two plantations, and that it was part of defendant's "duty to run a mill upon the lower of the two plantations, by sawing lumber cut on the place and shipping it to market for sale." The jury found the defendant guilty, and, after sentence, he appealed, having, before sentence, moved in arrest of judgment, and for a new trial.

The rest of the case will be understood from the opinion of the Court.

Knowlton, for appellant.

Buttz, Solicitor, with whom was O'Connor, contra.

Feb. 2, 1874. The opinion of the Court was delivered by

MOSES, C. J. It is not necessary to review all the grounds submitted, both in arrest of judgment and for a new trial, for among the many presented there are at least two in regard to which no difference of opinion can exist. Nor is it necessary, therefore, to enquire whether the form of the indictment is sufficient, as averring all the circumstances which are essential to constitute and express the offense designed by the Act.

A recognized principle pervades the whole

*66

system of pleading, *both civil and criminal, and is applied with unvarying precision to the latter, where something more than the mere right of property is involved. A criminal conviction subjects the offender to punishment in his person, even affecting life itself. Every safeguard which the law has provided for his defense, whether to be found in statutory enactment, or binding on the Court from long established precedents, originating in judicial decisions, the defendant in the Court of Sessions has the right to invoke in his behalf. It is not necessary to refer to authority to show that one, not least in consequence or importance, is that the charge must be sustained by some evidence, for, without this, there would be nothing for the jury to pass upon. Now, the indictment charges that the trust reposed in the appellant, (the defendant below) was "to keep the lumber for the said Michael O'Dowd." The testimony of O'Dowd, the only witness who says anything of the nature of the possession, is "that it was a part of the overseer's duty (referring to the appellant) to run a mill upon the lower of the two plantations, by sawing lumber cut on the place, and shipping it to market for sale."

A more glaring difference between the allegation in the indictment and the proof, in this particular, could not well be conceived. It can in no way be regarded as an immaterial averment, for to establish the breach of trust contemplated by the Act, the circumstances constituting it must be correctly set forth, and if sufficient to establish the charge, must be proved as laid. The trust averred was safely to keep the lumber; the trust proved was to saw and ship to market for sale. The allegation in the indictment was not sustained by any evidence, and until the trust charged in it was established by testimony, there could be no breach of it.

The exception to the instruction of the Judge, as violative of the 26th Section of the IVth Article of the Constitution, is also well taken. Its language is as follows: "Judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law."

We are not to be understood as holding that a Judge, in his charge to the jury, is to be confined to a mere narration of the evidence. While he is not at liberty to give his conclusion on any particular portion of the testimony, nor the result of his judgment as to the whole, he is not restrained from comparing the various parts of it, that the jury may have before them, in as concise a form as possible, the issues upon which they

*67

are to pass, so that they may *be the better enabled to apply the law to the facts presented in the cause. The Judge is not permitted to say, where the testimony makes an issue of fact, in what manner the jury is to value it; but he may review the whole testimony, and while not allowed to give his own conclusion, may collect and group together the various phases in which the evidence may be regarded, that the jury may view it in the various relations which it bears to the law, as pronounced by the Court. In Redding and Wife v. South Carolina Railroad Company, April Term, 1873 [5 S. C. 67], we had occasion to refer to the point now considered, and expressed our views in relation to it.

In the case before us the Judge, so far from refraining to give his own opinion on the very issue with which the jury was charged, said to them: "Witnesses on the part of the State agree as to the trust being created and betrayed, and the defense, even with the latitude allowed it, has failed to create a doubt in that particular, to wit: that the said Tappin G. Green did have in trust this lumber, and did misappropriate the proceeds." He thus submitted, not only his conclusion of law to be applied to the facts, but so expressed his opinion in regard to them that not even a doubt was left for the solution of the jury.

The motion in arrest of judgment is granted.

WRIGHT, A. J., and WILLARD, A. J., concurred.

5 S. C. 67

REDDING v. RAILROAD COMPANY.

(Columbia. April Term, 1873.)

[*Appeal and Error* ⇐230.]

Objections to the brief, or record of the Circuit Court, come too late, if made, in the first instance, on the hearing of the cause on the merits.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1299, 1352; Dec. Dig. ⇐ 230.]

[*Appeal and Error* ⇐235.]

Defects of that nature can only be taken advantage of by special motion, upon notice to the opposite party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1382, 1383; Dec. Dig. ⇐ 235.]

[*Appeal and Error* ⇐281.]

It is not necessary to move in the Circuit Court for a new trial in order to bring up, by appeal, questions of law raised at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1650–1661, 3024, 3281; Dec. Dig. ⇐281.]

[*Trial* ⇐194.]

The provision in the Constitution of the State, that "Judges shall not charge in respect to matters of fact, but may state the testimony and declare the law," was only intended to prevent Judges from forcing upon juries their own conclusions of fact; not to prevent them from summing up and commenting upon the evidence.

[Ed. Note.—Cited in State v. Green, 5 S. C. 67; Fripp v. Williams, Birnie & Co., 14 S. C. 511; State v. White, 15 S. C. 391; Benedict v. Rose, 16 S. C. 630; State v. Addy, 28 S. C. 13, 4 S. E. 814; State v. James, 31 S. C. 235, 9 S. E. 844; Norris v. Clinkscales, 47 S. C. 507, 511, 514, 25 S. E. 797.

For other cases, see Trial, Cent. Dig. §§ 413, 436, 439–441, 446–454, 456–466; Dec. Dig. ⇐ 194.]

[*Trial* ⇐139.]

It is for the Court to determine whether there is any evidence bearing upon an issue of fact, that being a question of law. If there is any evidence, then it is for the jury to determine its force and effect.

[Ed. Note.—Cited in Norris v. Clinkscales, 47 S. C. 517, 25 S. E. 797.

For other cases, see Trial, Cent. Dig. §§ 332, 333, 338–341, 365; Dec. Dig. ⇐139.]

*68

[*Appeal and Error* ⇐1064.]

*To charge the jury that there is no evidence of the cause of action stated in the complaint, is wholly immaterial, if the cause, as stated, would not support a verdict for the plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221–4224; Dec. Dig. ⇐1064.]

[*Civil Rights* ⇐13.]

An allegation that defendant "injuriously and unlawfully made a distinction on account of the color and the supposed race of the plaintiff, so as to damage, and actually damaging her standing, comfort and happiness," states of itself no cause of action.

[Ed. Note.—For other cases, see Civil Rights, Cent. Dig. § 12; Dec. Dig. ⇐13.]

Before Graham, J., at Charleston, February Term, 1872.

This case had been tried before, and a new trial ordered by the Supreme Court, (see 3 S. C., 1.)

The complaint, after stating that the defendant, the South Carolina Railroad Company, is a body corporate, doing business as carriers of passengers and merchandise, alleged as follows:

"For a first cause of action—

"1. That on the day of February, 1870, the defendants injuriously and unlawfully made a distinction on account of the color and the supposed race of the above named Julia F. Redding," (one of the plaintiffs,) "so as to damage, and actually damaging the standing, comfort and happiness of the above named plaintiff."

A second cause of action was also alleged.

After evidence had been given, and counsel on both sides heard, His Honor charged the jury "that there was no testimony to support the first cause of action." To this ruling the plaintiff excepted.

The evidence bearing upon the second cause of action was submitted to the jury, and they found a verdict for the defendant.

A motion for a new trial was afterwards made and overruled.

The plaintiffs appealed on the grounds that His Honor charged the jury upon matters of fact, and that there was no evidence to sustain the first cause of action.

The appellants, in their brief for the Supreme Court, stated that they excepted to the statement of the case made by the Circuit Judge, setting forth certain grounds relating to matters bearing upon the motion for a new trial in the Circuit Court.

Pope & Haskell, for appellants.

Porter & Conner, contra.

Feb. 17, 1874. The opinion of the Court was delivered by

WILLARD, A. J. Objections are made to the record of the Circuit Court as insuffi-

*69

cient. These objections cannot prevail. *In the first place, they were interposed too late, having been made, in the first instance, on the hearing of the cause on the merits. An objection to the brief, or record of the Circuit Court, is a preliminary matter. Defects of that nature can only be taken advantage of by special motion, upon notice to the opposite party of the nature of such objection. In the next place, the defects claimed are not substantiated nor pointed out with sufficient distinctness to enable this Court to judge of their character, whether substantial or frivolous.

The various matters presented by the brief, as the record of proceedings in the Circuit Court upon a motion there for a new trial, are unimportant here. It was not necessary that the application for a new trial, so far as it was based on matters of law alone, should

be made, in the first instance, to the Circuit Court. Such matters come properly before us by appeal without previous application to the Circuit Court. The motion before us comes up upon the record of the proceedings upon the trial of the cause, which, in the present instance, presents the single question, whether there was error in the charge and rulings of the Judge materially prejudicial to the appellants.

The charge complained of was: "That there was no testimony to support the first cause of action." This is objected to on two grounds: first, as in effect charging the jury upon matters of fact; and, second, that it was erroneous.

The Constitution (Art. IV, Sec. 26) declares: That "Judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law." Considering, together, the parts of this Section, it is quite clear that its sole intention was to prevent Judges from forcing upon the juries their own convictions as it regards matters of fact. The juries are the judges of such matters, and cannot properly look to the Court for a controlling view of the proper conclusions of fact, nor can the Court, on the other hand, employ its influence over the minds of jurors to force upon them its conclusions in such cases.

Stating the evidence means more than repeating it. It includes the idea of placing it in its logical relation to the propositions which it is adduced to support or contradict, as well as to the principles and rules of law by which its bearing and force ought to be controlled.

To say that there is no evidence bearing

*70

on an issue does not con*flict with the duty imposed on the Judges by the Section of the Constitution just cited. On the contrary, a ruling of that character is one involving strictly matter of law. It is the province of the Court to determine whether there is any evidence bearing on an issue; the jury can only determine the force of such matters as are submitted to them by the Court as matters of evidence proper to the issue.

It will not be material to look into the evidence to see whether the conclusion of the Court, that there was no evidence bearing on the first cause of action, as stated in the complaint, was correct, for that alleged cause of action, as stated, is incompetent to support a verdict or judgment. If this conclusion is correctly drawn, then the matters of the ruling in question are wholly immaterial, and need not be considered by us.

The language of the first cause of action is as follows:

"1. That on the ——— day of February, 1870, the defendants injuriously and unlawfully made a distinction, on account of the color and the supposed race of the above named Julia A. Redding, so as to damage, and actually damaging, the standing, comfort and happiness of the above named plaintiff."

This is put forth as a distinct and independent cause of action, and contains no averment in any way connecting the facts alleged with the various matters narrated under the second cause of action. It cannot be regarded as forming part of the matters stated under the second cause of action, and intended to point or aggravate the wrong there alleged, for the form of statement, and the absence of any recitals of fact that can serve as a link to connect it with the matters set forth in the second cause of action precludes such a conclusion. It must, therefore, be considered as complete in itself, and it must be judged by its allegations independently of any other part of the complaint. The ground of injury alleged is, that defendants "made a distinction," as it regards color or race. In what this distinction consisted is not stated; nor does the law attach an idea to the making of a distinction as the ground of an injury sounding in damages. The alleged damage to standing, comfort and happiness cannot, therefore, be ascribed to any injury known to the law as such. If the plaintiff were denied or disturbed in the enjoyment of any right on the ground of her color or race, constituting an actionable injury, the nature of the right, and the wrong and injury done to it, should have been stated. In the ab-

*71

sence of *such allegations the first cause of action presents nothing of an actionable character.

The appeal must be dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

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5 S. C. 71

In re STOKES.

(Columbia. Nov. Term, 1873.)

[*Contempt* ⇐66; *Habeas Corpus* ⇐30.]

Where a party is committed for contempt by a Court of record having jurisdiction of the subject-matter and the party, for irregularity in the proceedings, or error of judgment, habeas corpus is not the remedy. Relief must be sought by appeal.

[Ed. Note.—Cited in Ex parte Bond, 9 S. C. 81, 30 Am. Rep. 20; State v. Nathans, 49 S. C. 203, 27 S. E. 52; State v. Barnett, 98 S. C. 429, 82 S. E. 798.

For other cases, see Contempt, Cent. Dig. §§ 214, 219; Dec. Dig. ⇐66; Habeas Corpus, Cent. Dig. § 25; Dec. Dig. ⇐30.]

This was a writ of habeas corpus, directed to the Sheriff of Greenville County, commanding him to have the body of Edward F. Stokes, with the day and cause of his caption and detention, before the Supreme Court. The Sheriff made return to the writ, and submitted as the cause of caption and detention

a warrant, signed by the Judge of the 8th Circuit, in words and figures as follows:

"State of South Carolina, Greenville County. } In Circuit Court.

"R. H. Earle, plaintiff, against Edward F. Stokes, defendant.

"A notice having been made by the Court on the 25th day of July, A. D. 1872, that the defendant herein should appear before this Court and answer such questions as may be propounded to him, touching his property, and the said defendant refusing to be so sworn and answer, it is ordered that he be held by the Sheriff in close confinement until such time as he shall make such answer.

"T. H. Cooke.

"September 12, 1873."

Upon the motion for discharge the petitioner submitted his own affidavit, wherein he set forth certain supposed irregularities in the proceedings before the Circuit Court, and stated that he had taken an appeal from the orders of the Judge. It seemed, from the affidavit, that the proceedings in the Circuit Court were supplementary to an execution of R. H. Earle against the petitioner.

*72

*Feb. 17, 1874. The opinion of the Court was delivered by

MOSES, C. J. If any irregularities exist in the course of the proceeding under which the petitioner was committed, or if the conclusion of the presiding Judge, which resulted in the order of attachment, was erroneous, they are to be corrected by the appeal now pending, or which may be hereafter taken. Any anticipation of the judgment which may follow their hearing in the regular course, it is proper should now be carefully avoided.

The order of the 25th July, 1872, in the case of R. H. Earle, against this petitioner, appears to have been the origin of all the succeeding orders which were made, or, at least, of the one under which the applicant was committed. It was intended as the inception of what is termed in the Code of Procedure "proceedings supplementary to the execution," (Gen. Stat., 644), and was resorted to as the mode by which relief could be obtained through the remedy thereby provided. The jurisdiction to enforce the provisions therein prescribed attached to the Circuit Court. While it is to be regretted that the appeal was not pressed, so that the propositions involved in it could have been submitted at the present term, we are obliged to meet the motion now made under the writ of habeas corpus on its own merits, independent of any question of error on the part of the Circuit below.

The case of James and James v. Smith, and Gillam v. McJunkin, 2 S. C., 183 and 442, announce the principles upon which the motion before us must be determined. It is not necessary to enlarge upon them, for they present the very point on which the decision here must turn. Where a Court of record has jurisdiction of the subject-matter and the party, its judgment, though erroneous, must stand until rescinded by the proper tribunal. Such a Court must be the judge of a contempt committed against its authority, and its order must avail until reversed in the mode provided by law, which, under our practice, is by appeal.

The jurisdiction of the Court in "proceedings supplementary to the execution," is directly conferred by statute. It is not necessary to inquire whether the Court had the right to invoke the aid of its common law power to enforce, through the process of attachment, compliance with its orders in the course of such "proceedings," for the 328th Section of the Code, (Gen. Stat., 648), in terms, confers on the Judge the right to punish, as for a contempt, any disobedience

*73

*of any order made by a party or witness thereunder, and provides for the discharge by him of the person so committed.

The motion to release the petitioner is refused.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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5 S. C. 73

KNOX & GILL v. RAILROAD COMPANY.

(Columbia, Nov. Term, 1873.)

[*Appeal and Error* ⇐832.]

The Supreme Court will not entertain a petition for re-hearing, in order to allow counsel to submit grounds and authorities not before taken and cited in the case.

[Ed. Note.—Cited in Ex parte Knox, 17 S. C. 213, 214; State v. Turner, 39 S. C. 426, 17 S. E. 885.

For other cases, see Appeal and Error, Cent. Dig. § 3221; Dec. Dig. ⇐832.]

In the case of Knox & Gill v. The South Carolina Railroad Company, reported ante, p. 22, the following petition for re-hearing was now presented to the Court:

The defendants in this case respectfully pray the Supreme Court to grant a re-hearing in this cause, in order to allow their counsel to submit grounds and authorities not heretofore cited, to the end that the decision of the Circuit Court and the Supreme Court in the premises may be reconsidered and reversed:

1. That the Act of 1827 provided for fractions of 100 miles on heavy freights, but the Acts of 1828, 1835 and 1838 omit and repeal all provisions for fractions of 100 miles on heavy freight. The last named Acts were manifestly intended to establish the only rule which should prevail.

2. The Acts of 1828, 1835 and 1838 make 100 miles the unit per 100 pounds of heavy

freight, and the unit must be the rule where fractions are not provided for.

3. The phraseology of the Acts makes it clearly apparent that the mile was to be the unit in relation to passengers, and the 100 miles in relation to freight per 100 pounds.

4. The reason of the theory furnishes the best rule for the interpretation of a statute, and the reason of the theory is, that so great an element of expense in railroad transportation as loading and unloading should find compensation in a fixed charge for a stated distance, especially in relation to heavy freights.

5. When there is a charge and a unit of distance fixed by law there can be no pro rata for greater or less distance without statutory provision.

*74

*6. In interpreting the statutes on the subject, the repeal of subsequent statutes of the pro rata charge in the Act of 1827 must be taken into consideration, in order to ascertain the intent of the Legislature; in other words, the intent of the Acts of 1828, 1835 and 1838 cannot be ascertained without reference to the repeal by them of the pro rata provision in the Act of 1827.

7. That the cost of transportation on conveyance of heavy freight depends not so much upon the distance of carriage as upon the clerical or other physical force employed, which is nearly as great for distances under 100 miles as for 100 miles.

8. If the intention of the Legislature had been to establish the mile as the unit, and not the 100 miles, the natural and proper way of expressing it would have been either to fix the rate at ⅓ or ¼ of a cent per 100 pounds per mile, or to have retained the words of the Act of 1827, to wit: "At the above rates for any greater or less distance."

9. The construction sustained by the Court is ruinous to the local business of the road, and subversive of a practice which has prevailed and been acquiesced in from the establishment thereof.

Porter & Conner, for petitioner.

Feb. 17, 1874. PER CURIAM. This is an application, in terms, for a re-hearing of the case stated, but, practically, for a review of the decision, which, after full argument, has been rendered.

It is not our purpose now to prescribe any rule for the re-examination, on the mere petition of parties, of a final judgment, duly pronounced and filed. Whatever may be our views in regard to any control which we may be authorized to exercise over the judgments and decrees of the Court, or how far, ex mero motu, we are at liberty to reconsider them, we will announce when a proper case may so require.

The grounds and propositions of law on which the re-hearing is asked were fully considered, and the judgment was not rendered until all due weight was given to them. To open the case (not passing on our right to do so) would be establishing a precedent by which the hearing of every cause might be considered as only preliminary to a more extended one, on the application of any dissatisfied party, even after judgment pronounced.

The petition is not granted.

5 S. C. *75

*McKEOWN v. CARROLL.

(Columbia. Nov. Term, 1873.)

[*Homestead* ⟸153.]

Where land was assigned, in 1869, as a homestead to the widow and children of the judgment debtor, the estate remaining therein was not subject to levy and sale by the Sheriff under execution against the judgment debtor.

[Ed. Note.—Cited in Bull v. Rowe, 13 S. C. 368.

For other cases, see Homestead, Cent. Dig. § 306; Dec. Dig. ⟸153.]

[*Homestead* ⟸150.]

Where land has been assigned as a homestead, the validity of the assignment cannot be impeached collaterally, as by an action by a subsequent purchaser at Sheriff's sale to stay waste. It can only be impeached by a direct proceeding.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 303; Dec. Dig. ⟸150.]

[*Homestead* ⟸150.]

One who purchases land at Sheriff's sale, subject to an assignment, previously made, of a homestead therein, cannot impeach the validity of the assignment.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 302; Dec. Dig. ⟸150.]

[This case is also cited in Bull v. Rowe, 13 S. C. 355, and distinguished therefrom.]

Before Mackey, J., at Chester, April, 1873.

Action by Samuel McKeown, plaintiff, against John L. Carroll and Agnes Carroll, his wife, defendants.

The case was as follows:

The complaint, filed February 19th, 1873, was for an injunction to restrain the defendants from committing waste in certain lands alleged to belong to the plaintiff, of which defendants were in possession.

The land in question belonged, in his lifetime, to one James Younge, against whom a judgment was obtained in 1859, for $2,073.39.

Margaret Younge, the widow of the deceased, claimed a homestead therein, and on October 25th, 1869, the same was assigned to her. Margaret Younge departed this life in 1872, and the defendant, Agnes, her only child, a minor, who has intermarried with John L. Carroll, is now in the enjoyment of the homestead. The remainder in said homestead lands—being the interest of James Younge in said land, after the expiration of the homestead—was levied upon by the Sheriff of Chester County, under an execution issuing upon the judgment referred to, and was sold on sales day in January, 1872, and

bought by the plaintiff, who, in his complaint, charged that the defendants were cutting valuable timber on the homestead lands, and removing it therefrom, to erect buildings in the village of Blackstock, where they resided, several miles distant from the homestead, besides committing other acts of waste. Upon the complaint and affidavits an injunction was granted February 5th, 1873. The answer of the defendants did not deny the acts of waste complained of, but claimed that, under the Constitution and laws of the State, an absolute title to said lands is vested in them, and that the plaintiff had no interest therein.

*76

*The defendants gave notice of a motion to dissolve the injunction and to dismiss the complaint; and upon this motion the cause came on to be heard on the fourth day of April, 1873, when the following order was made:

Mackey, J. On hearing the pleadings in this case, and the argument of counsel for plaintiff and defendants, on the motion of the latter to dissolve the injunction heretofore granted at the suit of the plaintiff, and to dismiss the complaint herein, it is, on motion of defendant's counsel, ordered that the injunction heretofore granted in this case, of date the 5th day of February, 1873, be vacated and dissolved; ordered, further, that the complaint of the plaintiff herein be dismissed; and that the defendants have judgment for their costs.

The plaintiff appealed.

Brawley, for appellant:

The question submitted to the Court in this case is, whether the homestead, allotted according to the laws of the State of force in October, 1869, is an estate in fee or a less estate.

The estate of the defendants in the homestead premises was not derived from the ancestor, James Younge, was not acquired by purchase, but was vested in Agnes Younge, now Carroll, by operation of law. She, therefore, took and has only such estate as the law gave.

The homestead was assigned, or set off, in 1869. The only law then of force was the Act of 1868, (General Statutes, 475.) That Act provides that the homestead is "to be set off to said person;" not to said person and his heirs. There are no words directly or indirectly granting any estate of inheritance, and, without such words, only a life estate passes, under the familiar principles of law.

But, as if to avoid the very question here made, the Act goes on to provide what shall become of the estate of homestead on the death of the tenant. "The estate, or right of homestead of the head of any family, shall continue for the benefit of his widow and minor children, and be held and enjoyed by them until the youngest child is 21 years of age, and until the marriage or death of the widow, and be limited to that period." (§ 5, Gen. Stat., 476.)

*77

*It is thus an estate for life in the tenant, and estate for life or widowhood in the tenant's widow, and an estate for years, not exceeding 21, in the children of the tenant.

On the construction of the Act there can be no question as to the quantity or quality of the estate.

But the defendants claim that the Constitution gives, or intended to give, an absolute estate, and that the Act of 1868 does not carry into effect that intention.

To this we reply: The meaning and intention of the Constitution can only be ascertained from the Constitution itself; and there is not a single word in it granting any absolute estate, or carrying the estate of homestead beyond the life of the tenant or head of the family. There are no words of inheritance, nor is the estate declared to be an estate in fee. The extent of the homestead is clearly left to legislative discretion, limited by the provision that it shall "not exceed the value of one thousand dollars." When desiring "to secure the full enjoyment" of the homestead, it does not extend that enjoyment beyond "the person entitled thereto, or to the head of any family." Neither the widow nor children are mentioned in the Constitution.

There cannot, therefore, be any well-founded objection to the Act, on the ground that it grants to the tenant a less estate than the Constitution intended; on the contrary, the Act extends the benefit of the homestead farther than the Constitution does. The utmost that could be contended, under the Constitution, is that it left the quantity of the estate doubtful, in which case it remained for the Legislature to define and fix the character of the estate, whether for years, for life, or in fee.

That the Act of 1868 did not grant an absolute estate, and that the proper department to extend the benefits of the homestead was the Legislature, is clearly shown (if anything additional is needed,) by the Act of 1872, amending the homestead law, the 4th Section of which, (15 Stat., 230,) vests the estate in the head of the family in fee simple.

If an absolute estate had already been granted this Act would have been unnecessary. That it was necessary establishes conclusively that an absolute estate had not previously been granted.

Every estate of homestead granted after the passage of that Act will undoubtedly be an estate in fee; but the Act of 1872 cannot have a retroactive effect, and, by relation, enlarge into a fee simple the estate for life vested under the former Act.

*78

*Even if such construction were possible, it cannot apply to this case. Prior to the passage of the Act of 1872 there was a re-

mainder over after the termination of the estate of the widow and minor child. That remainder was levied on and sold, and purchased by plaintiff, as was expressly provided for in the Act of 1868, Section 5. No subsequent Act of the Legislature can divest the plaintiff of the property which he rightfully purchased, without impairing the obligation of the contract of sale; and, therefore, it cannot be done at all.

Even where retrospective laws are permitted, they are never allowed to divest rights acquired prior to their enactment. "Subsequent bona fide purchasers cannot be divested of the property which they have acquired by a retrospective Act, changing the legal position of their grantor in regard to the thing purchased." (Cooley, Con. Lim., p. 378.)

It may be said that the homestead is an exemption from levy and sale, etc., and that the party retains what is exempted in the same right and estate that he had before. But this exemption may be upon terms and conditions; and in our exemption Act of 1868, and in those of other States, the head of the family does not acquire the estate in fee simple, to dispose of it as he thinks proper. If he could turn round and dispose of it forthwith, the very policy of the law would be frustrated. It is, therefore, generally secured, after the party's death, to his widow and children.

This proves that he has not, and could not be intended to have, a fee simple absolute. The very policy of the law suggests and requires that the estate reserved or exempted should be subject to legislative restriction, and such is believed to be the case in homestead laws generally. If the Constitution gave the "head of the family" a fee simple absolute, the Legislature could not deprive him of it.

To arrive at the true interpretation of of Section 32 of Article II of the Constitution, it may be proper to inquire:

1st. What was the general view of the character of homestead rights at the time of its adoption.

2d. What was the contemporary construction of the Section in question.

It is a general rule that Constitutions are to be construed in the light of the common law, but, as the common law has no interest or estate analogous to this, and as the whole

*79

system is of very recent *origin, and confined to the United States, our inquiry is limited to the consideration of similar provisions in the different States of the Union. Professor Washburn, in his Treatise on Real Property, says: "The right of homestead partakes more nearly of the character of an estate for life than any other, and is treated of as coming within that category; indeed, in some of the States it comes properly within that class of estates."—Vol. 1, p. 325.

"A homestead, in law, means a home place, or place of the home, and is designed as a shelter of the homestead roof, and not as a mere investment in real estate, or the rents and profits derived therefrom."—Ibid, 326.

Twenty-five States have adopted homestead laws; nine of them by provisions in their Constitutions, the remainder by legislative enactment. Of all these, we have had facility for examining thoroughly the laws of fourteen only, and we find that, either by constitutional or legislative enactments, or by judicial decisions, it has been determined that the right of homestead shall terminate with the death of the head of the family, or minority of the youngest child. This in the States of Illinois, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New York, North Carolina, Ohio, Pennsylvania, Vermont, Virginia, and West Virginia.

It seems that in Iowa the homestead descends to the proper heirs of the estate, but the precise provisions of the law there we have not been able to ascertain. As to the other States, we have not been able to make any investigations which would enable us to speak with accuracy, but the general, we might almost say universal, current of law and authority is, that the estate of homestead is not an absolute estate in land, but something coming out of the general property in the land. This is consistent with the general policy under which these laws have been instituted—to secure to the householder a shelter for his family—that his children may not be turned out into the world by a stroke of unmerited misfortune, at an age when they are too tender to buffet with it. With the death of the head of the family, and the coming of age of the youngest child, this humane object has been accomplished; the children are then to seek homes of their own—society has done its work.

When it is considered that this was the general understanding of the meaning of homestead exemptions at the time of the adoption of the Constitution, and that the

*80

words clearly import that the ex*emption is not to the debtor himself, merely as a citizen, but as "head of a family," there should be no doubt as to the intention of the framers.

2d. This view is strengthened by the fact that such was the contemporary interpretation. It is a matter of history that the General Assembly of 1868, upon which the Constitution devolved the duty of enforcing the provision, was composed, for the most part, of men who were members of the Constitutional Convention. It is to be presumed that they knew their own minds. Who, better than the makers, can tell us what their intentions were? While contemporary construction should have but little weight in cases where there is no ambiguity, and should never be allowed to abrogate the text, or fritter away its obvious sense, yet, when

this construction is not unreasonable, is in accord with the general sentiment of mankind and the weight of authority, and comes from men who had all opportunity to know the real intention, and were bound by their official votes to enforce the provisions of the Constitution in letter and spirit, when this construction took the form of a solemn enactment, and has been acquiesced in by the Courts, and rights have accrued in reliance upon it, which should be divested by a decision that this construction was erroneous, the argument ought to have great weight.

The Supreme Court of the United States has frequently been governed in its decisions by such considerations.—Stewart v. Laird, 1 Cranch., 299; Martin v. Hunter's Lessee, 1 Wheat., 351; Cohens v. Virginia, 6 Wheaton, 418, where Chief Justice Marshall says, "great weight has always been attached, and very rightly attached, to contemporaneous exposition;" Bank of United States v. Halstead, 10 Wheat., 63; Ogden v. Saunders, 12 Wheat., 290, where Mr. Justice Johnson assigns the reason: "It proceeds upon the presumption that the contemporaries of the Constitution have claims to our deference, because they had the best opportunities of informing themselves of the understanding of the framers of the Constitution."

Some later cases—notably Brigham v. Miller, 17 Ohio, 446, and Johnson v. Joliet and Chicago R. R. Co., 23 Illinois, 207—have pushed the doctrine much farther, and have sustained legislative action, which they have held to be usurpation, on the ground of acquiescence and of rights acquired under it.

It is enough for our case that we should raise a doubt, for the Court should be bound by the doubt to refrain from acting; and

*81

*this suggests some consideration of the limits of judicial power, and the principles which control its exercise in cases of this nature.

The Constitution has expressly made it the duty of the General Assembly, at their first session, to enforce the provisions of this Section by "suitable legislation." It is clear, then, that the Constitution was not to act proprio vigore, and that the Legislature, and not the Courts, is to determine the "suitable legislation:" the Legislature, and not the Courts, then, is to interpret the meaning of this provision; for how "enforce" it without determining first what was to be enforced? The General Assembly, then, was clearly within the scope of its legitimate powers in passing the Act of 1868. But suppose the facts were as the defendants claim, what remedy could this Court apply? To declare an Act of the Legislature illegal, because in excess of the powers conferred by the Constitution, is one thing; but that the Court, in order to effect the supposed intention of the Constitution, shall extend the Act of 1868 farther than the Legislature has done, is a totally different question.

Even if the Court were convinced that it was the intention of the Constitution to grant an absolute estate, and were satisfied of the wisdom and expediency of such grant, it could not exercise any such power. "Although the Legislature may have omitted to do what the Constitution enjoined upon them, this is a matter with which the Court can have no concern."—Graves v. Slaughter, 15 Peters, 502.

Now, if the Court cannot supply the place of the Legislature, when that body has entirely failed to enforce the Constitution, a fortiori, when the Legislature has taken jurisdiction of the subject, and enacted what it regards as suitable legislation, the Court cannot extend that Act one step beyond the limit which the General Assembly has prescribed. What is said by Judge Cooley is apposite: "The remedy for unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people, in their sovereign capacity, cannot correct the evil, but the Courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of opinions upon points of right, reason and expediency with the law-making power."—Con. Lim., 168.

Courts are not at liberty to inquire into the proper exercise of power by the Legislature, in a case where the latter have been

*82

*acting within their constitutional limits. In the performance of any duty within those limits, their acts are valid and conclusively binding. They are a co-ordinate department of the government, and their opinions, on questions of natural right or expediency, are not subordinate to the judicial will.

If they violate the fundamental law, by legislating upon matters over which they have no authority, then the Courts may determine the validity or invalidity of their acts; but "Courts have no right whatever to set aside, to arrest, or to nullify a law passed in relation to a subject within the scope of the legislative authority, on the ground that it conflicts with their notions of natural right, abstract justice or sound morality."—Sedgwick on Stat. and Constitutional Law, 187.

They have no right to supply what they may conceive to be the defects of the Constitution—to fill up every casus omissus—or to interpolate into it whatever, in their opinion, ought to have been put there by its framers. "I cannot bring myself to approve of the power of Courts to annul any law solemnly passed, from a broad, loose and vague interpretation of a constitutional provision, beyond its natural and obvious sense,"

says Senator Verplanck, in Cochran v. Van Surley, 20 Wend., 381.

If the subject-matter of the Act, the manner in which its object is to be accomplished, and the mode of enacting it, is within the constitutional limits, the Court cannot inquire into the proper exercise of the power. They must assume that the legislative discretion has been properly exercised.—People v. N. Y. Cen. R. R. Co., 34 Barb., 137; Cooley, Con. Lim., 186; 36 Barb., 193.

"A legislative Act is not to be declared void upon a mere conflict of interpretation between the legislative and the judicial power. Before proceeding to annul, by judicial sentence, what has been enacted by the law-making power, it should clearly appear that the Act cannot be supported by any reasonable intendment or allowable presumption.—People v. Supervisors of Orange, 17 N. Y., 241.

There is another rule which should govern Courts in cases of this nature. They should never assume that the framers of the Constitution, any more than the General Assembly, would enact any law in contravention of the Constitution of the United States, which, in Section 4 of Article I, they declare to be paramount; and if it is possible to give legislation such construction as will not put it in conflict with that instrument, it is their

*83

duty so to do. *Now, the Constitution of the United States, Article I, Section 10, prohibits the States from passing any laws impairing the obligation of contracts. The homestead provisions, as interpreted by the Act of 1868, might possibly be sustained, as not being repugnant to the Constitution, on the ground that they do not deprive the creditor of his remedy, but only postpone it; and some great Judges have holden that to vary the remedy does not impair the obligation of the contract.—Marshall, C. J., and Duvall and Story, in Ogden v. Saunders. But if the construction contended for by the defendants is correct, the remedy is not simply postponed, but is taken away altogether, and no Court could hold that this is not in contravention of the Constitution of the United States, and, therefore, void.

Authorities might be multiplied upon this point, but it is sufficient to refer to the late case of Gunn v. Barry, decided by the Supreme Court of the United States, in a case involving the homestead laws of the State of Georgia.

Lastly, it is submitted that whatever may be the true interpretation of Section 32 of Article III of the Constitution of this State, this plaintiff having purchased the interest of James Younge in the lands in question, under legal process issuing upon a judgment obtained and a debt contracted prior to the adoption of the Constitution, is to be considered as entitled to the possession of said lands, the claims of the defendant to the contrary notwithstanding, said claims being wholly founded upon the said Section and Article of the Constitution of this State, and the laws passed in pursuance thereof, which Constitution, and which laws, so far as they relate to, or are intended to apply to, contracts made before their adoption, are wholly inoperative, and can have no binding effect, inasmuch as the same are in contravention of Section 10, Article I, of the Constitution of the United States.

Vide Constitution of South Carolina, Article 1, Section 4; Constitution of the United States, Article I, Section 10; Article III, Section 2; Gunn v. Barry, 15 Wallace, 610.

McLure & McLure, Brice, contra:

I. The estate of homestead in lands is an estate unknown to the common law; it is, with us, a creation entirely of the organic law of the State, and its character and extent can be determined only by reference to the special provisions of the Constitution creating it.

*84

*Section 20 of Article I of the Constitution declares that "a reasonable amount of property, as a homestead, shall be exempted from seizure or sale, for the payment of any debts or liabilities, except for the payment of such obligations as are provided for in this Constitution;" and Section 32 of Article II of the Constitution declares that the family homestead of the head of each family, &c., shall be exempt from attachment, levy or sale, &c.

The language here used, "shall be exempted," "shall be exempt from attachment, levy or sale," is positive, explicit and unqualified in its terms, and indicates clearly that it was the purpose and intention of the framers of the Constitution to vest in the heads of families, and for the benefit of families, an absolute and unlimited estate in the homestead.

These Sections of the Constitution are to be so interpreted as that the object and intention of the framers shall prevail; and the words used are to be construed according to their popular or generally received import. —1st Kent, 510, 511; Potter's Dwarris on Statutes, 175–183, 193–203.

They are also in the nature of remedial or beneficial statutes, and are to be construed liberally.—Potter's Dwarris on Statutes, 231–239.

Feb. 18, 1874. The opinion of the Court was delivered by

WILLARD, A. J. The Circuit Judge having dismissed the complaint on complaint and answer alone, it is necessary for us to consider whether, upon the facts stated by the complaint, the plaintiff is entitled to the relief demanded by him, or to any relief whatever.

The plaintiff claims to be the owner in fee of certain lands in the possession of the

defendants. His title, as alleged, was derived as purchaser at a Sheriff's sale under a judgment recovered in 1859 against James Younge. Margaret, the widow of the deceased judgment debtor, obtained the assignment of a homestead in the premises in controversy on the 25th of October, 1869. She died in 1872. The defendant, Agnes, the wife of J. S. Carroll, the minor child of James and Margaret Younge, is now in the enjoyment of the homestead. In January, 1872, after the assignment of the homestead, the premises covered by the homestead exemption was sold at Sheriff's sale, subject to the right of homestead, and purchased by the plaintiff. He alleges that defendants are

*85

com*mitting waste by the destruction of the timber, and the answer does not deny such waste.

The judgment dismissing the complaint appears to have been based upon a determination that the right acquired under the assignment of the homestead, and now held by the defendants, was in the nature of a fee simple, and that, accordingly, waste could not be alleged.

At the close of the appellant's argument a question appears to be discussed affecting the validity of the proceedings for the assignment of the homestead, on the ground that such assignment was in violation of the rights secured by the judgment, and tended to impair the obligation of the contract enforced by such judgment. That question cannot be made at the present time. If the assignment of the homestead was, for any reason, in violation of plaintiff's rights, advantage should have been taken of such fact in a direct proceeding; it cannot be considered collaterally as sought by the plaintiff in a suit to stay waste. The plaintiff's case is placed by him upon a purchase made subject to the homestead right, and, doubtless, at a price based on the assumption of the validity of the homestead claim, and, accordingly, he does not occupy a position enabling him to open the question of the validity of the original assignment.

The first question that is presented is, whether the plaintiff shows in himself an estate or interest in the lands of such a nature as to entitle him to restrain waste on the part of the defendants. His whole claim depends upon the validity of the Sheriff's sale, under the judgment, of the premises subject to the homestead. The defendants claim to hold the premises in the right of the defendant, Agnes, as an estate in fee simple. On the other hand, the plaintiff claims to have acquired the fee under the Sheriff's sale.

The question then arises, did the fee of the lands pass to plaintiff under the Sheriff's sale? If not, are defendants in a position to allege against the effect claimed for such Sheriff's sale?

At the time of the sale of the premises in question they were subject to a right of homestead which we must assume to have been rightfully assigned. The Constitution declares that such homestead "shall be exempt from attachment, levy or sale on any mesne or final process issued from any Court." It is clear that this language distinctly forbids such execution of final process as that under which the plaintiff claims. It is equally clear

*86

that, as the plaintiff claims *through the operation of the law above, and not from any act of the parties, he can only take that which the law confers on him in virtue of the validity of his proceedings. Now as the Constitution is a part of the law governing the force and effect of the process of the Courts, it follows that that which the Constitution forbids cannot be effectually attained through the abuse of the process of the Courts. Unless, then, there is something in the proposition, that although the land could not be sold, yet a remainder over after the expiration of the homestead right could be sold, the plaintiff altogether fails to show such title in himself as he alleges as the foundation of his demand for relief.

We must, then, inquire whether enforcing a judgment against premises in respect of which a homestead right is properly secured, by way of selling a remainder therein, to vest in possession after the termination of the right of homestead, is conformable to the Constitution.

If the Constitution, in using the term "exemption," means absolute exemption, then it is clear that the attempt to sell such a remainder was a violation of its terms.

In order to hold that a limited exemption only was intended, such as would admit of stripping the judgment debtor of title, while leaving him a limited right of possession alone, it would be necessary to find either language in the Constitution importing such limitation, or something in the declared policy of the enactment rendering such a construction proper. Nothing of this kind appears in the Constitution, or can be made out on the principles of construction. The object of the Constitution was, clearly, to perpetuate in the judgment debtor or his family, under certain conditions, the ownership as well as the use of the family homestead. We are not justified in diminishing the force and effect of the word "exempt" as it stands in the Constitution.

The plaintiff has not made out a title in himself that authorizes an injunction to stay waste.

It is not necessary, then, for us to consider what was the nature of the interest remaining in the judgment debtor and his family under the operation of the homestead laws, for the plaintiff does not put himself

in a proper position to question the nature of the defendants' right of possession.

The appeal should be dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

5 S. C. *87

*HUBBELL v. COURTNEY.

(Columbia. Nov. Term, 1873.)

[*Specific Performance* ⟸122.]

In an action for specific performance, if the facts alleged by the complaint constitute a cause of action, it is error to decide the case upon the pleadings and dismiss the complaint without affording the plaintiff an opportunity to offer her proofs.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 396; Dec. Dig. ⟸122.]

[*Equity* ⟸339.]

An answer under the Code is not, as under the former practice in equity, to be taken as true until the plaintiff has had an opportunity to controvert its denials and allegations.

[Ed. Note.—Cited in Latimer v. Sullivan, 30 S. C. 115, 8 S. E. 639.

For other cases, see Equity, Cent. Dig. §§ 685, 686, 688–696, 703–705, 710, 714; Dec. Dig. ⟸339.]

[*Specific Performance* ⟸114.]

In an action for specific performance of a contract for the sale of land, it is not necessary to allege that the contract was in writing.

[Ed. Note.—Cited in Groce v. Jenkins, 28 S. C. 175, 5 S. E. 352.

For other cases, see Specific Performance, Cent. Dig. § 361; Dec. Dig. ⟸114.]

Before Graham, J., at Orangeburg, January Term, 1873.

This was an action by Mary M. Hubbell, against William C. Courtney, as executor, and George H. Sass and others, as devisees of Jacob K. Sass, deceased, for specific performance of a contract for the sale of a lot of land in the village of Orangeburg.

The plaintiff, by her complaint, alleged that Jacob K. Sass, in his life time, agreed with the plaintiff, his sister, to sell to her the lot in question, at a price stated; that he put her in possession under the contract, and that the purchase money was paid, setting forth how it was paid.

The defendants, by their answer, denied the contract and payment of the purchase money. They set forth the facts as they understood them, and alleged that the plaintiff's occupation of the premises was merely permissive, and not under any contract of sale.

In February, 1872, the Court made an order, on motion of defendants' counsel, that the plaintiff reply to the new matter contained in the answer.

The plaintiff then filed a reply, in which she repeated, with more fulness and particularity, the allegations of her complaint.

The cause was placed on Calendar No. 1, and when it was called for trial the plaintiff moved that the issues be submitted to a jury—announced her readiness for trial, and to introduce evidence in support of her cause. The defendants objected to a trial by jury, and moved that the matters in issue be submitted to the Court, and that the complaint be dismissed.

The Court heard the argument, and reserved its decision; and on the 28th January, 1873, filed a decree, ordering that the complaint be dismissed.

*88

*The plaintiff appealed, on the following grounds:

I. Because His Honor erred in refusing the plaintiff a trial by a jury of the issues of fact herein, and in dismissing the action on the pleadings without evidence.

II. Because the decree erroneously alleges certain matters of fact as if contained in the pleadings, which are not therein contained, and which were not before the Court, (the argument having been on the sufficiency of the pleadings, and no evidence having been introduced on either side.)

III. Because His Honor erred in deciding adversely to the plaintiff a question as to the admissibility of testimony, before any opportunity was afforded to the plaintiff to offer evidence in support of her action, and has assumed in his decree that the plaintiff could only support her case by parol testimony, and that testimony her own; whereas her counsel were ready to produce competent evidence, outside of the plaintiff, in support of all the material allegations of the complaint and reply, but had not opportunity to do so.

IV. Because His Honor erred in deciding that the Statute of Frauds was fatal to the plaintiff, although the plaintiff alleged that the terms of her contract with the deceased, Jacob K. Sass, were in writing, and was ready to prove the said contract and its terms.

V. Because His Honor erred in deciding that there had been no part performance on the part of the plaintiff.

VI. Because His Honor erred in deciding that the contract of the plaintiff with the deceased was without consideration.

VII. Because His Honor erred in deciding that the plaintiff had no equity for a specific performance of the contract with the deceased.

Izlar & Dibble, for appellant.
Miles, contra.

Feb. 18, 1874. The opinion of the Court was delivered by

WILLARD, A. J. The action was for the specific performance of a contract for the sale of land, the complaint alleging possession in the plaintiff, and the payment to, and acceptance by, the vendee, J. K. Sass, of the entire consideration of the sale. The defend-

ants, the executor and devisees of the vendee, answered, denying the material facts alleged. Upon an order made by the Circuit Judge for

*89

*that purpose, the plaintiff interposed a reply, re-affirming, with more detail, the material facts alleged in the complaint. The decree appealed from dismissed the complaint, and was made before the plaintiff had been afforded an opportunity of introducing proofs to establish the facts alleged in the complaint and controverted by the answer.

After issue joined motions were simultaneously made on the part of plaintiff and defendant—that on the part of plaintiff for a trial by jury, and that on the part of defendant for a dismissal of the complaint. The validity of the plaintiff's appeal depends on the sufficiency of the pleadings on the part of the plaintiff to entitle her to judgment on the assumption of the truth of her averments.

The averments and denials of the defendant's answer are not to be considered as supporting the decree. An answer under the Code of Procedure differs from an answer under the former Chancery practice in this respect, that, in the latter case, the complainant made the defendant his witness as it regarded the matters demanded of him by way of answer, and the truth of the answer was accordingly assumed until disproved, while an answer under the Code cannot be taken to be true until an opportunity has been afforded to the plaintiff to controvert its allegations or denials.

The remark just made is inapplicable to the case of matters set up in an answer by way of counter-claim—the answer in such cases as it regards the matters of counter-claim having the force and effect of a cross complaint. (See Code of Procedure, Sections 171 and 176.)

The reply does not materially affect the present question, as, in substance and effect, it controverts the matter of the answer as to all material facts. The order requiring a reply was probably made under the second paragraph of Section 176 of the Code; but whether the answer contained "new matter constituting a defence by way of avoidance," so as to authorize an order requiring a reply, is not made a question here, and need not be considered. Had the defendants distinctly averred in their answer that the contract on which the plaintiff sought to recover was a parol contract, not in writing, it might have become a question whether the failure of plaintiff to controvert such fact in her reply would operate as an admission of its truth; but no such averment appears. The reply does not authorize any of the averments of the answer to be taken as true, and the question turns on the sufficiency of the plaintiff's pleadings.

*90

*The principal objection made by the decree to a recovery by plaintiff is, that plaintiff's alleged contract of sale is not in writing, in conformity to the Statute of Frauds. This objection cannot be sustained in the present state of the case. The fact that the complaint does not allege that the contract was in writing is not conclusive, for the plaintiff was not bound to plead that fact.—Poag v. Sandifer, 5 Rich. Eq., 180.

The fact that the contract of sale was not in writing is nowhere admitted, either by the record or in any other manner, and we cannot assume such fact at the present stage of the case.

For the reasons just stated it is not necessary to consider whether the complaint makes a case for equitable relief, assuming that the contract was not in writing.

The decree considers certain questions of evidence, but that discussion was premature. The plaintiff had a right to shape her offers of proof, and would not be called upon to do so until a time and place of trial was afforded her. To undertake to criticize her proofs before they were offered tends to deprive her of the opportunity of shaping her offers of proof, and also to raise questions of the competency of evidence on purely speculative grounds.

The dismissal of the complaint was clearly erroneous, and should be set aside and the cause remanded for further proceedings.

MOSES, C. J., and WRIGHT, A. J., concurred.

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5 S. C. 90

ZORN v. RAILROAD COMPANY.

(Columbia. Nov. Term, 1873.)

[*Mortgages* ⇐174.]

Where, in an action to foreclose an unrecorded mortgage against a subsequent purchaser of the mortgaged premises, the defense is that of purchase for valuable consideration without notice, it will not avail, if the consideration consisted in merely giving credit, for the amount of the purchase money, on claims held by the purchaser against the vendor.

[Ed. Note.—Cited in Bischoff v. Ward, 5 S. C. 141; Dearman v. Trimmier, 26 S. C. 512, 2 S. E. 501; Summers v. Brice, 36 S. C. 210, 212, 15 S. E. 374; Norwood v. Norwood, 36 S. C. 342, 15 S. E. 382, 31 Am. St. Rep. 875; Marsh v. Ramsay, 57 S. C. 125, 35 S. E. 433.

For other cases, see Mortgages, Cent. Dig. § 414; Dec. Dig. ⇐174.]

Before Maher, J., at Colleton, February Term, 1873.

This was a bill in equity for foreclosure by William Zorn against the Savannah and Charleston Railroad Company. The case was referred to a Referee, whose report to the

*91

Court contains a full state*ment of the facts

and points of law involved in it. The report is as follows:

On the first day of January, 1858, the Charleston & Savannah Railroad Company, a body corporate, for the purpose of raising money to complete its road, conveyed, by way of mortgage, to Isaac Hayne and others, all its present and future to be acquired property, with all its rights, privileges and franchises, in, to, or concerning the same; said company covenanting, further, "to execute and deliver any further necessary and reasonable conveyance of the premises, or any part thereof, to the party of the second part—Hayne and others, trustees—their successors or assigns, * * * particularly for the conveyance of any property subsequently to the date hereof acquired by the party of the first part, (the Charleston & Savannah Railroad Company,) and comprehended in the description contained in this indenture."

This deed was duly recorded on the 21st day of January, 1858.

Subsequent to the date of said conveyance, on the 10th day of February, 1858, the Charleston & Savannah Railroad Company purchased from William Zorn, trustee of Philip S. Price and Emma N., his wife, a plantation in Colleton, known as "Slandovery," giving its bond for $12,600, conditioned for the payment of $6,300, the purchase money, to secure which the said company executed, at the same time, its mortgage of the premises to the said William Zorn, trustee. This mortgage was not recorded until after the commencement of this suit, viz: on the 30th November, 1869.

The Charleston & Savannah Railroad Company having failed to fulfil the conditions of the mortgage to Hayne and others, trustees, the said mortgage was foreclosed according to its provisions, and the entire property of the company, including, it is claimed, the plantation mortgaged to Zorn, was sold at public auction, in the city of Charleston, on the 20th day of November, 1866, and purchased by James H. Taylor, as agent for the bondholders, to secure whom the conveyance to Hayne and others had been executed.

These bondholders having organized themselves into a body corporate, under the name of the Savannah and Charleston Railroad Company, and obtained a charter, Hayne and others, trustees, conveyed to them, by deed, dated January 31st, 1867, the premises mortgaged to and sold by said trustees, and purchased as above mentioned; in which indenture Hayne and others, trustees, *being the party of the first part, and the Savannah and Charleston Railroad Company the party of the second part, the said party of the second part "agree unto and with the party of the first part to take, accept and hold the aforesaid granted and assigned premises, liable and subject to the statutory liens to which the party of the first part would be liable to under the indenture, by way of mortgage, * * * * which may be prior to or superior to said mortgage."

*92

There is no proof that this deed was ever recorded.

On the 15th day of June, 1869, the mortgage to Zorn being yet unrecorded, plaintiff filed his bill for foreclosure, and prayed process of subpœna against the Savannah and Charleston Railroad Company and J. Reid Boylston, its President.

It seems that Boylston was not President, as the answer is signed by Isaacs, as President.

On the 16th day of October following, the answer of the defendant was filed, which denies the liability of defendant for the debts of the Savannah and Charleston Railroad Company, and claimed that defendant is a subsequent purchaser for valuable consideration without notice of the premises in question.

The testimony, most of which was taken by commission, fails to bring home to the officers or Directors of the Savannah and Charleston Railroad Company any notice whatever of the existence of Zorn's mortgage —though it is proven to have been spread on the books of the Charleston and Savannah Railroad Company—nor does the testimony, on the part of the defense, show that the covenant, contained in the mortgage to Hayne and others, trustees, to make further conveyance of after acquired property, was ever executed by the Charleston and Savannah Railroad Company as to "Slandovery."

The amount due on the bond to plaintiff is ten thousand seven hundred and one dollars and eighty-five cents, and interest from November 22, 1872.

It is claimed by the plaintiff that as the purchase by the Charleston and Savannah Railroad Company from Zorn, trustee, of the mortgaged premises, was subsequent to the date of the conveyance to Hayne and others, trustees, they are not covered by that conveyance, on the ground that future to be acquired property cannot be conveyed by deed; it is a bare possibility, and cannot pass by deed.—Bouv. Law Dic., Title "Possibility;"

*93

Adams v. *Chaplin, 1 Hill Eq. 265; Wallace v. Ford, 3 Dana, 505; Dawson v. Dawson, Rice Eq., 243.

2. That, as to future to be acquired property, the deed to Hayne and others was only a covenant to convey, which, as to the mortgaged premises herein mentioned, was never executed.

3. That even supposing that the Charleston and Savannah Railroad Company could convey property not yet acquired, and that some title in the premises herein mentioned was actually conveyed to the trustees, the said trustees could only acquire the equity of redemption, and that the Savannah and Charleston Railroad Company could and did

purchase no more, is evidenced by the wording of the deed from Hayne and others to the Savannah and Charleston Railroad Company, wherein the latter agree to "take, accept and hold the aforesaid granted and assigned premises, liable and subject to any lien or liens to which the party of the first part (Hayne and others) would be liable to under the mortgage."

4. That the Savannah and Charleston Railroad Company is not a purchaser for valuable consideration without notice, "for, to sustain this plea, it must appear that the legal title was purchased."—Brown v. Wood & Ashley, 6 Rich. Eq., 155; Bush v. Bush, 3 Strob. Eq., 131 [51 Am. Dec. 675].

The Savannah and Charleston Railroad Company being in possession of the mortgaged premises, and claiming under the sale of Hayne and others, trustees, reply:

1. That the Charleston and Savannah Railroad Company, in mortgaging all its "rights and franchises" to Hayne and others, trustees, "the right to acquire property being one of the rights passed also, and property after acquired by virtue of its exercise is acquired and held under and subject to the conditions of the mortgage."—Pierce Am. R. R. Law, 531; Redfield on Railways, 590.

2. That the mortgage of Zorn never having been recorded within the period prescribed by the Statute of 1843, the Savannah and Charleston Railroad Company is a purchaser for valuable consideration without notice. —Williams v. Beard, 1 S. C., 309.

3. That the actual notice to supply the place of recording must be full, explicit, and clearly proved.—City Council v. Page, Speers, Eq., 212; Anderson v. Harris, 1 Bail., 315; Martin v. Sale, Bail. Eq., 4.

The facts and the law applicable to them

*94

have been fully stated: *and, in conclusion, the Referee reports, as special matter, that the whole of this controversy is narrowed down to the following issues:

1. Can future to be acquired property be conveyed by deed?

2. Did these mortgaged premises pass under the deed to Hayne and others, trustees?

3. If the above issues are settled affirmatively, is the Savannah and Charleston Railroad Company a subsequent purchaser for valuable consideration without notice?

The judgment of the Circuit Court is as follows:

Maher, J. This is an action for foreclosure of a mortgage, which was commenced prior to the passage of the Code. It was brought on to be tried before the Court at the February Term, 1873, upon the report of Robert Campbell, Esq., Special Referee, to whom, by an order in the cause, dated the 30th November, 1869, it had been referred to inquire and report upon the facts and the law applicable thereto. It is not deemed necessary to set forth the facts found by the Referee, and without more than this general reference to the report, I proceed to the consideration of the questions of law involved.

Even conceding (vide Curtis v. Leavitt, 15 N. Y., 1 Smith, 9, 220, 221,) that the bonds and mortgage issued and executed by the Charleston and Savannah Railroad Company, for the purpose of raising money to build and equip the road, were ultra vires, as unauthorized by the charter, it is very clear that the subsequent recognition and sanction of these instruments by the Legislature, in the Act incorporating the Savannah and Charleston Railroad Company, (this defendant,) operated, retrospectively, to give them validity ab initio. No vested rights of the plaintiff under his mortgage were in any manner disturbed, and, as a remedial law, healing an infirmity which originated only in the absence of express authority in the original charter, it was a competent act of legislation, and availed to make the acts of the company as good and effectual, to all intents and purposes, as if the power had been conferred in the first instance.—Cooley Con. Lim., 369 to 383.

The mortgage to the trustees neither professed to convey in presenti property not then owned by them, nor, in the nature of things, could possibly so operate, either at law or in equity. It was, nevertheless, a binding contract in respect to future acquisitions of property, embraced within the description of the deed, which attached to such property when and as acquired; a contract which

*95

*the Court, on its equity side, would specifically enforce, by compelling the execution of a mortgage or other assurance, in compliance with the company's covenant. And as equity holds that as done which ought to have been done, and as done, too, at the time when, according to the agreement, it should have been performed, it follows that the lien of the trustees' mortgage attached to the premises conveyed by the plaintiff to the company upon the execution and delivery of the conveyance, and this as effectually as if a mortgage had then been executed in pursuance of the covenant for further assurance. —2 Story Eq., Sec. 1,040, b.; Row v. Dawson, 2 Lead. Cas. Eq., Am. Notes, 41, Law Lib., 224; Allston v. Bank, 2 Hill Eq., 235; Roddy v. Elam, 12 Rich. E., 343; Duke v. Palmer, 10 Rich. E., 380; 1 Story Eq., 364, g.; Pennock v. Coe, 23 How. U. S., 117 [16 L. Ed. 436]; Galveston R. R. v. Cowdrey, 11 Wall. 459 [20 L. Ed. 199]; Pierce v. Milwaukee and St. Paul R. R. Co., 24 Wis., 551, 1 Am. Rep., 203; Philadelphia, W. and B. R. Co. v. Waulpher, 64 Penn., 366, 3 Am. Rep., 596; Seymour v. Canandaigua and N. F. R. R. Co., 14 How. N. Y., 532.

But the trustees' mortgage could attach to after acquired property only in the condition in which it came to the hands of the mort-

gagor, and in subordination to all liens and equities subsisting upon or in respect to the same. The conveyance which the company received from the plaintiff, and the mortgage which it gave back to secure the purchase money, must be regarded as a single transaction, and no lien then impending over the company, whether in the shape of a general mortgage or a judgment, could be permitted to interpose and displace the mortgage for the purchase money.—United States v. New Orleans R. R., 12 Wall, 362 [20 L. Ed. 434]; Allston v. Bank, 2 Hill Eq., 235.

The plaintiff's mortgage was, therefore, the paramount lien upon the land in question, and his failure to record the same according to law no wise affected its superiority over the trustees' mortgage; for neither the trustees nor the bondholders, (the beneficiaries of the mortgage,) were subsequent creditors, or incumbrancers, within the meaning of the recording Acts.—United States v. New Orleans R. R., 12 Wall, 362 [20 L. Ed. 434].

The bondholders, through their agent, bid in the property sold under this mortgage, in order to save their debt. At their instance the bid was transferred to the defendant, a corporation of which they constituted the individual members, and the charter of which

*96

*was based upon their purchase, and the trustees made titles accordingly. It was substantially a conveyance to the bondholders themselves, though in their corporate name and charter certainly they had the right to become the purchasers at their own sale, and the legal title unquestionably passed from the mortgagor to the defendant company, through the exercise of the power conferred in the deed. Although the trustees' mortgage attached to the land in question, subject to the lien of the plaintiff's mortgage, and the latter held good, notwithstanding the failure to record it, and although in a contest for priority over the proceeds of sale, under proceedings for foreclosure, the trustees' mortgage must have yielded precedence to its competitor, still the bondholders, whether as individuals or as corporators, are not precluded from availing themselves of the want of notice, as subsequent purchasers for value, if they can prove themselves to be such. They were, in fact, purchasers only of the equity of redemption, yet they may insist that the plaintiff is precluded, by his failure to put his mortgage on record within the time limited by the statute, from interposing the estate which he acquired by it in bar or derogation of the estate for which the defendant, claiming to be within the terms of the Act, has paid.—McKnight v. Gordon, 13 Rich. Eq., 222, 232 [94 Am. Dec. 164]; Williams v. Beard, 1 S. C., 309, 323.

The only question that remains, therefore, is whether the defendant, who is, beyond controversy, a purchaser without notice, is also one for valuable consideration.

The plea of purchase for valuable consideration without notice, among other essential requisites, must aver distinctly that the consideration money mentioned in the deed was bona fide and truly paid, independently of the recital of the purchase deed, for if the money be not paid the plea will be overruled, as the purchaser is entitled to relief against payment of it.—Sugden, Ven. and Pur., 1069. If the purchaser has paid no part of it, then the plea is null; if he has paid a part, he is entitled to protection pro tanto.—Story Eq. Pl., Sec. 604, a; Bassett v. Nosworthy, 2 Lead. Cas. Eq., Am. Notes, 40 Law Lib., 112, 113; Dillard v. Crocker, Speer's Eq., 20; Bush v. Bush, 3 Strob. Eq., 131 [51 Am. Dec. 675]. And the purchaser must not only aver in his plea, but must also prove, that he had paid the consideration before he had notice. His answer, if not responsive to any allegation of the bill, is not evidence for him on that point.—Ellis v. Woods, 9 Rich. Eq., 19.

*97

It has been repeatedly held in *this State that a purchaser at Sheriff's sales, who is also the plaintiff in the executions to whom the money is payable, and who, therefore, parts with no money, is not entitled to the protection of a bona fide purchaser for valuable consideration.—Williams v. Hollingsworth, 1 Strob. Eq., 103 [47 Am. Dec. 527]; Shultz v. Carter, Speer's Eq., 542. This is the established doctrine in New York.—Dickerson v. Tillinghast, 4 Paige, 215. The leading case there has been followed and affirmed in a number of subsequent cases on the subject. The question in that case was between the holders of an unrecorded mortgage and a subsequent grantee of the mortgaged premises, the consideration of whose purchase was a precedent debt. Chancellor Walworth, upon a careful consideration of the question, both upon principle and authority, held that the mortgagee was entitled to the priority. He considered the principle of equity to be well settled, that if one take title to real estate in payment of or as security for a previous debt, without giving up any security, or divesting himself of any right, or placing himself in a worse situation than he would have been if he had received notice of a prior equitable title or lien previous to his purchase, a Court of Equity will not permit him to retain the title which he had thus obtained, to the injury of one having a prior equity.—Van Heusen v. Radcliff, 17 N. Y., 3 Smith, 580, 582. Such subsequent purchaser sustains no injury by being postponed in right to the prior unrecorded deed or mortgage. He is placed in no worse condition than he was before he received his deed or mortgage, and ought not to disturb any prior acquired rights.—Tiffany v. Warren, 24 How. N. Y., 293, 297.

The answer of the defendant thus sets forth the averment of payment of the purchase money: "That the consideration aforesaid, for the purchase aforesaid, at the sale

aforesaid, has been duly paid by this defendant, and the said Charleston and Savannah Railroad Company fully satisfied therefor, prior to the notice of the claim of the said plaintiff to defendant, by receipt in due form to the said Charleston and Savannah Railroad Company, for the amount thereof on the bonds of the said Charleston and Savannah Railroad Company, due to the members of this corporation." This allegation was not proved, as it certainly should have been; but taking it as proved, it amounts to this, that the bondholders credited the amount of the consideration money on the bonds in their hands. I am unable to distinguish the case from those cited as to purchases by execution creditors. The bonds

*98

are still held by the corporation *or its members; no security has been given up, no money parted with. How would the situation of the defendant or its members be made worse than it was before the receipt upon the bonds, by subjecting the land to the plaintiff's mortgage? The receipts are not conclusive against the holders of the bonds, if any part of the consideration therefor has failed. The plaintiff has an equity that commends itself to the favorable consideration of the Court, growing out of the original supremacy of his mortgage, and the circumstance that his claim is for the purchase money of premises which are held by the defendant, without any actual consideration having been paid for the same. If the Charleston and Savannah Railroad Company had released its equity of redemption to the trustees, in satisfaction of the mortgage debt, and the Trustees had, thereupon, at the instance of the bondholders, conveyed to this defendant, without any pecuniary or other valuable consideration, moving independently from the latter, it would, I apprehend, have been difficult to find any principle of equity upon which the lien of the plaintiff's mortgage could have been made to give way. The effect of the release would only be virtually to eliminate the defeasance from the mortgaged deed, thus perfecting it as a legal conveyance, operating as such from the date of its execution, but, surely, not to relieve it from its original subordination to the superior lien of the plaintiff's mortgage. Now the bondholders have acquired, although in a more circuitous way, the mortgagor's legal title, without other consideration than a mere receipt pro tanto upon the bonds secured by their mortgage. I cannot perceive in what respect their present position is more favorable to the defense set up in the answer than it would have been had the equity of redemption been released as suggested. My conclusion is, that the defendant is not a purchaser for valuable consideration, within the meaning of the rule which protects such purchasers, and, therefore, that the plaintiff is entitled to the relief demanded in his complaint, and to judgment for foreclosure and sale of the premises mentioned and described in his mortgage, and also in the complaint. The defendant, however, is not liable for the mortgage debt, and, therefore, no judgment can go against it for any deficiency in the proceeds of sale to satisfy the same.

It is ordered that the plaintiff have leave to enter judgment for the sale of the said mortgaged premises, and foreclosure of the defendant's equity of redemption therein, for

*99

the satisfaction of the *amount reported to be due on the security thereof, with interest thereon from the date specified in the Referee's report, that is to say, the sum of ten thousand seven hundred and one 85-100 dollars, with interest thereon from the 22d November, 1872. And also for his costs and disbursements in this action, to be paid to him by the defendant, such judgment to be entered, in the usual form, according to the rules and practice of this Court, save in this, that the defendant shall not be adjudged liable to pay any part of the amount so reported due, if the proceeds of sale should prove insufficient to satisfy the same; but shall, in any event, be liable for the costs and disbursements aforesaid. If need be, the plaintiff may, upon notice, apply at Chambers for a settlement of the form of judgment to be entered herein.

The defendant appealed on the following ground:

1. Because it is not necessary to the defense of "a purchaser for valuable consideration without notice" that money itself should actually be paid.

2. Because if generally necessary it is not so under the circumstances of this action.

3. Because if necessary under the circumstances in this action, the assumption that no money actually was paid by the purchaser is unwarranted by the answer (the evidence of it) relied upon by His Honor the Circuit Judge in his decision, "that the answer states that the consideration aforesaid, for the purchase aforesaid, at the sale aforesaid, has been only paid by this defendant, and the said Charleston and Savannah Railroad Company fully satisfied therefor prior to the notice of the claim of the said plaintiff to defendant, by receipt in due form to the said Charleston and Savannah Railroad Company, for the amount thereof, on the bonds of the said Charleston and Savannah Railroad Company due to the members of this corporation."

4. Because it necessarily follows from the circumstances in this action that money was actually paid out by the purchasers of the Charleston and Savannah Railroad.

5. Because if there is any doubt as to the actual payment of money, under all the circumstances of this case, a reference should be ordered to inquire into the fact.

Tracy, for appellant.
Williams & Fox, contra.

*100

*Feb. 27, 1874. The opinion of the Court was delivered by

WILLARD, A. J. The mortgage of plaintiff was not recorded in due time, and is accordingly void as to subsequent creditors and purchasers for a valuable consideration without notice.—Williams v. Beard, 1 S. C., 309.

The only question is, whether the defendants are included in the class of persons entitled under the registration Acts to take advantage of a want of due registration. This question is still further narrowed down to an inquiry whether the defendants have paid a valuable consideration for the lands covered by plaintiff's mortgage. The question of notice has been determined by the Circuit Court as a question of fact, and no ground appears to disturb its conclusion.

The title set up by defendants to the lands in question was derived through a sale made under a decree of foreclosure upon a mortgage made by the Charleston and Savannah Railroad Company to trustees to secure the payment of bonds, prior to the purchase by that company of the lands of the plaintiff, and to the execution of the mortgage in suit. The purchasers under such decree of foreclosure were a portion of the whole number of original bondholders, whose bonds were secured by such mortgage. The only statement of the consideration paid by the bondholders thus purchasing is set forth in the answer in the following language: "and this defendant avers that the consideration aforesaid, for the purchase aforesaid, at the sale aforesaid, has been duly paid by this defendant, and the said Charleston and Savannah Railroad Company fully satisfied therefor, prior to the notice of the claim of the said plaintiff to defendant, by receipts in due form to the said Charleston and Savannah Railroad Company for the amounts thereof on the bonds of the said Charleston and Savannah Railroad Company, due to the members of this corporation."

The proper conclusion from this language is, that whatever may have been the amount bid on such foreclosure sale by the bondholders whose interest is now held by defendants, it was endorsed as so much money paid on the bonds held by the purchasers. The amount for which the road was purchased is not stated, and we cannot ascertain whether that amount was a nominal or a substantial consideration. It is difficult to understand by what means the purchasing bondholders acquired the right to apply the whole purchase money to their particular bonds to the

*101

exclusion of the other bond*holders equally entitled under the decree of foreclosure, but who did not become purchasers under the decree; but it is not important to the plaintiff's rights that this obscure transaction should be resolved, for the burden of showing a clear claim as purchasers for a valuable consideration is imposed by the law upon the defendants, and failing in this respect they cannot obtain the benefit of the registration Acts.

The case, as it stands, is, then, that of an antecedent creditor purchasing the land bound by an unrecorded mortgage at a judicial sale, upon the sole consideration of extinguishing so much of his original indebtedness as equals the sum at which the property was bid off by him.

Although this point does not appear to have been conclusively adjudicated by the Courts of this State, yet authority of abundant weight is afforded by our decisions denying the right of a purchaser under such circumstances to take advantage of the want of registry.—Williams v. Hollingsworth, 1 Strob. Eq., 113 [47 Am. Dec. 527], per Dunkin, Ch.; Dillard & Kirby v. Crocker, Speers Eq., 27; Bush v. Bush, 3 Strob. Eq., 131 [51 Am. Dec. 675].

The true rule on this subject is laid down by Chancellor Walworth in Dickerson v. Tillinghast, 4 Paige N. Y., 215. Chancellor Walworth states the point so clearly, and exhibits the ground on which the construction of the Acts of registration rests, so far as it regards the requisites to constitute a valuable consideration under those Acts, that a better presentation cannot be made than that afforded by his language in the case just cited. It will be observed that what he says in regard to the construction of the registry laws of New York is directly applicable to our own Acts. He says: "The English registry Acts made the unregistered deed or incumbrance at law wholly inoperative and void, as against a subsequent grantee or incumbrancer. But the Court of Chancery, in accordance with the manifest spirit and intention of the statute, at an early day adopted the principle of considering the prior deed or incumbrance as an equitable title or lien. It, therefore, applied to such cases, the equitable principles which had previously been adopted by that Court in relation to other contests between the holder of an equitable title or lien and a subsequent grantee or mortgagee of the legal title. In accordance with these principles, if the subsequent purchaser or mortgagee was a bona fide purchaser, that is, if he had actually parted with his proper-

*102

ty on the credit of the estate, so as *to give him an equitable claim or specific lien thereon, without notice of the prior equity, and had also clothed that equitable lien with the legal title by taking a deed or mortgage, the Court would not divest him of that legal title or lien in favor of the prior equity. But if he had notice of the prior equity at any time before he had parted with his property on the credit of the estate, and before

he had united the subsequent equity with the legal title, he was not considered as entitled to protection against the prior equity as a bona fide purchaser.

"The words bona fide purchaser, therefore, when introduced into our recording and registry Acts, were intended to be used in conformity with this established meaning thereof, and they must, in the present case, receive the same construction which they had previously received in the Court of Chancery in reference to that principle of equity. If a person has an equitable title to, or an equitable lien upon, real estate, a subsequent purchaser who obtains a conveyance of the legal estate, with notice of that equity, cannot, in conscience, retain such legal title, as he has no equity united with it. So if he merely takes the legal estate in payment of or as security for a previous debt, without giving up any security, or divesting himself of any right, or placing himself in a worse situation than he would have been if he had received notice of the prior equitable title or lien previous to his purchase, this Court will not permit him to retain the legal title he has thus obtained to the injury of another."

This case was directly sanctioned by the Court of Appeals of New York, in Van Heuson v. Radcliffe, (17 N. Y., 589), where the same principle was applied to an assignee for the benefit of creditors.

The defendants acquired their legal title from the purchasers under the trust mortgage sale through a transaction, the object of which was to enable such purchasers to get the full benefit of their purchase through the instrumentality of a new corporation to embrace themselves and such others as they might see fit to admit to it.

The title of defendants is no better than that of the purchasers at such sale. Those purchasers paid no real value, but took the property and rights covered by the mortgage in satisfaction of so much of the bonded debt as would equal a sum named by themselves for that purpose, and advanced by way of a bid for the property.

*103

*As antecedent creditors, they could not take advantage of the want of registration. In order to acquire, as purchasers, a right not enjoyed as creditors, it was necessary that some new consideration should be paid other than that which was the basis of their claim as creditors. No such consideration appears, and, accordingly, it must be held that they are not entitled to set up the want of registration.

The conclusion above stated disposes of the only question raised by the defendant's appeal.

The appeal should be dismissed and the judgment affirmed.

MOSES, C. J., and WRIGHT, A. J., concurred.

5 S. C. 103

CHARLESTON v. PEOPLE'S NATIONAL BANK.

(Columbia. Nov. Term, 1873.)

[*Taxation* ⇐128.]

Where a national bank voted to increase its capital stock, and the requisite number of new shares were subscribed and paid for before the 1st January, 1872, and a semi-annual dividend, declared as of that day, was paid upon the new shares, as well as the old, but such increase of capital was not approved by the Comptroller of the Currency, nor his certificate issued until the 5th January, 1872: *Held*, That such new shares were not the subjects of taxation under an ordinance imposing a tax on bank shares "in the hands of the tax-payers on the 1st January, 1872."

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 234; Dec. Dig. ⇐128.]

[*Banks and Banking* ⇐241.]

There can be no increase of the capital of a national bank until the Comptroller of the Currency approves thereof and issues his certificate, as provided by § 13 of the Act of Congress providing for the organization of national banks.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 899; Dec. Dig. ⇐241.]

Before Graham, J., at Charleston, December Term, 1873.

Case agreed upon in a controversy submitted without action.

The City Council of Charleston claims to recover of the stockholders of the People's National Bank $6,312.50.

The following are the facts upon which said controversy depends:

1. That the City Council of Charleston is a municipal corporation under the laws of the State of South Carolina, "with power and authority to make such assessments on the inhabitants of Charleston, or those who hold taxable property within the same, for the safety, convenience, benefit and advantage of the said city, as shall appear to them expedient."

*104

*2. That an Ordinance to raise supplies for the year 1872, ratified on the day of , 1872, by said City Council, imposed a tax of two per cent. upon the taxable property within said city, in the hands of tax-payers, on 1st January, 1872.

3. That the People's National Bank, a banking association within the limits of the city of Charleston, organized under the laws of the United States, on the 12th day of February, 1872, returned seven thousand five hundred shares, valued at one hundred dollars each, as in the hands of its stockholders, subject to taxation, upon which, after deducting value of real estate and city stock, at $23,440, a tax of two per cent. was duly assessed by the City Appraiser, and the same has been duly paid by said bank for its stockholders, pursuant to Section 28 of Ordinance of February 10, 1870.

4. That, on the first day of July, A. D.

1871, said banking association voted to increase the number of shares of capital stock in said bank to one thousand, subject to the approval of the Comptroller of Currency. Between 1st July, 1871, and 1st January, 1872, said two thousand five hundred additional shares were duly subscribed, and the amount thereof, two hundred and fifty thousand dollars, was secured to be paid to said banking association, and the securities were held by the Cashier in trust for it. The said banking association declared and paid a semi-annual dividend upon all of its said stock, including said increase of two thousand five hundred shares, on the 7th day of January, A. D. 1872, for the half year ending January 1, 1872.

5. That the subscribers to said additional shares of stock did receive certificates of stock representing the same after the 2d January, 1872.

6. That on the 15th day of June, A. D. 1872, said banking association, having failed to return said additional shares for taxation to the City Council, the City Appraiser, pursuant to Sections 29 and 38 of the Ordinance of the city of February 10th, 1872, proceeded to list said two thousand five hundred shares of stock for taxation, and fixed the value thereof at one hundred dollars per share, amounting, in all, to two hundred and fifty thousand dollars, and levied, pursuant to Ordinance of City Council, of the day of , A. D. 1872, a tax of two per cent. thereon, which tax amounted to the sum of

*105

five *thousand dollars, which, not having been paid at the times required by Ordinance, is subject to a penalty of twenty per cent. for non-payment, pursuant to Section 48 of the Ordinance of February 10th, 1872, amounting to one thousand dollars. There has been a school tax assessed, by the Charleston City Board of School Commissioners, of three hundred and twelve dollars and fifty cents, ($312.50,) to be collected by the City Council of Charleston, and if said stock is taxable the same is now due to plaintiff.

7. The said banking association did not obtain leave of the United States Comptroller of Currency to increase its capital stock till after the first day of January, 1872; and the Comptroller of Currency refused to recognize any increase of the capital stock of the bank until the fifth day of January, 1872; and the third day of January, 1872, said banking association returned to the Comptroller of Currency, at Washington, only seven thousand five hundred shares as the amount of its capital stock, subject to taxation by the general government, paid the tax thereon, and the said return and payment were accepted by the said Comptroller.

The question submitted to the Court is: Had the City Council a right to levy the tax on the two thousand five hundred shares of stock, under the facts stated?

Graham, J. This case is submitted to me upon an agreed statement of facts, under the provisions of Section 389 of the Code of Procedure.

The case having been fully argued before me, by D. T. Corbin, Esq., City Attorney, on the part of the City Council, and Charles H. Simonton, Esq., on the part of the People's National Bank, and, after full consideration, I am of opinion that the City Council had a right to levy the tax on the two thousand five hundred shares of stock of said bank, as claimed.

It is, therefore, ordered, that judgment be entered against the defendant in the sum of six thousand three hundred and twelve dollars and fifty cents, with costs, and that the plaintiff have execution thereof.

The defendant appealed.

Simonton, for appellant:

The City Council of Charleston, by an

*106

Ordinance passed in Feb*ruary or March, 1872, imposed a tax of two per cent. upon the taxable property within the city, in the hands of tax-payers on the 1st January, 1872. The shares in the capital stock of the People's National Bank, in the hands of its stockholders, are taxable property. This bank, having an authorized capital of $750,000, divided into shares valued at $100 each, under the provisions of an Ordinance hereinafter specially referred to, made the return for its stockholders, and reported for taxation the number of shares in their hands as seven thousand five hundred.

That on the first of July, 1871, this bank, by resolution, had determined to increase its capital, and had made application to the Comptroller of the Currency therefor, under an act of Congress, which will be quoted hereafter. That subscriptions were received for such proposed increase of capital between July, 1871, and January, 1872, and the securities for such subscriptions were held by the bank, in the name of the Cashier, in trust. That on the fifth of January, 1872, the Comptroller of Currency gave his assent to the proposed increase of the capital stock by the addition of two thousand five hundred shares, and the certificates for these new shares were issued thereupon and consequent on such assent.

On 7th January, 1872, the bank declared a dividend on all of its shares, including these new shares. The question is, are these two thousand five hundred shares taxable under the tax Ordinance of 1872? or, in other words, were these two thousand five hundred shares taxable property in the hands of tax-payers on 1st January, 1872?

The subject-matter of the tax is the shares in the hands of the shareholders.

The Act of Congress providing for the organization of institutions known as national banks is to be found in second Brightley's Digest, 51.

This Act establishes in the Treasury Department a Bureau of Currency, which is charged with the execution of all laws passed by Congress respecting the issue and regulation or a national currency secured by United States bonds; and the chief officer of the Bureau is denominated the Comptroller of the Currency, (Section 1.)

Before a national bank can be formed an organization certificate must be prepared and signed by the persons forming it, and acknowledged before some Judge of a Court

*107

of record or a Notary *Public, which among other things, must specify the amount of its capital stock and the number of shares into which the same shall be divided. This organization certificate must be forwarded to the Comptroller of the Currency, who is directed by the Act to "record and carefully preserve the same in his office," (Section 5.)

When an increase in the capital stock is desired it can be done only as follows: "It shall be lawful for any association formed under this Act, by its articles of association, to provide for an increase of its capital stock from time to time, as may be deemed expedient, subject to the limitations of this Act, provided that the maximum of such increase in the articles of association shall be determined by the Comptroller of the Currency, and no increase of capital shall be valid until the whole amount of such increase shall be paid in, and notice thereof shall have been transmitted to the Comptroller of the Currency and his certificate obtained, specifying the amount of such increase of capital stock, with his approval thereof, and that it has been duly paid in as a part of the capital of such association." (Section 13.)

Two things, therefore, were essential to make valid the proposed increase of the capital stock of the People's National Bank, to authorize and call into existence the twenty-five hundred shares in question: the one was that the whole amount of the subscription should actually be paid in; the other was that the certificate of the Comptroller of the Currency should be obtained, expressing his approval and specifying the amount of such increase of the capital stock. Until these conditions were complied with, especially until the certificate of the Comptroller, expressing his approval, was obtained, the whole matter was uncertain, incomplete, in fieri. Now the case states that the certificate of the Comptroller of the Currency was not obtained until the fifth of January, 1872, and therefore, until that day, the twenty-five hundred shares of new stock had no legal existence. So that, on the first day of January, 1872, these twenty-five hundred shares in no sense were taxable property within the city of Charleston in the hands of tax-payers.

The difficulty in the mind of His Honor the presiding Judge, who ruled on this question in the Court below, seems to have been that the bank was in possession of the money subscribed for the stock paid into its hands by the subscribers; and that these subscribers, on 7th January, 1872, received a dividend.

Let us examine more closely this matter.

*108

*The practical operation of the resolution to increase the capital stock of the bank was this: Subscriptions were called for and were made from time to time. As the payments were made, or were secured to be made, the sums paid in were deposited, and the securities were held in the name of the Cashier, in trust. During the progress of the subscription it was impossible to say to whom the money so subscribed and paid in belonged, nor to whom it would belong.

Until all the proposed increase of stock was subscribed for, and all payments on the subscription were made, no application, as we have seen, could be made to the Comptroller of the Currency; and when these payments were made and the application forwarded to the Comptroller, his decision had to be obtained. It is scarcely necessary to say that the result of this decision was by no means certain. National banks can issue notes to the amount of ninety per cent. of their capital, and no more, (2 Brightley's Digest, p. 56, Section 21.) The entire amount of the whole issue of such bank notes is limited, and is proportioned among the several States, to each its specified quota, (ibid, Section 22.) By the original Act the total amount of the issue of national bank notes was fixed at three hundred million dollars. It is now three hundred and fifty-four million dollars. So the decision of the Comptroller depended on three conditions: First, whether the general limit to the entire issue of the national bank notes had been reached; second, whether the quota of this State had been exhausted; third, whether, in his opinion, it was more expedient to permit a bank already established to increase its capital than to reserve the privilege for some other bank in the city of Charleston or in another part of the State.

It was by no means certain, therefore, that these shares would ever be issued. In the meantime the bank used the money. It was a deposit in the bank, and, at the utmost, was a debt due by the bank to the depositor—the money constituting the property of the bank, (Morse on Banking, 24, 25.)

But it must be remembered that the tax is not on the bank as a corporation, but on the shares in the hands of the shareholders, as the property of such shareholders, and in no sense the property of the bank. Indeed, it is more than questionable whether these national banks can be taxed by the State, or under State authority, except upon the real estate owned by them. The 41st Section of

*109

*the Act of Congress, from which we have quoted so freely, (2 Brightley's, pp. 60, 61) after declaring what taxes shall be paid by these associations to the United States, has this proviso: "Provided, That nothing in this Act shall be construed to prevent all the shares in any of the said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority, at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State: Provided, further, That the tax so imposed under the laws of any State upon the shares of any of the associations authorized by this Act shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the State where such association is located: Provided, also, That nothing in this Act shall exempt the real estate of the association from either State, County or municipal taxes, to the same extent, according to its value, as other real estate is taxed."

The same reasoning which is used in McCulloch v. Maryland, (4 Wheaton, 316,) to exempt the Bank of the United States from State taxation, will exempt these banks, they also being the fiscal agents of the government.—See Van Allen v. Assessors, 3 Wallace, 591, opinion of Chase, C. J.

The precise question was made in this State, and in the Court below the right of taxation on the part of the State was denied. The case was carried before the late Court of Appeals, and was argued as a constitutional question before the whole Court of Errors. Just before its dissolution a decision, we believe, was reached, but the opinion was not written. As a matter of curiosity, we have reason to know that the ruling below was sustained.

Be this as it may, in the present case the question cannot arise. There is no pretense that the bank, as a corporation, is taxed. The stockholders are taxed on their shares, and the bank, exercising its option, pays the tax for them. The Sections of the City Ordinance on this subject are as follows: "All companies and corporations, whether organized under the laws of this State or not, the manner of listing whose personal property is not otherwise specifically provided for by law, shall list for taxation all their personal property and effects at the same time, in the same manner, and in the same localities as individuals are required to list similar property and effects for taxation."—Sec. 22, p. 96, City Ordinances 1859–70.

*110

*"It shall be lawful for any such bank or banking association to pay to the City Treasurer the taxes that may be assessed on its shares, as aforesaid, in the hands of its shareholders, respectively, and deduct the same from any dividends that may be due, or may thereafter become due, on any such shares, or deduct the same from any funds in its possession belonging to any shareholder, as aforesaid."—Sec. 28, p. 97.

Again, the shares are taxed according to their par value, without regard to dividend. The share itself, not the income, is taxed. Be this more or less, it makes no difference to the assessor. The shares at par are one hundred dollars, and are assessed and taxed at this amount. If, therefore, it be admitted, which, indeed, it is impossible to deny, that these twenty-five hundred shares were not in existence on the first day of January, 1872, and, therefore, not the subject of taxation, and yet this tax be imposed because the bank had the money, this would be taxation of a deposit account in the bank under an Ordinance not imposing such a tax, in a mode not consistent with the ordinance, and if either were the case it would be a tax on the bank itself, and such a tax would be contrary to law. In full confirmation of the position taken by us, is the action of the Comptroller of the Currency himself. On the 3d January, 1872, the People's National Bank sent off its statement to the Comptroller of the Currency, and in that statement returned seven thousand five hundred shares as the amount of its capital stock subject to taxation. This return was received by the Comptroller of the Currency, and the tax was paid on this amount of stock without objection.

We submit, therefore, that the decision of the Circuit Court should be reversed, and that judgment should be entered for the defendant.

Minott, City Attorney, Corbin & Stone, contra:

The People's National Bank, a banking Association doing business in the city of Charleston, on the 1st day of July, 1871, voted to increase its capital stock from seven hundred and fifty thousand to one million dollars. By the National Currency Act of June 3, 1864, Section 12, (2 Bright. Dig., 59, § 12,) the capital stock of national banking associations is divided into shares of one hundred dollars each.

*111

*The proposed increase of capital, therefore, would require the issue of two thousand five hundred additional shares of capital stock.

Between July 1, 1871, and January 1, 1872, this additional stock was subscribed for; the amount thereof, $250,000, was secured, to be paid by securities held by the cashier in trust for the purpose, and a semi-annual dividend was declared and paid on said additional stock for the half year ending January 1, 1872.

The question is, had the City Council of

Charleston a right to levy a tax on the said two thousand five hundred additional shares of stock?

No question is raised by the bank as to general right of the city to tax the shares of stock in this bank, nor as to the validity of the Tax Ordinance for 1872, under which the city seeks to enforce the tax which the bank is now resisting.

The city bases its claim for taxation on the following grounds:

1. The action of the bank, in pursuance of which the capital stock was increased, was taken July 1, 1871.

2. The $250,000 additional capital was actually paid before January 1, 1872, (from which date the tax for 1872 was assessed) and the bank treated the money paid in by the subscribers to the additional stock as in payment of shares, and paid a semi-annual dividend for the half year ending January 1, 1872, upon such shares.

By Section 13 of the National Currency Act of June 3, 1864, (2 Brightley's Digest, p. 60,) provision is made for the increase of the capital of banking associations. The association makes the increase, the maximum of such increase being limited by the Comptroller of the Currency.

Such increase is not valid until the additional capital is paid, to which fact the Comptroller certifies, and which increase he by his certificate approves.

It would seem from the record in this case, that the Comptroller of the Currency made the certificate as to the actual payment of the additional capital, and expressed his approval of the increase, January 5, 1872.

The Comptroller's approval was a ratification of the action of the bank in increasing its capital, and was not the authority itself for the increase. The authority came from the Act of Congress. The Comptroller had simply to see that the provisions of the Act had been complied with. He could regulate

*112

the maximum amount *of increase, but the bank had otherwise complete control in the matter.

The record shows that the additional capital was entirely paid in before January 1, 1872; that it was made use of in the business of the bank; that it was earning interest; and that a like dividend for the six months preceding January 1, 1872, was paid to the subscribers to this additional capital as was paid to the holders of the shares in the original capital stock of the bank.

The additional capital thus paid in was, by Sec. 12 of the Currency Act, divided into 2,500 shares, of which shares the subscribers to the additional capital stock, respectively, were owners.

The bank, by paying the dividend on the additional capital, admitted the existence of such capital. There could not be capital without shares, and there could not be shares unless there were owners. The bank, therefore, by its own acts, has admitted the existence of the shares which the city seeks to tax, and those shares had been yielding the owners thereof a profit for the six months next preceding the 1st of January, 1872.

A share of stock is a right to partake, according to the amount of the party's subscription, of the surplus profits obtained from the use and disposal of the capital stock of the company, to those purposes for which the company is constituted. It is a mere demand for dividends as they become due.—Angell & Ames on Corporations, §§ 557, 560.

In this case the bank paid, on January 7, 1872, dividends on 10,000 shares of stock to the holders thereof, as their share of the surplus profits of the bank for the six months ending January 1, 1872. It returned for taxation only 7,500 shares. It must pay taxes on the balance of the shares in existence January 1, 1872.—Van Allen v. The Assessors, 3 Wall., 584, 586, 587; National Bank v. Commonwealth, 9 Wall., 359.

Escape from taxation is sought on the grounds—

1. That certificates of stock were not issued until after January 1, 1872.

2. That the Comptroller of the Currency had not approved the increase of capital until January 5, 1872.

Reply to first objection:

The taxation is upon shares of stock, not upon certificates of stock.

*113

*The certificate is only the evidence of ownership, not ownership itself.—Mechanics' Bank v. New York and New Haven R. R. Co., 13 N. Y., 627; Van Allen v. The Assessors, 3 Wall., 573; dissenting opinion of Ch. Justice Chase, 598; Hutchins, Adm'r., v. State Bank, 12 Met., 426.

Whether or not the shares were in existence, is to be determined by the books of the bank. The books of the bank will show that a dividend was paid upon this additional number of shares; so, of course, they must have been in existence, whether certificates had been issued or not.

The fact that the bank had not issued certificates cannot affect the question of ownership.—Brigham v. Mead, 10 Allen, 245.

The failure to issue the certificates until after January 1, 1872, may have been a device to evade the return of the shares for taxation.

Reply to second objection:

The Comptroller's certificate, on which reliance is placed, we have already shown was merely a ratification of what had been previously done, and was not the point on which the rights of the subscribers to the additional capital, or the right of the State or the city to tax hinged. These rights must be determined by the action of the bank, and not the action of the Comptroller.

As to the return made to the Comptroller of the Currency on the 3d of January, 1872, as to the amount of its capital stock subject to taxation.

This return is required by the 41st Section of the Currency Act. (2 Bright. Dig., 66, § 42.)

It purports to give the average amount of the capital stock beyond the amount invested in United States bonds for the six months next preceding the day on which it is due, and on the amount thus returned the bank pays a duty or tax to the General Government of one-quarter of one per centum.

Whether the return made by the People's Bank for the first of January, 1872, were correct or incorrect, whether it were accepted by the Comptroller or not, cannot affect this case. If the bank had one million dollars paid up capital on the first of January, 1872, then it had ten thousand shares of capital stock, subject to city taxation on that day, and should so have returned.

The payment of a semi-annual dividend on

*114

the amount of capital *is sufficient proof of the existence of the shares which contributed to make up that amount.

But the return to the Comptroller was probably correct.

It returned, as subject to taxation, seven thousand five hundred shares of capital stock—in other words, $750,000.

This amount must have been in excess of the amount of capital invested in United States bonds.

Section 16 of the Currency Act, (2 Bright. Dig., 60,) requires that at least one-third of the capital shall be invested in United States bonds, which the Treasurer of the United States has on deposit.

Capital stock of the Bank paid in up to July 1, 1871	$750,000
One-third invested in United States bonds	250,000
Balance returnable for taxation by the General Government	500,000
Increase of capital between July 1, 1871, and January 1, 1872	250,000
Liable to taxation by the General Government, January 1, 1872	750,000

On this amount the bank paid to the Comptroller the tax of one-quarter of one per cent. provided by law.

We think we have shown that the Court below was right in determining the question submitted to it in the affirmative, and we ask this honorable Court to reiterate that answer.

Feb. 27, 1874. The opinion of the Court was delivered by

MOSES, C. J. The single question presented by the case agreed upon in a controversy submitted without action between these parties is, whether the City Council of Charleston had a right to levy the tax on the twenty-five hundred shares of the stock referred to in the brief.

It is not necessary to repeat the facts on which our judgment is to be pronounced, for they are recited in the agreement which precedes this opinion.

The Ordinance of the City Council imposed the tax "on the shares in the hands of its shareholders, respectively," (Sec. 22, p. 96, City Ordinance, 1859-70), and if the shares upon which it is claimed the proposed tax is to operate can be comprehended within its terms the judgment of the Circuit Court must be affirmed.

*115

*The institution in question was established and organized as one of the national banks, under the Act of Congress of 3d June, 1864, "to provide a national currency secured," &c., (13 U. S. Statutes, 99 [U. S. Comp. St. 1913, § 495]). For its formation it was necessary that a certificate should be prepared and filed with the Comptroller of the Currency at Washington, which should contain, among other things, a specification of the amount of its capital stock, and the number of shares into which it was to be divided. This is the evidence of the amount of such capital stock and its distribution into shares, and these last are then fixed, designated and known at the Bureau of Currency by the record preserved in the proper office thereof. The Act further provides by its 13th Sec., p. 103 [U. S. Comp. St. 1913, § 9679], "for an increase of the capital from time to time, provided that the maximum of such increase shall be determined by the Comptroller of the Currency; and no increase shall be valid until the whole amount of such increase shall be paid in, and notice thereof transmitted to the Comptroller, and his certificate obtained, specifying the amount of such increase of capital stock, with his approval thereof, and that it has been duly paid in as a part of the capital of such association."

The argument, on the part of the respondent, proceeds upon the ground that the proposed increase of the capital by the said twenty-five hundred shares was effected by the subscription to that extent, and the acceptance of certain securities therefor, held by the Cashier in trust for the association. If this is well founded, then the increase does not depend on a compliance with the conditions expressed in the Act of Congress, but on arrangements which the shareholders, originally organized under it, may make with third persons, in the face of the very law to which they owe the existence of their association, and under which, it is to be assumed, they are at least to carry out the obligations which it imposes. The error is in the attempt to give force to these shares as valid and properly constituted shares of the association, before the approval of the Comptroller, when, in point of fact, the increase of the capital depended upon it. The resolution on the first day of July, 1871, to increase the

number of the shares, by its very terms, made it dependent on such approval. Until obtained, the capital remained as originally fixed. The act of the stockholders to that end was no more than a proposition among themselves, the effect of which was subject to the assent of the higher authority designated by the Act of Congress.' A solution of

*116

the proposition may be tested by the *enquiry, whether, if before the 7th January, 1872, any one of the so-called stockholders could have required the association to issue a certificate for the shares so agreed to be taken by him. Only one answer could be given to it, and that, it appears to us, would conclude the respondent from imposing the tax, which must be upon shares of the capital stock, which, before the 7th January, 1872, was limited to the amount originally allowed by the certificate of organization.

It is supposed that these additional shares are subject to the tax because the $250,000 which they represented was actually paid before the 1st January, 1872, and a semi-annual dividend declared and paid on them for the half year then ending. The ordinance in question "imposed the tax on taxable property within the said city in the hands of taxpayers on 1st January, 1872."

The proposed increase of the capital was required by the Act of Congress to be paid in as a precedent condition, on the performance of which the approval of the Comptroller depended. If he had withheld it, the very requisite which was necessary to make the money deposited the medium through which the certificates of the additional shares could of right be demanded, was wanting.

That the money thus subscribed remained in possession of the bank, and that those who had advanced it, received on 7th January, 1872, a dividend for the half year ending on the first day of the said month, in common with the original stockholders, cannot affect the question. The original stockholders could apply the profits of the bank at their own pleasure, and if those who were interested in restricting the application of the dividends to the original stock do not complain, their want of objection can not convert what must be considered as mere proposals for stock into valid and legal shares. The tax is not on the dividend, but on the share. The view which the Comptroller of the Currency took of the liability of the said twenty-five hundred shares to the tax of the government is clear, from the fact that although the said banking association, on 3d January, 1872, returned to him, subject to taxation by the government, only seven thousand five hundred shares, he imposed no tax beyond them, and accepted the said return and payment as a compliance with the law.

While we are in no way bound by his decision, it cannot prejudice our conclusion, that the public officer charged by Congress with the duty of estimating the capital of these

*117

associations, on which *the U. S. tax was to be laid, on the same facts before him, with the knowledge of the further extension of the capital of this bank, did not exact any tax on the said twenty-five hundred shares.

The answer of the Court is, that the City Council of Charleston did not have the right to levy the tax on the twenty-five hundred shares under the facts stated.

The judgment of the Circuit Court is therefore reversed.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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5 S. C. 117

Ex parte CARSON.

(Columbia. Nov. Term, 1873.)

[*Courts* ⊂⊃207.]

The Supreme Court has no power, in the exercise of its original jurisdiction under the Constitution, to issue a writ of certiorari to a Board of Commissioners of Election to remove into that Court the record of a contested election case.

[Ed. Note.—Cited in Ex parte Childs, 12 S. C. 118; State ex rel. Richland County v. Columbia, 16 S. C. 414.

For other cases, see Courts, Cent. Dig. § 736; Dec. Dig. ⊂⊃207; Certiorari, Cent. Dig. § 49.]

This was a petition by Carson and others, citizens of Charleston, to the Supreme Court, for a writ of certiorari to the Board of Commissioners of Election of the city of Charleston, to remove into that Court the plaint and record, together with the testimony taken by them, in a certain case in which an election for Mayor and Aldermen of the city of Charleston had been contested.

Miles, Barnwell, Hayne, Porter, for petitioners.

Feb. 27, 1874. The opinion of the Court was delivered by

MOSES, C. J. The proposition of the counsel on behalf of the petitioners, that the writ of certiorari is the remedy by which, in the absence of other provision, the errors of law committed by inferior tribunals are to be corrected may be conceded. As a common law remedy, any Court having the powers of the King's Bench may issue it.

The application in the case before us is to the original jurisdiction of this Court, and the first enquiry which it necessarily must make is as to the power which it is asked to exercise. All the powers of the Supreme Court are primarily derived from the Constitution. These may be supplied or extended

*118

by the Legislature, so far as *they do not effect the authority conferred by that instrument upon it, both as a Court of appellate

and original jurisdiction. If within the rules which should govern a Court in the construction of the Constitution, where its own jurisdiction is involved, and by its own determination is to be either limited or enlarged, it should be seen that the proposed power is not clearly granted, it would be inconsistent with all the precedents which we find to assume it. This conclusion is so conformable to all just reason and sense of right, that it is not necessary to refer to the many authorities which might be cited to sustain it.

It will not be contended that, as a Court of "appellate jurisdiction in chancery and for the correction of errors at law," the right to issue the writ in question attaches as an incident properly pertaining to it. The mode of bringing cases before it, implied by the language which expresses its jurisdiction, is by appeal as to matters in equity, and writ of error as to questions at law. We must enquire, then, whether it is included in so much of the Constitution as confers original jurisdiction. The words in that connection are: "The said Court shall always have power to issue writs of injunction, mandamus, quo warranto, habeas corpus, and such other original and remedial writs as may be necessary to give it a general supervisory control over all other Courts in the State." Are the "other Courts" over which this "supervisory control" is to be exercised, to be confined to those which by the Constitution were to constitute "the judicial powers of this State," or are they to include tribunals which, with the administrative or executive duties imposed upon them, may nevertheless be required incidentally to exercise powers of a judicial character? This latter class, we are of opinion, are not comprehended in the clause of the Constitution from which this Court derives its jurisdiction.

The Section referred to invests the Court, in the exercise of original powers, with authority to issue writs of injunction, mandamus, quo warranto and habeas corpus. These are expressly named. They are not confined in any way to the subject-matter upon which they may act, either in regard to any particular persons or bodies who are to be affected by their enforcement. The grant of power in relation to them is without restriction, and whatever result may be accomplished through their action, by any Court having the undoubted right to issue them, may be attained in their issue by the order of this Court. This unrestrained right as to the

*119

writs specified *does not attach to "other original writs," in which that now sought is included. The very qualification which is annexed shows that the power is restricted, and that a more limited jurisdiction was intended.

The word "Courts" in this Section follows in close proximity the enumeration of the Courts which were to form the Judicial Department of the State. The Courts to be supervised by this power, thus conferred on the Supreme Court, were "all the other Courts in the State." A technical significance seems to have been designed in the very use of the phrase. Take the case of the Commissioners of Election, against whom the writ of certiorari is now prayed, or of The Managers of Election [State v. Acting Board of Aldermen] 1 S. C. R., 30, or The Commissioners of the Poor, 2 McC., 170—were bodies like these in the contemplation of the framers of the Constitution when they used the words "all other Courts in the State?" The term "Court" has a well understood and accepted meaning. Popular as well as legal parlance impart to it a sense generally recognized and received. "When a statute uses a word which is well ascertained at common law, the word shall be understood in the statute in the same sense in which it is understood at common law."—9 Bacon Ab., Statute I.

In Gregory's Case, Coke's Rep., 6th Part, p. 19, Lord Coke says: "If it be spoken generally of the feast of St. Michael, where there are two feasts, it shall be intended of the most worthy and notorious feast, and with the case at bar, in effect, agrees, Mich., 6 and 7 Eliz., where any Court of the Queen of Record shall be intended one of the four eminent and most excellent Courts at Westminster. If the Act shall be intended according to the letter, Scil, (in any Court of Record,) then the Court of Oyer and Terminer, gaol delivery, Sewers, Sheriff's turn, Leet, Pipowders, and others, will be within the Act, for these and many others are Courts of Record. Then, it being left to the construction of the law, the rule is, "quod verba equivoca et in dulcio posita, intelliguntur in digniori et potentiori sensu."

The terms in which the Constitution, by the 15th Section, grants to the Court of Common Pleas, separate and apart from its powers as a common law Court, authority to issue "all other writs," besides those specifically named, give force to the construction by which we limit our jurisdiction under the 4th Section. The said 15th Section, after giving the Courts of Common Pleas general and exclusive jurisdiction in certain cases,

*120

declares that *"they shall have power to issue writs of mandamus, prohibition, scieri facias, and all other writs which may be necessary for carrying their powers into effect." If the difference is clearly made in the Constitution, and so it appears to us, we are not called upon to assign the reasons which may have induced it.

We find no obstacle to the conclusion we have reached in the State Ex Rel. The S. C. R. R. Co. v. The Columbia and A. R. R. Co., 1 S. C., 46. There the Court held that it had the power to issue writs of prohibition "in proper cases made." It is true that the said writ is not among those expressly named in

the fourth Section of the Constitution; but it issued the Rule in the case then before it, in the exercise of a "supervisory control" over a Court of common law powers established by the Constitution. The process was claimed to prohibit the Judge (and those acting under his authority) from enforcing an order made by him as a judge of a Superior Court. The power to issue the writ in the particular instance was not doubted by this Court, though on hearing the return it was refused, because the facts did not present a case proper for the operation of the writ.

The motion for the certiorari is denied.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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5 S. C. 120

THE STATE v. HALL.

(Columbia. Nov. Term, 1873.)

[*Officers* ⇐122.]

Where the charge against any of the officers enumerated in Section 29 of Chapter CXXXI of Gen. Stat., 729, is, in substance and effect, neglect of official duty "required of him by law," the indictment must be framed under that Section, and not under Section 27 of the same Chapter.

[Ed. Note.—Cited in State v. Green, 52 S. C. 523, 30 S. E. 683.

For other cases, see Officers, Cent. Dig. §§ 209–216; Dec. Dig. ⇐122.]

[*Statutes* ⇐159.]

Where there is a repugnancy between two Sections of a Statute the last Section must prevail.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 229; Dec. Dig. ⇐159.]

[*Judges* ⇐38.]

Where an indictment against a Probate Judge alleges neglect of official duty in a particular case conjointly with misconduct of a general character, which is punishable only under Section 27 of Chapter CXXXI, Gen. Stat., 729, it is fatally defective.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 182; Dec. Dig. ⇐38.]

[*Judges* ⇐38.]

An indictment under Section 29 of Chapter CXXXI, Gen. Stat., 729, is also fatally defective if it does not lay a specific duty imposed upon the officer by law and a wilful neglect of such duty.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 182; Dec. Dig. ⇐38.]

[*Judges* ⇐38.]

Where a Probate Judge sells real estate for distribution amongst heirs, an indictment against him for wilful neglect in not paying out the money cannot be sustained until an order for distribution has been obtained.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 181; Dec. Dig. ⇐38.]

[*Judges* ⇐38.]

Failure to make such an order is not, it seems, the subject of indictment, but only of appeal.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 180–183; Dec. Dig. ⇐38.]

*121

*Before Mackey, J., at York, July Term, 1873.

This was an indictment against Samuel B. Hall, late Judge of Probate of the County of York.

The indictment charged:

"That Samuel B. Hall, late of the County and State aforesaid, on the fourth day of March, in the year of our Lord one thousand eight hundred and seventy-two, at Yorkville, in the County of York, and State of South Carolina, was Judge of the Court of Probate, in the County of York and State aforesaid, which was then and there a judicial office, whose powers were confined to the said County of York; and the said Samuel B. Hall, as such Judge of Probate, had jurisdiction, among other things, over the administration and partition of the estates of persons deceased in the said County of York, and was empowered and entrusted in certain cases to receive moneys arising from the sales of the real estate of persons deceased in the said County, upon the trust that he would make faithful distribution of the same among the persons entitled thereto, as by the duties of his office, and in justice, he should have done. And the said Samuel B. Hall, on the day and year last aforesaid, at Yorkville aforesaid, in the County and State aforesaid, by virtue of his said office and the entrustment aforesaid, did receive and take into his possession a certain sum of money, to wit: the sum of one hundred and fifty-four 66-100 dollars, which was derived from the proceeds of the sale of the real estate of one Samuel Steele, deceased, which sum of money was properly distributable, and was paid and delivered to the said Samuel B. Hall, as Judge of the Court of Probate, in the trust that it would be distributed among Sarah Steele, Joseph N. Steele, Robert A. Steele, Martha, the wife of L. D. Poag, and Margaret, the wife of A. K. Smith, the heirs-at-law and distributees of the said Samuel Steele. And having so received the said sum of money for and on account of the persons and object aforesaid, the said Samuel B. Hall, not regarding the proper conduct of his office aforesaid and his duty in that behalf, and with the fraudulent intent to use said money for his own private purposes, in breach of his trust, then and there fraudulently and feloniously did embezzle and convert to his own use the said sum of one hundred and fifty-four 66-100 dollars, and did refuse and neglect to pay over the same to the persons above named, who were properly entitled thereto, or to Joseph

*122

A. McLean, Esq., who *was his successor in office, to whom such moneys should have been paid over by the said Samuel B. Hall, on the expiration of his own term of office, in the month of November last past, who then became entitled to receive from the said

Samuel B. Hall all such moneys as had not properly been distributed among the parties entitled thereto. And so the jurors aforesaid, upon their oaths aforesaid, do say that the said Samuel B. Hall did then and there feloniously, in manner and form aforesaid, steal, take and carry away the said sum of one hundred and fifty-four 66-100 dollars, of the moneys of Sarah Steele, Joseph N. Steele, Robert A. Steele, Martha, the wife of L. D. Poag, and Margaret, the wife of A. K. Smith, the heirs-at-law and distributees of Samuel Steele, deceased, for whose use, and on whose account the same was delivered to, and taken into the possession of, the said Samuel B. Hall, and that the said Samuel B. Hall did then so misconduct himself in his office of Judge of the Court of Probate for the said County of York, contrary to the form of the Act of the General Assembly, in such cases made and provided, and against the peace and dignity of the said State aforesaid."

Evidence was given for the State, tending to show that one Samuel Steele died intestate, leaving certain real estate in York County, which had been sold by defendant, as Judge of Probate, for payment of debts, and also for distribution amongst his heirs-at-law named in the indictment; that the sale was made upon a petition filed by the administrator of the intestate; that the defendant, in March, 1872, received the money arising from the sale, and had not paid over the same to the heirs-at-law of the intestate, nor had he turned over the same to his successor in office.

No order for distribution of the fund was shown.

The defendant was found guilty, and he moved in arrest of judgment or for a new trial. The motions were overruled, and he was sentenced to pay a fine of $1,000 and be confined in jail one year.

Various exceptions were taken at the trial to the rulings of His Honor, which are sufficiently indicated by the opinion of the Court.

The defendant appealed.

Wilson, Hamilton & Hart, for appellant.

Brawley, Solicitor, contra.

*123

*March 10, 1874. The opinion of the Court was delivered by

WILLARD, A. J. The indictment must be tested by Section 29 of Chap. CXXXI of the General Statutes, (p. 729,) which is as follows: "If any Clerk of the Court of Common Pleas and General Sessions, or Sheriff, or Judge of Probate, or Register of Mesne Conveyance in this State, shall wilfully fail or neglect to discharge all the duties and perform all the services which are required of him by law, in addition to his liability to the party aggrieved, he shall be liable to be indicted as for a misdemeanor, and, upon conviction thereof, shall be fined, at the discretion of the Court, not exceeding five hundred dollars."

The General Statutes, of which the Section just quoted is part, went into effect February 10th, 1872.—Gen. Stat., Chapter CXLVI, Sec. 2, p. 766. The indictment, as well as the testimony given at the trial, fixes the commission of the offense in March, 1872.

As the Circuit Court held that the indictment was supported by Section 27 of Chapter CXXXI of the General Statutes, (p. 729,) it will be necessary, before proceeding to consider it in its relations to Section 29, to point out the considerations that prevent its being sustained under Section 27.

Section 27 is as follows: "If any public officer hereafter to be elected or appointed, whose authority is limited to a single election or judicial District, shall be guilty of any official misconduct, habitual negligence, habitual drunkenness, corruption, fraud or oppression, he shall be liable to indictment, in which the privilege of traverse shall not be allowed, and, upon conviction thereof, shall be fined not exceeding one thousand dollars, and imprisoned not exceeding one year."

When the charge is, in effect and substance, neglect of any official duty imposed by law on the officers enumerated in Section 29, the indictment must be founded upon, and must conform to, that Section. This conclusion results from a comparison of the two Sections, as they are to be read together as integral parts of Chapter CXXXI.

If these two Sections could be regarded and treated as parts of a new law, taking original effect from the date when the General Statutes, as such, became operative, the construction would be without serious difficulty.

*124

The fact is, however, that Section 27 is *taken without change from the "Act for the punishment of official misconduct of District officers," passed in 1829, (5 Stat., 390,) while Section 29 was taken from the Act of 1837, (6 Stat., 577,) and amended in important particulars on its adoption as part of the General Statutes. The amendment consisted in striking out the names of certain officers then existing, but now abolished by the Constitution and laws, and inserting the name of Judge of Probate, and also changing the phraseology of the body of the Section as to a matter not important to be considered at the present time.

But whether we consider these Sections as occurring in two distinct statutes, successive in the order of time, or as parts of a single statute, a conclusion arises which will be sufficient for the purposes of the present case. It is clear that the cases embraced in Section 29, the last adopted, as it regards the class of persons enumerated under that Section, cannot be prosecuted under Section 27. The penalties imposed by the two Sections differ essentially. As they cannot be treated as cumulative, that prescribed by Section 29

must displace that prescribed by Section 27, as it regards all offenses embraced within Section 29. In this respect a repugnancy exists between them that tends to the conclusion that the Legislature, in adopting the statute, of which Section 29, in its original form, constituted a part, either regarded the case of a neglect of official duty as not embraced in Section 27, or that they deemed the punishment prescribed by Section 27 as in excess of what was called for in the class of cases to which Section 29 relates. Both of these conclusions tend to the same result, namely, an interpretation of the two Sections by which failure to perform official duties will be punished under Section 29 exclusively.

Under this view the indictment is defective in alleging, conjointly, neglect of official duty in a particular case, and misconduct of too general a character to form a subject of indictment under Section 29. This is obvious, for, under a verdict of guilty, the Court cannot know whether the penalty imposed by Section 27 or that by Section 29 is applicable to the case.

If, however, it was competent to reject as surplusage all that is stated in excess of what properly belongs to an indictment under Section 29, still the indictment would be fatally defective, for it does not lay a specific duty imposed by law, and aver its wilful neglect. Indeed, it is doubtful, on the face of the indictment, whether the duty of which

*125

neglect is alleged did not arise on a *mere trust in virtue of the acceptance of certain funds applicable to a particular purpose.

The proper mode of procedure may be illustrated by the case of an indictment under Section 46 of Chapter XX of the General Statutes (p. 166), where it is made the duty of the Probate Judge to deposit in bank all moneys not intended for immediate distribution. To convict under Section 29 for a default under the Section just referred to, it would be necessary to set forth a case under that Section where the duty of making such deposit was absolute, and to aver its willful neglect.

It is also clear that the evidence did not support the indictment, regarding it as under Section 29. The failure of the Court to make an order of distribution is not an indictable offense, but must be corrected on appeal. There is no absolute legal duty to pay out moneys to parties independently of the existence of an order determining their rights, nor can a neglect of that character be regarded as embraced within Section 29.

It must be a clear official duty imposed by the law governing the office to constitute a case for conviction under Section 29.

The judgment below should be reversed.

MOSES, C. J., and WRIGHT, A. J., concurred.

5 S. C. 125

COCHRAN v. DARCY.

(Columbia. Nov. Term, 1873.)

[*Constitutional Law* ⇐180; *Homestead* ⇐7.]

The homestead exemption allowed by the State Constitution of 1868 is, under the constitutional inhibition that "no State shall pass any law impairing the obligation of contracts," void as to debts arising out of contracts made before the State Constitution was adopted.

[Ed. Note.—Cited in Ex parte Hewett, 5 S. C. 410; De La Howe v. Harper, Id., 472; Ryan v. Pettigrew, 7 S. C. 150; Choice v. Charles, Id., 172; Gibbes v. Greenville & C. R. Co., 13 S. C. 242; Bull v. Rowe, Id., 365; Douglass v. Craig, Id., 374; Adams v. Agnew, 15 S. C. 38; Bradley v. Rodelsperger, 17 S. C. 12; Agnew v. Adams, Id., 370; Norton v. Bradham, 21 S. C. 378; Hosford v. Wynn, 26 S. C. 134, 1 S. E. 497; McClenaghan v. McEachers, 47 S. C. 448, 25 S. E. 296; Ex parte Goldsmith, 68 S. C. 538, 47 S. E. 984.

For other cases, see Constitutional Law, Cent. Dig. § 499; Dec. Dig. ⇐180; Homestead, Cent. Dig. § 9; Dec. Dig. ⇐7.]

[*Courts* ⇐97.]

In re Kennedy, 2 S. C., 216, upon above point, overruled upon the authority of Gunn v. Barry, 15 Wal., 610 [21 L. Ed. 212].

[Ed. Note.—Cited in Bouknight v. Epting, 11 S. C. 74.

For other cases, see Courts, Cent. Dig. § 330; Dec. Dig. ⇐97.]

[*Constitutional Law* ⇐169.]

Upon questions arising under the United States Constitution the State Courts must conform their decisions to those of the Supreme Court of the United States.

[Ed. Note.—Cited in Warren, Wallace & Co. v. Jones, 9 S. C. 294; Carrier v. Thompson, 11 S. C. 83.

For other cases, see Constitutional Law, Cent. Dig. § 474; Dec. Dig. ⇐169.]

[*Constitutional Law* ⇐106.]

Legal State remedies, existing at the time and place where a contract is made, form part of its obligation, and only such changes of the remedies can be made as do not impair substantial rights under the contract.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 186, 212, 238–245, 252–257, 259; Dec. Dig. ⇐106.]

[This case is also cited in Charles v. Charles, 13 S. C. 387, as an example of proceeding by rule requiring sheriff to enforce process.]

Before Graham, J., at Charleston, August, 1873.

Cochran held two judgments against Darcy, recovered in June and October, 1872, on contracts made between the parties in December, 1867.

*126

*The Sheriff refused to enforce the executions by sale of a house and lot in Charleston, where Darcy resided, and which he claimed as his homestead, he being the head of a family, and this was a rule on the Sheriff to compel him to enforce them.

His Honor held, under the authority of In Re. Kennedy, 2 S. C., 216, that the homestead was exempt from levy and sale, and dismissed the rule.

Cochran appealed.

Rutledge & Young, for appellants, relied mainly upon Dunn v. Barry, 15 Wal., 610.

Corbin & Stone, contra.

March 12, 1874. The opinion of the Court was delivered by

MOSES, C. J. These cases involve the judgment of this Court—In Re. Kennedy, 2 S. C., 216—and seek to reverse it, under the authority of Gunn v. Barry, decided by the Supreme Court of the United States, at December Term, 1872, 15 Wallace, 610 [21 L. Ed. 212].

It is true, as submitted by the respondent, that, in Gunn v. Barry, the question directly made was as to the effect of a homestead exemption on a judgment obtained before its allowance by the Constitution and Act of the General Assembly of the State of Georgia, still it is so apparent that, in the view of the Court, the retrospective operation of such provision against all previous contracts was void, because in violation of the 10th Section of the 1st Article of the Constitution of the United States, which declares "that no State shall pass any law impairing the obligation of contracts," that we feel bound to regard the opinion as expressive of the views of the Court, to the full extent to which the reasons which it assigns may carry it.

A respect to the duty which we owe to the highest judicial tribunal of the country, as well as to ourselves, requires that we should not only give to the decision all proper effect in the case, as presented by the facts, but that we should accept the argument of the opinion, as it affects the general question involved in its judgment.

We yield a ready assent to what Mr. Justice Grier says, in Cook v. Moffat, 5 Howard, 308 [12 L. Ed. 159]: "The Constitution of the United States is the supreme law of the land, and binds every forum, whether it derives its

*127

authority from a State or from the *United States. When this Court has declared State legislation to be in conflict with the Constitution of the United States, and, therefore, void, the State tribunals are bound to conform to such decision."

The Constitution of Georgia declared that each head of a family should be allowed a certain amount of realty, as well as of personalty, and that no Court or ministerial officer should ever have jurisdiction or authority to enforce any judgment, decree or execution against such property, except for taxes, &c. The Legislature of the same State, in October, 1868, passed an "Act to provide for setting apart the homestead as required by the Constitution." In the cases before us the exemption was claimed under the Constitution and Acts of the General Assembly of this State, which, except as to the amount of homestead allowed, and the prohibition of jurisdiction by the Courts, were of the same character as those provided by the Constitution and laws of Georgia. In the application of the principles which are to govern their enforcement, as proposed by the two States, no difference can be found to exist. The emphatic language of the opinion bears directly upon the general power of the State to withdraw from a contract any substantial right which attached to it at its inception, and must be viewed and accepted as the expression of the Court in regard to all homestead exemptions. It is in these words: "The legal remedies for the enforcement of a contract which belong to it at the time and place where it is made, are a part of its obligation. A State may change them, provided the change involve no impairment of a substantial right. If the provisions of the Constitution, or the legislative Act of a State, fall within the category last mentioned, they are, to that extent, utterly void. They are, for all the purposes of the contract which they impair, as if they had never existed. The constitutional provision and statute here in question are clearly within that category, and are, therefore, void."

The contracts on which these actions are founded were entered into before the adoption of our Constitution, and we can perceive in them no element, in regard to the homestead law, which withdraws them from the principles announced in Gunn v. Barry.

The motions are granted, and the cases remanded to the Circuit Court.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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5 S. C. *128

*ARMSTRONG v. HUMPHREYS.

(Columbia. Nov. Term, 1873.)

[*Mortgages* ⇐507, 539.]

A decree in foreclosure directing the sale to be made by a Referee is erroneous, and will be set aside on appeal; but, until notice of appeal given, it binds the defendant, and a purchaser at the sale will not be affected by an appeal afterwards taken.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1508, 1560; Dec. Dig. ⇐507, 539.]

[*Mortgages* ⇐544.]

A bidder at a sale under a decree in foreclosure is not entitled to an order to be let into possession until he has complied with the terms of sale.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1570; Dec. Dig. ⇐544.]

[*Mortgages* ⇐544.]

A writ of habere facias possessionem is not the proper mode of putting a purchaser at a sale under a decree in foreclosure into possession.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1568–1577; Dec. Dig. ⇐544.]

Before Graham, J., at Charleston, March Term, 1873.

This was an action of foreclosure, commenced July, 1872. In October, 1872, judg-

ment by default was entered, and a decree made directing the mortgaged premises to be sold by a Special Referee. On the 28th March, 1873, the Referee made a report, wherein he stated that he had sold the mortgaged premises on the 12th December, 1872; that the purchaser was ready to comply with the terms of sale if he could obtain possession of the premises, and that the defendant still occupied the same, and refused to surrender possession; and on the same day the Court made an order that defendants do show cause on the 31st inst. why they should not be ejected from the premises. No cause was shown, and on the 31st March, 1873, the Court made an order that a writ of habere facias possessionem do issue against the defendants, and that the Sheriff do put the purchaser into quiet and peaceable possession forthwith.

On April 17th, 1873, defendant filed a notice of appeal from the judgment, on the ground that a sale for foreclosure could only be made by the Sheriff, and that a sale by a Referee is a nullity, and should be vacated. They also appealed from the order to put the purchaser in possession.

Melton & Chamberlaim, Bachman & Youmans, for appellants.

Rutledge & Young, contra.

March 18, 1874. The opinion of the Court was delivered by

WILLARD, A. J. The questions for consideration are: first, whether a decree in foreclosure, directing the mortgaged premises to be sold by a Special Referee, is in contravention of law, on the ground that such sales are by statute required to be made by the

*129

*Sheriff; and, secondly, as to the effect upon the rights of a purchaser under such decree of avoiding such decree upon an appeal taken on such decree, after the sale of the premises; and, third, whether an order putting the purchaser in possession can be made previous to the compliance on the part of the purchaser with the terms of purchase.

By Section 310 of the Code of Procedure, as amended March 13th, 1872, (15 Stat., 194,) real property adjudged to be sold must be sold in the County where it lies by the Sheriff of the County. The same requirement was contained in the Act of January 27th, 1870, (15 Stat., 324,) and was embodied in the General Statutes that took effect February 10th, 1872, (General Statutes, 766, Section 2.) Section 310 of the Code, as it originally stood, authorized such sales to be made either by the Sheriff or a Referee to be appointed by the Court.

It was evidently the intention of the Act of January 27th, 1870, to amend the provisions of Section 310 of the Code as it then stood by confining the power to sell in such cases to the Sheriff, but the subsequent republication of Section 310 in its original form as part of the General Statutes gave rise to a question whether, under the operation of these two provisions, the power of sale could not be exercised by either the Sheriff or a Referee. The amendatory provision of March 13th, 1872, was passed, finally disposing of the question, and placing the power of sale in such cases in the Sheriff exclusively.

It is argued that limiting the power to sell in execution of judicial decrees and orders is an infringement upon the constitutional rights of the Courts. It cannot properly be regarded in this light. The Legislature have the right to regulate the forms of procedure in the Courts, a right recognizd in terms by Section 3, Article V, of the Constitution. While the Legislature cannot deprive the Courts created by the Constitution of the powers conferred by that instrument, still they can mould the proceedings in the Court, and the present instance is one falling within the legitimate exercise of this legislative function.

It has also been argued that the statute is directory merely, and not mandatory. If this view was applicable it would still follow that the Courts were bound to pursue such direction, and a decree or order disregarding it would have to be considered as erroneous. But it is impossible to view the pro-

*130

visions of the statutes together, *without arriving at the conclusion that the Legislature have studiously excluded a Referee from exercising the powers attempted to be conferred upon him by the decree appealed from.

It is clear that the decree is erroneous, and should be set aside so far as it directs the sale to be made by a Special Referee instead of the Sheriff.

The next question is as to the effect of setting aside the decree upon proceedings taken under it prior to the notice of appeal. The facts are that the property was sold by the Special Referee, but that the terms of purchase have not been complied with by the purchaser.

Whether there has been a compliance on the part of the purchaser with any part of the requirements of the terms of purchase does not appear. Nor does it appear whether any time was prescribed within which the purchaser would be bound to comply with his terms of purchase. It is evident that the record is not in a condition to enable this Court to determine whether any rights that the purchaser may have acquired by his bid are still in existence, or have been lost for want of performance on his part. That matter must be determined in the Circuit Court upon such proceedings as may be taken for that purpose.

The right of the purchaser, such as it may be, cannot be affected by the setting aside of that portion of the decree directing the

sale to be made by the Special Referee, although, if any act remains to be performed in order to comply with what may be held to be due to the purchaser, such act must be performed by the Sheriff, under the decree as conformed to the present decision.

The judgment of the Circuit Court was valid and conclusive until set aside upon appeal. Any party prejudiced by such judgment had a right of instantaneous appeal, and, incident thereto, the right, upon complying with the requirements of law, to stay all proceedings for the enforcement of the judgment. Failing to avail himself of such remedies the appellant cannot allege that that which has been done in the course of the execution of such judgment, as affecting third persons, is null and void.

The principles involved in the proposition just stated are set forth in Whiting v. Bank, (13 Peters, 15 [10 L. Ed. 33]). So much of the judgment of the Circuit Court as directs the sale of the mortgaged premises by a Special Referee should be set aside.

The order of the Circuit Court for the is-

*131

sue of a writ of habere *facias possessionem is erroneous. In the first place, it was premature: the purchaser could not claim to be let into possession until he had complied with the terms of sale and had acquired title to the premises.

The proper remedy for ousting the defendant from the possession of the mortgaged premises in a proper case, is an order of the Court for that purpose, and not a writ of habere facias possessionem.

The order in question should be set aside, and the cause remanded to the Circuit Court for further proceedings.

MOSES, C. J., and WRIGHT, A. J., concurred.

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5 S. C. 131

DUDLEY v. ODOM.

(Columbia. Nov. Term, 1873.)

[*Contracts* ⟸130.]

A contract between two creditors interested in a public sale about to be made by an assignee in bankruptcy, that one will not bid against the other, and, in consideration thereof, that the latter will pay to the former a certain sum of money, is against public policy, and, therefore, null and void.

[Ed. Note.—Cited in Barrett v. Bath Paper Co., 13 S. C. 158; Magee v. O'Neill, 19 S. C. 185, 45 Am. Rep. 765; Bath South Carolina Paper Co. v. Langley, 23 S. C. 145; Herndon v. Gibson, 38 S. C. 361, 17 S. E. 145, 20 L. R. A. 545, 37 Am. St. Rep. 765; Howlett v. Garner, 50 S. C. 12, 27 S. E. 533.

For other cases, see Contracts, Cent. Dig. § 655; Dec. Dig. ⟸130.]

Before Townsend, J., at Bennettsville, September Term, 1873.

This was an action by C. W. Dudley against Noah Odom to recover $700 alleged to be due on contract.

The case was this: The plaintiff held a judgment by confession for $2,112.98, entered 22d August, 1866, against John Odom, the father of defendant; and J. H. Hudson also held an older judgment against John Odom, which amounted, at the time of the sale herein mentioned, to about $1,500. In 1868, John Odom was adjudged a bankrupt on his own petition, and on November 1st of the same year his real estate, consisting of 600 acres of land, of the value of $10 per acre, was sold by his assignee, and purchased by the defendant at the price of $1,500. The plaintiff and defendant met at the time and place of the sale, and just before the property was offered by the assignee it was agreed between them that the defendant should bid $1,500, a sum sufficient to satisfy Hudson's judgment; that the plaintiff

*132

should not bid, and in consideration *thereof, that defendant would pay to the plaintiff $700 whenever the Supreme Court of the United States should decide that obligations for the purchase money of slaves were valid debts, that being the character of the debt on which plaintiff's judgment was founded. The plaintiff did not bid at the sale, and the Supreme Court of the United States having decided that obligations for the purchase money of slaves were valid debts, this action was commenced to recover the $700 and interest.

The contract, as alleged in the complaint, was as follows:

"That the defendant, Noah Odom, knowing that a sufficient amount of money would be realized from the sale of his said father's real estate to satisfy the plaintiff's said confession of judgment, and, fearing competition in the bidding when the said land should be offered for sale, applied to and induced the plaintiff to desist from bidding for the same, agreeing to and with the plaintiff, and promising that he, the said defendant, would pay the plaintiff the sum of seven hundred dollars, whenever the Supreme Court of the United States should decide that obligations given for the purchase money of slaves were valid debts, if he, the said defendant, should be allowed to bid off the real estate of the said John Odom, without opposition from the plaintiff.

"That, in consideration of said agreement, and confiding in the promises and undertakings of the said defendant, supposing that he intended fairly and faithfully to carry out his promises made as aforesaid, he (the plaintiff) made no bid for the said land, which was sold at Bennettsville, S. C., on the first day of November, A. D. 1868, and was bought by the defendant for a nominal price, the sum of fifteen hundred dollars, much less than the real value."

The defendant's counsel contended that the contract as alleged and proved contravenes established principles of public policy, and is, therefore, null and void, and cannot be enforced in a Court of justice. His Honor declined so to rule, and instructed the jury that the contract was legal and binding.

The jury found for the plaintiff, and after judgment entered the defendant appealed.

Hudson, for appellant:

The plaintiff's cause of action is an agreement or contract which contravenes established principles of public policy: is, therefore, illegal and void, and ought not to be

*133

sanctioned in a Court of jus*tice. "The forbearance of bidding was the real (and only) consideration, and it is a consideration which ought not to be sanctioned in a Court of justice."—Jones v. Casswell, 3 Johns. Cas., 30. "The abstaining from bidding, upon concert or agreement, under a promise of benefit for thus abstaining, is the very evil the law intends to repress. * * * * * The principle (i. e., that sales must be free from combinations to silence bidders) is of too salutary a nature to permit any refinements which go to sap or subvert it."—Thompson v. Davies, 13 John. R., 114. "An agreement not to bid, for the purpose of paralyzing competition, vitiates the sale so that no party to such agreement can claim any benefit from it. The sale is void at law. There is no part of the transaction which should be preserved."—Smith v. Greenlee, 2 Dev., 128.

The principle, that sales at auction, and particularly on legal process, should be conducted with good faith and without prejudice to any party, is so well founded in public policy that, while Courts of law will withhold aid from either party to an agreement to abstain from bidding, and leave them without legal remedy, Courts of Equity will go further, and declare void a sale at which bidding has been chilled.—Troup v. Wood, 4 Johns. Ch., 228-254; Martin & Walter, v. Evans, 2 Rich. Eq., 368; Hamilton v. Hamilton, 2 Rich. Eq., 379.

Chancellor Dunkin, who delivered the opinion of the Court in both the aforesaid cases, in Rich. Eq., discusses with much force and clearness the doctrine of auction sales under decree of Court, and cites, with approval, the above named cases from New York and North Carolina. In closing his review of all the cases bearing on the subject, he says, in Hamilton v. Hamilton: "The current of decisions is so uniform, and the general principles so clearly announced, that it is not deemed necessary further to consider its validity, or the importance of preserving it." "Agreements whereby parties engage not to bid against each other at public auctions, especially in cases where such auctions are directed or required by law, as in cases of sales of property under execution, are held void; for they are unconscientious and against public policy, and have a tendency injuriously to affect the character and value of sales at public auction, and mislead private confidence."—Story's Eq. Jur., 293.

The contract is void by the common law, and the reason why the common law says such con-

*134

tracts are void is for the public good. *You shall not stipulate for iniquity. No polluted hand shall touch the pure fountain of justice. And for the public good the law allows either party to such a contract to take advantage of its illegality, and impeach it in a Court of justice.—Chit. on Con., 571. Lord Mansfield says: "The principle of public policy is this, ex dolo malo non oritur actio. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating or otherwise, the cause of action appear to arise ex turpi causa, or a transgression of a positive law of this country, there the Court says he has no right to be assisted."—Holman v. Johnson, Cowp., 343.

McIver, contra:

A doubtful matter of public policy is not sufficient to invalidate a contract. An agreement is not void on this ground, unless it expressly and unquestionably contravene public policy and be manifestly injurious to the interests of the State.—Chit. on Con., 664, 6th Am. Edit.; see, also, remarks of Best, C. J., in Davis v. Bank of England, 9 E. C. L. R., 452, and in Richardson v. Mellish, 9 E. C. L. R., 397.

Unless the contract in question can be shown to be in violation of some statute, or in contravention of some established principle of the common law, it is not subject to the objection raised against it.

It is not pretended that we have any statute on the subject, nor do we find it in any of the classes which are mentioned in the elementary writers on contracts, as instances of contracts in violation of public policy; for instance, contracts in restraint of trade, in restraint of marriage, marriage brocage contracts, sale of offices, contracts affecting the course of public justice, etc.—Chit. on Con., 664, 678.

Illegality of a contract cannot be inferred; the burden is on the party making the objection to establish it clearly.—Chit. on Con., 659.

The English cases furnish no authority for the proposition contended for by appellant. See admission of Dunkin, Ch., in Martin and Walter v. Evans, 2 Rich. Eq., 370.

The appellant's proposition rests upon the authority of the following New York cases: Jones v. Caswell, 3 Johns. Cas., 30, Thompson v. Davies, 13 Johns., 114, which will be commented on for the purpose of showing

*135

that they do not sustain the proposition *of appellant in its fullest extent, and at most

only establish the rule, that where the proof shows an agreement not to bid at an auction sale, such proof is only prima facie evidence of fraud, and, unless explained, will vitiate the agreement.

If this be the correct rule, then appellant has no ground upon which to claim the interposition of this Court, as he failed to ask the Circuit Judge so to lay down the rule to the jury.—Abrahams v. Kelley and Barrett, 1 S. C., 235.

In Hamilton v. Hamilton, 2 Rich. Eq., 388–9, Harper, Ch., says that the above cited New York cases have been followed, to a certain extent, in other States, but in no instance without qualifications and exceptions; for instances of which he cites Smith v. Greenlee, 2 Dev., 126; Phippen v. Stickney, 3 Met., 384.

No case in our own State sustains the position contended for by appellant, what is said in Martin and Walter v. Evans, and in Hamilton v. Hamilton, by Dunkin, Ch., being mere dicta. On the contrary, in two cases, our Courts have sustained agreements which would seem to be more directly in contravention of public policy than the one now in question.—Carson v. Rambert, 2 Bay, 560; Owen v. Davis, 1 Bail., 315.

Respondent was under no obligation to bid. He attended the sale merely to protect his own interest, and was at liberty to do anything, not illegal, to effect that purpose. He did nothing to chill the biddings; on the contrary, increased the bid of the purchaser, and required him to bid fifteen hundred dollars.

March 20, 1874. The opinion of the Court was delivered by

MOSES, C. J. The respondent held a second lien by judgment recovered in 1866 on the land of one John Odom, who, in 1868, was adjudged a bankrupt. His land having been advertised for sale by his assignee, on the day appointed therefor, Noah Odom (the appellant,) the son of said John, agreed with C. W. Dudley, (respondent,) that if he would desist from bidding on it, and allow him (the appellant,) to bid it off without opposition from the respondent, he would pay him the sum of seven hundred dollars whenever the Supreme Court of the United States should decide that obligations given for the purchase money of slaves were valid debts. The land, which was proved to be worth six thousand dollars at the time of sale, was

*136

bought by the appellant at fifteen hun*dred dollars—the only bid made. All knowledge of the agreement was confined to the parties and a third person, who was called as a witness to it. It was not denied that the validity of contracts for the purchase of slaves was sustained by the Supreme Court of the United States in May, 1872.

The action was brought for the recovery of the amount alleged to be due under the agreement.

On the part of the defense it was insisted "that the agreement or contract sued upon and set up in the testimony for the plaintiff, is one that contravenes established principles of public policy, was, hence, illegal and void, and cannot be enforced in a Court of justice." The Circuit Court overruled the proposition of law thus submitted, and a verdict was rendered for the sum demanded, with interest thereon from the first day of May, 1872. The question which we have now to consider is, whether there was in this error of law on the part of the Court?

It is not to be denied that contracts which are in violation of a positive statute, or of long established and recognized principles of public policy, cannot be enforced in Courts of justice.

The former speaks the will of the community through the Legislative power, and demands a direct obedience, by the observance of all the obligations which it imposes. It is the expression of the public, in the most authoritative mode that it can use, to assert its opinion upon the subject-matter to which it relates. It is not essential to its validity that it should attach any penal provision for its violation. It may prohibit certain acts, and declare that all agreements made through their intervention shall be without force or effect. Upon analogous principles, and in the absence of all statutory regulations, considerations of public policy, long established, may operate to the full extent, as if enjoined by legislative enactment, to prevent the enforcement of contracts which are in contravention of them.

They, too, in another form, speak the public will, not through the law-making power, but because the continued acquiescence of the community gives to the judicial decisions which announce it the force of law. Precedent following precedent, without interference on the part of the Legislature, at last ripens into a common law, with all its consequences and sanction.

It is scarcely necessary to enquire whether the sale made here was an official one, for the rules which govern and regulate bidding

*137

*at such sales apply to all public actions. It is true that they are more carefully watched and jealously regarded where the sale is under judicial process. We must hold the sale here to have been one made by the order of a competent Court, for without it the assignee in bankruptcy could not lawfully sell the effects of the bankrupt.

Does an agreement at such a sale between two or more not to bid against each other contravene established principles of public policy?

It was the sale of the land of a bankrupt. The purpose was to obtain the largest possible price for the creditors by the competi-

tion through unrestrained bidding. Whatever was calculated to prevent the result which might thus be realized prejudiced the object which the Court proposed by its order. Justice, not only to the owner of the property, but a sense of respect to the Court, which, in fact, is the seller, require that when it orders a sale to the highest bidder no combination shall be made which may prevent a full and open competition among those who may be disposed to buy. Official sales without these safeguards would not reach the end contemplated by the orders which direct them. It is needless, however, to enlarge upon the views which look to the policy of the rule that demands a free and open field for all who propose to bid at such sales, for they are now comprehended in a principle which obtains not only in the Court of Equity, but that of law, and no where carried to a greater extent than by the decisions in our own State.

In Jones v. Creswell, 3 John. Cas., 29, the action was on a note given for forbearance to bid at a sale by the Sheriff, and it was held "a consideration which ought not to be sanctioned in a Court of justice." The Judge delivering the opinion of the Court says: "A combination to prevent fair competition is contrary to morality and sound policy. It operates as a fraud upon the debtor and his remaining creditors by depriving the former of the opportunity which he ought to possess of obtaining a full equivalent for the property which is devoted to the payment of his debts, and opens the door for oppressive speculation." The same principle had been announced in Doolin v. Ward, 6 John., 194; in Wilbur v. How, 8 John., 444; and in Thompson v. Davies, 13 John., 112. Chancellor Kent, in Troup v. Ward, 4 J. C. R., 254, re-affirms the doctrine laid down in Jones v. Creswell, by a Court of which he was then a member.

*138

*In this State the point was fully and at large considered by the Court of Errors, in Hamilton v. Hamilton [2 Rich Eq. 355, 46 Am. Dec. 58] and Martin and Walter v. Evans, 2 Rich. Eq., 368, in which it was held "that the principle which governs all sales at auction, and especially judicial sales, is that there should be full and fair competition. Any agreement or combination, therefore, the object and effect of which are to chill the sale and stifle competition, is illegal, and no party to the agreement or combination can derive benefit from the sale."

Ch. Duncan, closing the opinion of the Court, says, "the current of decisions is so uniform, and the general principle so clearly announced, that it is not deemed necessary further to consider its validity, or the importance of preserving it."

Ch. Harper who delivered the dissenting opinion of the Court, p. 389, says "that the matter seems to have been put upon the proper footing in Massachusetts, in Phippen v. Stickney, 3 Met., 384." There the rule, as laid down in the cases then before him, appears to have been narrowed, by requiring it to depend upon circumstances, showing an innocent intention, or a design to prevent competition and depress the price. Let the principle declared in Phippen v. Stickney be tested by the circumstances of the case now under review. The purpose of the sale was to obtain the highest price which might be offered. The agreement of the parties prevented this, for while the appellant obtained the land at his bid of fifteen hundred dollars, the agreement sued upon required that he should pay the additional sum of seven hundred dollars, not for the benefit of the seller, but for that of the respondent. Was the consideration which induced the agreement on the part of the appellant anything but the forbearance of the respondent? In fact, his complaint avers "that the defendant, Noah Odom, knowing that a sufficient amount of money would be realized from the sale of his said father's real estate to satisfy the plaintiff's said confession of judgment, and fearing competition in the bidding when the said land should be offered for sale, applied to and induced the plaintiff to desist from bidding on the same, agreeing to and with the plaintiff, and promising, that he, the said defendant, would pay the plaintiff the said sum of $700, &c.; that, in consideration of said agreement, and confiding in the promise and undertaking of the said defendant, supposing that he intended fairly and faithfully to carry out his promises made as aforesaid, he (the plaintiff) made no bid for the said land, which was

*139

sold at Bennettsville, on the 1st Novem*ber, 1868, and was bought by the defendant at a nominal price the sum of $1,500, much less than the real value."

Does not this allegation amount to a clear admission by the respondent of a combination or confederation for the purpose of preventing competition, and depressing the price of the property below its fair market value? Who but the plaintiff (below) had an interest in the bidding, after the bid which was stipulated to be made under the agreement? It was, by the understanding of the parties, to satisfy the senior judgment, and the creditor next in interest was the respondent himself, who preferred the seven hundred dollars rather than risk the purchase of the land at a price beyond the fifteen hundred dollars, which last sum he would have been obliged to advance if the land had been knocked off to him; for that amount was obliged to be paid before any of the purchase money could be applied to his judgment. It appears idle to pursue the facts further, to show that they bring the case even within the rule contended for by the dissenting members of the Court of Errors in Hamilton

v. Hamilton, and Martin & Walter v. Evans.

We have no idea that the respondent intended to violate any moral rule, but his agreement cannot be sustained, because it is in disregard of law; nor have we anything to do with the want of faith on the part of the appellant.

An English Judge has properly said, "the law encourages no man to be unfaithful to his promise, but legal obligations are, from their nature, more circumscribed than moral duties."

The allegation that "the defendant, by his pleading, having put his defense upon a general denial of the contract sued on, cannot take advantage of any illegality in the contract," cannot prevail. No such exception was taken in the Circuit Court. On the contrary, the brief shows that the counsel for the appellant submitted to the Court his proposition of law, which impugned the validity of the agreement sued upon. "The plaintiff's counsel, in replying, first combated the said legal proposition, and then addressing the jury upon the facts of the case rested." The exception not having been made in the Court below, it cannot be interposed here.

The view which the Court takes in regard to the principal question made in the cause renders unnecessary any consideration of the point submitted in regard to the interest allowed in the verdict.

The motion for a new trial is granted, and the case remanded to the Circuit Court.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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5 S. C. *140

*BISCHOFF v. WARD.

(Columbia. Nov. Term, 1873.)

[*Assignments* ⇐57, 86.]

A bona fide assignment of a claim arising out of contract made pending an action on the claim is valid against a judgment creditor of the assignor, and will be protected by the Court against an attempt of the judgment creditor to enforce his execution against the money due on the claim when collected by the Sheriff after judgment and execution, and it makes no difference that neither the judgment creditor of the assignor nor his debtor had notice of the assignment.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 116, 153; Dec. Dig. ⇐57, 86.]

Before Graham, J., at Charleston, December, 1872.

On the 29th April, 1871, W. W. Ward commenced an action in the Court of Common Pleas for Williamsburg County, against Mantone & Co., on a money demand for services rendered by the plaintiff as Sheriff, and in March, 1872, he recovered judgment for $177.40. Execution on the judgment was entered in the Sheriff's office of Charleston County, and on the 15th May, 1872, Mantone & Co. paid the money to the Sheriff. Henry Bischoff was plaintiff in, and owner of, an execution against Ward, which had been entered in the Sheriff's office of Charleston County, on the 6th June, 1869. Bischoff directed the Sheriff to apply the money to his execution. This was resisted by one S. J. Tharp, to whom Ward, on the 18th December, 1871, had assigned his claim against Mantone & Co. The assignment was made in good faith, and for value, but notice of it had not been given, either to Bischoff or to Mantone & Co.

The Sheriff refused either to apply the money to Bischoff's execution or to pay it to Sharp; and this was a rule against him to show cause why he had not applied it to Bischoff's execution.

The Sheriff, in his return, stated the facts and submitted the matter to the judgment of the Court.

His Honor held that Bischoff was entitled to the money, and made the rule absolute.

Tharp appealed.

Maurice, for appellant.

Phillips, contra.

March 20, 1874. The opinion of the Court was delivered by

WILLARD, A. J. The first question to be considered arises out of the fact that Ward, who was the plaintiff in the action in which

*141

*the judgment was recovered, under which the money claimed by Bischoff was made, assigned his cause of action to Tharp, prior to judgment, without notice to the defendants in such action, or to Bischoff, and without making Tharp a party to the record in such action.

Tharp became, under the assignment, the equitable owner of the judgment upon its recovery. The fact that Tharp was a bona fide assignee of the cause of action, for value, is not controverted, and must be taken as true. The direct effect of the assignment was to make Tharp legal owner of the cause of action. Under the last clause of the first paragraph of Section 144 of the Code of Procedure, the action might proceed, in the name of the original plaintiff, unless proceedings were taken to substitute Tharp as plaintiff. If he desired to obtain full control of the judgment, his proper course was to be substituted as plaintiff on the record. Having allowed the action to proceed in the name of Ward to judgment, Ward held the record evidence of the ownership of the judgment, but Tharp was entitled to have his equitable rights protected by the Court. Tharp was under no obligation to give notice of his claim to the judgment, but, failing to do so, he was subject, under the general rule affecting equitable rights, to have his right defeated in favor of third persons acquiring legal rights in good faith

through the person having the apparent right to control the judgment.—Zorn v. Railroad Company, ante, p. 90.

The right and duty of the Court to protect equitable rights under its judgments and process, is fully recognized in Reid v. Ramey, 2 Rich., 4, and in Means v. Vance, 1 Bail., 39, both cases arising in Courts of law.

Bischoff does not claim to have acquired any rights from Ward, acting as the apparent owner of the judgment. His claim is based solely on the idea that the money in the hands of the Sheriff, made under the judgment standing in Ward's name, was Ward's money, and, as such, liable under his execution against Ward.

It only remains to consider whether any legal rights in favor of Bischoff has attached to the money in the Sheriff's hands, precluding the Court from treating the money as subject to Tharp's equitable demand.

Had the money been actually paid by the Sheriff to Bischoff before notice of Tharp's assignment, the effect of such payment could not be enquired into in this summary way. But the money still remains in the Sheriff's hands.

*142

*The lodging of Bischoff's execution against Ward did not in itself create a lien upon the money in the Sheriff's hands. (Reid v. Ramey, 2 Rich., 4; Maddox v. Kennedy, 2 Id., 102.) assuming it to be Ward's money. Bischoff could only acquire rights over such money by either the voluntary application of the money by the Sheriff to his execution, or an order of the Court requiring such application to be made.—Maddox v. Kennedy.

In the present case the Sheriff does not assume to decide between the parties making opposing claims to the money, but leaves that question to the Court.

Under such circumstances the Court was enabled to look into and protect the rights of Tharp. (Dupong v. Watkins, 2 Rich., 328; Means v. Vance, 1 Bail., 39.) and was bound to give effect to the assignment to Tharp, inasmuch as his claim was both meritorious and prior to that of Bischoff.—Bloomstock v. Duncan, 2 McC., 319 [13 Am. Dec. 728].

The order appealed from should be reversed.

MOSES, C. J., and WRIGHT, A. J., concurred.

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5 S. C. 142

MOORE v. RICHARDSON.

(Columbia. Nov. Term, 1873.)

[*Appeal and Error* ⇐840.]

Inconsistency between the findings of fact and conclusions of law in the judgment of a Referee affirmed by the Circuit Court, is sufficient ground for setting the judgment aside.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3312½; Dec. Dig. ⇐840.]

Before Green, J., at Manning, October Term, 1873.

Action by John B. Moore and William R. Flud, against William H. B. Richardson and James B. Richardson, to recover the possession of real estate, described in the complaint as a plantation known as Birch Hill, containing 2,900 acres of land, lying in Clarendon, bounded, &c., [stating the boundaries].

All the issues were referred to a Referee, who filed a judgment as follows:

"I find upon the facts:

"1st. That on the 11th of October, 1869, Thomas W. Arlege, then Sheriff of Clarendon County, levied upon the plantation de-

*143

scribed *in the complaint as the property of the said William H. B. Richardson, under writs of fieri facias against him, duly issued from the Court of Common Pleas for said County, under judgments against said defendant.

"2d. That said plantation was advertised for sale by said Sheriff, on the first Monday in November, 1869, and was sold by said Sheriff on that day to the plaintiffs, at the price of five dollars, and that the said Sheriff, by his deed of release, dated the first day of November, 1869, did convey the said plantation, as the property of the said William H. B. Richardson, to the plaintiffs.

"3d. That a creek running towards the west, on which there was a mill and mill pond, divides said plantation into two parts, the part lying north of said pond, and the swamp of said creek, containing about two hundred and fifty acres of land.

"4th. That in the year 1850 the said William H. B. Richardson made a verbal gift of said two hundred and fifty acres of land to the said James B. Richardson, and in the year 1856 the said James B. Richardson entered into the actual occupation of a portion or portions of the same, and has occupied such portion or portions from thence hitherto under said gift.

"5th. That at the commencement of this action the said William H. B. Richardson was in the possession of the said plantation, with the exception of the portion or portions occupied by the said James B. Richardson as aforesaid, and has withheld the possession of the same from the plaintiffs, and that the damages for such withholding of the possession are one hundred dollars.

"6th. That no trespass on said plantation has been committed by the said James B. Richardson, and he has not occupied the same, or any part thereof, except the portion or portions occupied by him under said gift as hereinbefore set forth.

"Upon the law—

"7th. That the plaintiffs are entitled to recover from the said William H. B. Richardson the possession of the said plantation, and also the damages aforesaid.

"8th. That the said James B. Richardson acquired title by adverse possession to such portion or portions of said plantation north of said mill pond and swamp as have been occupied by him.

"It is, therefore, adjudged that the plaintiffs recover of the said William H. B. Richardson the possession of the said plantation and one hundred dollars for the withholding of the same.

*144

*"And it is further adjudged that the complaint be dismissed as against the said James B. Richardson.

"No survey or plat of the plantation was given in evidence by either party, and without a plat designating the portion or portions occupied by the said James B. Richardson, and the boundaries of the part of said plantation claimed under the said gift, it is impossible for me to describe the part or parts of said plantation to which the said James B. Richardson acquired title by adverse possession. That matter I am compelled to leave undecided."

The defendant, William H. B. Richardson, excepted to the report on the facts on the grounds:

1st. Because no notice is taken in the report of the sale made under the plaintiff's fi. fa., at which the lands sued for were bid off for Dr. M. S. Moore, trustee.

2d. Because no mention is made in the said report of the agreement made between John B. Moore and defendant, W. H. B. Richardson, prior to the sale, that the said sale should not be final between them.

3d. Because the said Referee has failed to report, on facts of this case, that the advertisement under which the sale was made was altered after the first insertion of the same, and did not appear three times after such alterations.

And, on the law, on the ground:

That the said plaintiffs are entitled to recover the said plantation from the defendant, W. H. B. Richardson, is respectfully submitted to be an error of law.

His Honor, the presiding Judge, overruled the exceptions, and ordered that the report stand as the decision of the Court.

William H. B. Richardson appealed upon the following grounds:

1st. Because said judgment is inconsistent with itself, inconclusive, uncertain, indefinite, and remitted the parties to new law suits to determine its meaning.

2d. Because, before the confirmation of the report of the Referee in this case, the plat was produced in Court, showing the boundaries of that portion of the tract described in the testimony as that portion given to James B. Richardson; and His Honor Judge Green was requested to recommit the cause to the Referee, in order that the boundaries might be defined to which the respondents might be entitled.

*145

*Which request His Honor refused to grant.

3d. Because said report should not have been confirmed, there being no conclusions submitted by the Referee in relation to the purchase by M. S. Moore, trustee, nor the agreement made between the respondents and the appellant, touching such sale.

4th. Because His Honor held that it was the duty of the Referee to report upon only such facts as he deemed material, and, in this case, the Court regarded it as immaterial whether the advertisement was changed or not, under which the respondents purchased.

5th. Because the seventh clause of the report of the Referee, confirmed by the Court, is inconsistent with the eighth clause of the said report, and is illegal and void.

6th. Because the Referee failed to report upon the absence of the writ of fieri facias in the case under which the land was supposed to be sold, also upon the prior sale to M. S. Moore, trustee; also, upon the agreement between respondents and appellant, prior to said sale. Wherefore such report should have been recommitted, and should not have been confirmed.

Moise, for appellant.

Blanding, Richardson & Rhame, contra.

March 20, 1874. The opinion of the Court was delivered by

WRIGHT, A. J. The case must be remanded to the Circuit Court. The judgment does not follow the conclusion of fact as found and reported by the Referee. The action was against W. H. B. Richardson and J. B. Richardson, for the recovery of real estate. It was clearly established by the evidence, and so held by the Referee, that the title to a portion of the land set out in the complaint, and sought to be recovered by the respondents, was defined by the proof as lying north of a certain creek, was vested in the said J. B. Richardson, and that he had committed no trespass on any of the land sued for outside of his own boundaries. The Referee, while dismissing the complaint as to the said J. B. Richardson, nevertheless adjudges "that the plaintiff recover of the said W. H. B. Richardson the possession of the whole plantation and one hundred dollars for the withholding of the same." The judgment seems to be inconsistent with itself, for while it dismisses the complaint as to J. B. Richardson, it in fact not only establishes the right to his land in respondents, but requires the

*146

appellant, W. H. B. Richardson, to *pay to the respondents "one hundred dollars for withholding the same," thus compensating them for the withholding of land, to which the report finds they had no title, and which had not been in the possession of the said W.

H. B. Richardson. While the error thus charged by the appellant, W. H. B. Richardson, is good ground for his motion, notwithstanding no appeal by the said J. B. Richardson, it may not be out of place to refer to the consequences which would follow from the judgment as it stands. It adjudges to the respondents a recovery of the whole plantation, not excepting the portion to which it is found they have no title. Under a writ of habere facias possessionem the Sheriff would be bound to put the respondents in possession of the premises, and, also, to turn out all who are in possession.—Ex Parte Black, 2 Bail., 8.

Thus, although J. B. Richardson was found to be the lawful owner of a portion of the very plantation, he would be liable to be ejected from the possession of his own property, and turned over to new and further litigation to obtain the very right which the judgment in his favor establishes.

The judgment, as against the said W. H. B. Richardson, is set aside, and the case remanded to the Circuit Court.

MOSES, C. J., and WILLARD, A. J., concurred.

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5 S. C. 146

MILES v. KING.

(Columbia. Nov. Term, 1873.)

[*Execution* ⟸272.]

That an execution creditor has notice of an unrecorded mortgage does not affect a purchaser at Sheriff's sale under the execution of the mortgaged land, such purchaser being without notice.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 783; Dec. Dig. ⟸272.]

[*Vendor and Purchaser* ⟸231.]

Where a mortgage given in 1855 was duly recorded, as the law then of force directed, but—the record having been destroyed—was not again recorded, as the Acts of 1866 required, it is void as against a subsequent purchaser for valuable consideration without notice.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 487, 513–539; Dec. Dig. ⟸231.]

[*Constitutional Law* ⟸157.]

The Act of 1866, directing all instruments of writing which by law were required to be recorded, the records of which had been destroyed, to be again recorded within a time fixed by the Act, or else to be null and void as against subsequent purchasers for valuable consideration without notice, and creditors without notice, does not impair the obligation of contracts, and is a constitutional and valid law.

[Ed. Note.—Cited in McLure v. Melton, 24 S. C. 570, 58 Am. Rep. 272.

For other cases, see Constitutional Law, Cent. Dig. § 441; Dec. Dig. ⟸157.]

Before Farmer, J., at Colleton, May, 1872.

This was an action by C. R. Miles and L. D. DeSaussure, against Samuel J. King, C. P. W. King and Caleb Sauls, to foreclose a mortgage of land.

*147

*The case was this: In the year 1854, Samuel J. King and C. P. W. King gave to Edward J. Parker their bond for $5,000, and on the 26th May, 1855, to secure the payment of the debt, they executed to Parker their mortgage of a tract of land in Colleton. The mortgage was duly recorded in June, 1855, and a few months afterwards Parker assigned both instruments to the plaintiffs. The record of the mortgage was destroyed in 1865, and it was not again recorded as directed by the Acts of 1866, which provided that "all instruments of writing of which a record or registry is required by law, and of which the record or registry is destroyed or lost, but the original preserved," shall be recorded by the 1st day of December, 1867, "otherwise they shall not prevail as liens against subsequent purchasers for valuable consideration without notice, nor creditors without notice." (13 Stat., 384, 411.) The original had been preserved.

When the mortgage was given the two Kings were seized of the tract of land, as tenants in common, each being entitled to one undivided moiety. On the 4th August, 1866, the undivided share of Samuel J. King was sold by the Sheriff under execution, in favor of Hull & Co., against Samuel J. King, and purchased by Caleb Sauls, who paid his bid and received a conveyance from the Sheriff. The debt, to satisfy which the sale was made, was contracted in 1860 and 1861. Sauls was a purchaser without notice. He alone answered the complaint, and he put his defense upon the ground that he was a purchaser of Samuel J. King's moiety, for valuable consideration, and without notice. His Honor sustained the defense, and made a decree for the sale of C. P. King's moiety.

The plaintiffs appealed, on the following grounds:

First. Because the plaintiffs' mortgage given for the purchase money, having been duly recorded in accordance with the provisions of the Act of 1843, became the paramount lien upon the mortgaged premises; and Hull & Co., who became creditors of the mortgagor, Samuel J. King, in 1861, while the said record was in existence, were subsequent creditors, with notice of the mortgage; and under the judgment recovered by them against the mortgagor could levy only upon his interest, subject to the mortgage, viz: the equity of redemption or right to redeem the mortgage.

Second. Because the defendant, Sauls, who purchased at the sale under Hull & Co.'s execution, obtained no greater rights, as

*148

*against the lien of plaintiffs' mortgage, than those of the plaintiffs in execution, who were subsequent creditors, with notice of the mortgage.

Third. Because the due registration of

plaintiffs' mortgage was notice to all the world; and the defendant, Sauls, as well as Hull & Co., were affected with notice, and could never become "purchasers or creditors without notice;" and Sauls having purchased only the interest of the mortgagor levied upon under the judgment obtained by creditors with notice, is not "a purchaser for valuable consideration without notice," within the purview of the Acts of 1866.

Fourth. Because the Acts of 1866, according to their true construction, do not destroy the paramount lien of plaintiffs' mortgage, secured by due compliance with the requirements of the Act of 1843.

Fifth. Because, if such is the effect of the Acts of 1866, then their "provisions are so unreasonable as to amount to a denial of a right, and call for the interposition of the Court."

Sixth. Because the mortgagees, by compliance with the requirements of the Acts of the Legislature in relation to the recording of mortgages existing at the time of registration, acquired certain vested rights in the mortgaged premises, which could not be divested by any subsequent exercise of mere legislative will. And if the operation of the Acts of 1866 is to destroy, defeat or postpone rights so vested, then they "impair the obligation of a contract," and are unconstitutional, null and void.

Tracy, for appellants.

Henderson & Behre, contra.

The following is the opinion of

MOSES, C. J. Assuming that the mortgage was recorded in conformity with the Act of 1843, the points involved in the grounds of appeal draw in question the validity of the Acts of 1866, (13 Stat. 384, 411,) so far as they are held by the Circuit decree to affect it.

Sauls presents himself in the position of a subsequent purchaser for valuable consideration without notice, and it is an error on the part of the appellants to contend that the mortgage having been on record when Hull, in 1861, became the creditor of the mortgagor, S. J. King, the notice thus binding him

*149

must be held to extend to *the respondent, the purchaser. There is no connection between them. The equities existing between Hull, the creditor, and King, the debtor, in no way, either in an actual shape, or by implication, attach to the purchaser at Sheriff's sale, who takes his title, not mediately, but immediately, as is said in McKnight v. Gordon, 13 Rich. Eq., 233 [94 Am. Dec. 164]. That case disposes of the argument that the purchaser at a Sheriff's sale was bound by the notice, which the creditor, under whose judgment the land was sold, had of the pre-existing mortgage, when the debt due him was contracted.

The main ground on which a reversal of the Circuit decree is claimed by the appellants is, that their mortgage having been recorded in conformity to the requirements of the Acts in force at the time of its execution, they acquired certain vested rights in the mortgaged premises, which could not be divested by any subsequent exercise of mere legislative will; and if the operation of the Acts of 1866 is to defeat, destroy or postpone rights so vested, then they amount to a denial of right, impair the obligation of a contract, and are unconstitutional, null and void.

The lien of a mortgage becomes operative through its own force. It is perfect and complete without the aid of confirmation by legislative authority. In McKnight v. Gordon, (already referred to,) p. 231, it is said: "Recording is not an element in the due execution of a mortgage, and, therefore, is not essential to its validity." To prevent the mischief that would result to the public, if instruments, by the force of which property is transferred, particularly where no change of possession is required, the Legislature declared that although their effect may remain unchanged as to the parties, they should not prevail against subsequent creditors or purchasers for valuable consideration without notice, unless recorded in certain offices within a limited period. The mortgage acted by its own power from its execution, and we fail to see how the fact of recording it, in compliance with the provision then required by law, was so incorporated with it as to constitute a part of the contract, which the respective parties, as shown by the instrument, had entered into. The Legislature did not declare in the Act of 1843 that the notice which it therein fixed should forever remain unchanged, or by any implication bind itself, no matter what might be the necessity that intervened, not to provide by further interposition, for the prevention of the mischief which the Act of 1843 was designed to frustrate, should it prove ineffectual for the end in view.

*150

*But the General Assembly has power to divest vested rights, and to enact statutes retrospective in their action, provided they do not impair the obligation of a contract.—Satterlee v. Matthewson, 2 Pet., 380 [7 L. Ed. 458]; Watson v. Mercer, 8 Pet., 110 [8 L. Ed. 876]; Charles River Bridge v. Warren Bridge, 11 Pet., 420 [9 L. Ed. 773]; Florentine v. Barton, 2 Wal., 210 [17 L. Ed. 783].

In what respect, however, are the statutes of 1866 retrospective? While that of 1843 was effectual for the intended purpose, the conditions on which it should operate as notice remain unchanged. When it failed to meet the exigency for which it was adopted, all that the Legislature proposed by the Act of 1866 was to establish a mode by which, for the future, constructive notice of mortgages and other instruments, of which a registry had before been required, should be

provided. This it did by directing that they should be re-recorded. It did not affect the past. When the Act of 1843 failed to accomplish its intended purpose through the destruction of the record books which contained the evidence of the notice, all that the Legislature proposed was to carry out the purpose of its enactment.

The notice which it required was to protect the public. Where would have been the protection, after the destruction of the registry books, to a proposed purchaser from the mortgagor? The original, if preserved, would remain in the hands of the mortgagee, without anything to put such purchaser to enquiry, and the whole community in the Counties where the books of the Register of Mesne Conveyance had been destroyed would have been in a state of inextricable confusion as to the title to their lands, without some legislation of the character of that of 1866.

What vested rights did the appellants acquire by recording their mortgage, according to the direction of the Act of 1843? It contained no stipulation that involved any prohibition against the State to require a compliance with any new regulations which it might impose to make the registration law more perfect, and certainly none which prevented it, when, by causes beyond its control, the provisions of the Act of 1843 ceased to effect the purpose contemplated by it, in the way of notice, from supplying the means by which notice of the mortgage of appellants should be given to the public.

But, as the authorities show, a vested right may be divested by the Legislature, unless it exists by virtue of, or in the nature of a contract. What elements of a contract en-

*151

ter into the registration *laws of a State? Surely, between the parties to a deed, there is no obligation that the grantee shall record it, for his omission to do so in no way impairs its validity against the grantor. The State is no party to it, and while it forbears to do anything which may infringe upon the obligation between the grantor and grantee imposed by the instrument on its execution, it remains without inhibition as to the change or modification of its registry regulations. A contract is an agreement or compact between two or more, expressed or implied, and for its support must rest on some consideration. Unless, therefore, the Acts of 1866 can be shown to impair some vested right, arising or growing out of a contract under the Act of 1843, their validity cannot be successfully assailed.

Mr. Cooley, in his treatise on Constitutional Limitations, referring to the power of legislation in regard to vested rights conferred by virtue of a contract, says at page 286: "Such being the obligation of a contract, it is obvious that the rights of the parties in respect to it are liable to be affected in many ways by changes in the laws, which it could not have been the intention of the constitutional provision to preclude;" and quotes, as follows, the language of Mr. Justice Washington, in Ogden v. Saunders, 12 Wheat, 259 [6 L. Ed, 606]: "There are few laws which concern the general police of a State, or the government of its citizens in their intercourse with each other, or with strangers, which may not in some way or other effect the contracts which they have entered into or may thereafter form. For what are laws of evidence, or which concern remedies, frauds and perjuries, laws of registration, and those which affect landlord and tenant, sales at auction, acts of limitation, and those which limit the fees of professional men and the charges of tavern keepers, and a multitude of others which crowd the Codes of every State, but laws which affect the validity, construction, or duration, or discharge of contracts." "But," proceeds Mr. Cooley, "the changes in these laws are not regarded as necessarily affecting the obligation of contracts."

Mr. Sedgwick, in his work on Statutory and Constitutional Law, p. 660, has not failed, in treating of the constitutional prohibition against interference with the obligation of a contract, to refer to its bearing on the recording laws of a State, and regards the question settled by the decision of the Supreme Court of the United States, in Jackson, ex dem. Hart v. Lamphire, 3 Pet., 289 [7 L. Ed. 679]. The point there made involved the effect of subsequent legislation in

*152

regard *to a land patent, granted to one Cornelius, who had conveyed title under it. In the course of the opinion of the Court, Mr. Justice Baldwin, at p. 90, says: "It is within the undoubted power of State Legislatures to pass recording Acts, by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time; and the power is the same whether the deed is dated before or after the passage of the recording Act. Though the effect of such a law is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law impairing the obligation of contracts. Such, too, is the power to pass Acts of limitation and their effect. Reasons of sound policy have led to the general adoption of laws of both descriptions, and their validity cannot be questioned. The time and manner of their operation, the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the Legislature, according to the nature of the title, the situation of the country, and the emergency which leads to their enactment. Cases may occur where the provisions of a law on those subjects may be so unreasonable as to amount to a denial of a right and call for the interposition of the Court, but the present is not one."

The doctrine of Jackson v. Lamphire was referred to and applied in Curtis v. Whitney, 13 Wal., 71 [20 L. Ed. 513]. Under its authority it was there held, "that a statute which requires the holder of a tax certificate, made before its passage, to give notice to an occupant of the land, if there be one, before he takes his tax deed, does not impair the obligation of the contract evidenced by the certificate."

A review of the legislation of South Carolina, beginning long before the ratification of the Constitution of the United States, will show a succession of Acts in regard to the recording of conveyances, both of personal and real estate, enforcing changes and conditions, operating on those executed prior to the requirement of the new provisions. We will, however, confine ourselves to those enacted since the adoption of that instrument. On 13th March, 1789, 5 Stat., 127, the Legislature passed an Act whereby, after reciting a previous Act, which required the recording of conveyances of land in a prescribed time, and that, if not so recorded, should be void against creditors or subsequent purchasers, who had recorded their title according to its provision, that few or no mortgagees or purchasers had discovered the Act—and had

*153

failed to record according *to its requirements—it enacted that the instrument, though not so recorded, "shall be valid and sufficient in law," if recorded within twelve months from the date of its passage.

On the 5th of September, 1792, 5 Stat., 203, an Act was passed reciting the Act of 1785, which required marriage deeds and contracts to be recorded, and that it had been judicially held not to extend to those actually existing at its passage. Therefore, it enacted that those so existing and not recorded within eighteen months of the passage of the Act should be null and void as against creditors and bona fide purchasers and mortgagees.

On 20th of December, 1823, 6 Stat., 42, the Legislature declared by Act that no marriage settlement "shall be valid until recorded in the office of Secretary of State and Register of Mesne Conveyance of the District wherein the parties reside: Provided, The parties shall have three months to record the same, and if not recorded in three months, the same shall be null and void."

In December, 1832, 6 Stat., 482, the Legislature declared "that marriage settlements of the wife's property, executed since said 20th of December, 1823, and not recorded, shall be regarded as valid between the parties." This very Act of 1843, which makes mortgages void as to subsequent creditors or purchasers for valuable consideration, if not recorded within sixty days after 1st of May, 1844, declares those void which shall not be recorded within sixty days of the 1st day of May, 1844, if executed previous to that day.

If these various Acts, which, in view of the argument for the appellant, affected vested rights supposed to be protected by the prohibition of the Constitution of the United States, it is strange that in the extended period of their existence no question has been ever made, in their practical operation, by or on behalf of creditors, purchasers, or even debtors, of the right of the Court to enforce them.

In the construction of the Act of 1843, and of all registration statutes, being remedial in their character, we must look to the mischief of the existing law, and the means which were supplied to prevent it. The evil was the want of notice of the lien of the mortgage, and the remedy was afforded by requiring it to be recorded in some public office, to which all might have access. While the books which contained the record could be reached, a source of notice was provided for the community. Where, as in the County of Colleton, they were destroyed, it was deprived of the notice they were intended to supply. The Statute ceased to secure the very object

*154

of its *enactment. The mortgagor was left without opportunity of detection or defeat, if he had been dishonestly disposed to sell, or encumber anew, the land he had already mortgaged, and the public were in the attitude of unprotected victims. The evil was not confined alone to the County in which this case originated, but the destruction by the war of so many recording offices throughout the State induced the Legislature to provide a security against double mortgages and deceitful conveyances, and this it did by the Acts of 1866. It was but a re-enactment of the provisions of the Act of 1843, extending them where the instrument was preserved, but the record of it destroyed, by requiring a re-recording between the 20th September, 1866, and the 1st day of December, 1867. In point of fact, the Legislature virtually said, the constructive notice by the Act of 1843 shall not avail, unless the instrument is re-recorded within a specified time. Should the appellants complain, when, by their omission to avail themselves of the benefit of the opportunity thus extended, they have placed Sauls in the position of a purchaser for valuable consideration without notice, when their compliance with the Acts would have not only protected them, but saved the innocent and unwary from a loss, which followed from their own omission to re-record their mortgage? It will be remembered that Sauls did not purchase until the 4th of August, 1868. Actual notice on his part was not proved, and the appellants failed to afford him the constructive notice which the law gave them the opportunity of imparting. Mr. Justice Story, in his Equity Jurisprudence, Section 403, says: "In America it is uniformly held that the registration of a conveyance operates as constructive notice to all

subsequent purchasers of any estate, legal or equitable, in the same property. The reason upon which this doctrine is founded is the obvious policy of the registry Acts, the duty of the party purchasing under such circumstances to search for prior incumbrances, the means of which search are within his power, and the danger (so forcibly alluded to by Lord Hardwicke) of letting in parol proof of notice, or want of notice of the actual existence of the conveyance." In what possible way can Sauls be said to hold the attitude of a purchaser with notice? and if he does not, he is entitled to the benefit of his purchase.

The motion is dismissed. It is necessary, however, as the time fixed for the sale of the other moiety of the mortgaged premises, which, it is admitted, is bound by the mort-

*155

gage, being the share of *the said C. P. W. King, has passed, to remand the case to the Circuit Court, that its further order may be had for such sale. It is so accordingly ordered.

The following is the opinion of

WILLARD, A. J. We fully concur in the opinion that the fact of having complied with the provisions of the registration Act, in force at the time of the making of the mortgage in suit, does not constitute a contract as between the mortgagee and the State, and the subsequent enactment of a law requiring a second Act of registration cannot be regarded as tending to impair the obligation of any such contract.

The real question is, whether the enactment of a law requiring the re-registration of mortgages already in operation, and registered in conformity with the laws in force at its inception, and validating the title of subsequent purchasers and judgment creditors in case of a neglect so to record, tends to impair the obligation of a contract. We do not question the power of the Legislature to pass laws requiring instruments already in existence to be recorded, or to provide suitable penalties in case of a failure to comply with such requirements. The question here arises out of the nature of the penalty imposed. It is, whether it does not disturb the relations between the mortgagor and mortgagee as settled by the mortgage. On this point we yield with reluctance to the authority of the Supreme Court of the United States, as expressed in Jackson v. Lamphire, (3 Pet., 289 [7 L. Ed. 679]). That Court may feel at liberty to treat the question as still open, in view of the fact that the registration laws were not before the Court in that case, nor in Curtis v. Whitney, (13 Wall., 68 [20 L. Ed. 513]); but this Court is bound to give weight to the fact that the legislation of this State on this subject has been shaped upon the views expressed in regard to registration laws in Jackson v. Lamphire, and also to the consideration that doubtful constructions of clauses of the Constitution of the United States, limiting the powers of the States, should generally be solved by the State Courts in favor of those powers, and always so solved where the general doctrines advanced by the Supreme Court of the United States appear to sanction such a course. We do not, therefore, feel at liberty to follow the convictions of our own minds on this subject.

*156

*To validate the title and claim of a subsequent purchaser or creditor is, in effect, to give power to the mortgagor, to affect the mortgaged premises by his act and deed in a manner inconsistent with the legal effect of his mortgage. We cannot see how an Act of the Legislature can have this effect on an antecedent contract, either executory or executed, consistently with the Constitution, whether as a consequence of the failure of the holder of a mortgage to comply with laws requiring the registration of such mortgage, or for any other reason. Laws like that under consideration, requiring the performance of certain acts by an individual, for the exclusive benefit of the community, and in which the party bound to perform has no interest, and attended by a forfeiture of estates as a consequence of a neglect to conform therewith, push the rights of the community, as against the individual, to the utmost limit. If such a construction and operation might be given to the clause of the Constitution as would tend to restrict the sphere of such legislation, it would add greatly to the security of property, without limiting unduly the legitimate means of compelling conformity to law in the hands of the Legislature of the State.

For the reasons above stated, we are compelled to concur in upholding the statute in question.

WRIGHT, A. J., concurred.

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5 S. C. 156

BANK v. RAILROAD COMPANY.

(Columbia. Nov. Term, 1873.)

[*Bills and Notes* ⇐43.]

An instrument of writing, having in every respect the form of a promissory note, except that the corporate seal was impressed, whereby a railroad corporation promised to pay to the order of A. a certain sum of money, *Held* to be a negotiable promissory note.

[Ed. Note.—Cited in McLaughlin v. Braddy, 63 S. C. 438, 41 S. E. 523, 90 Am. St. Rep. 681.

For other cases, see Bills and Notes, Cent. Dig. § 63; Dec. Dig. ⇐43.]

[*Corporations* ⟸455, 465.]

The seal of a corporation is equally appropriate as a means of evidencing its assent to be bound by a single contract as by a specialty.

[Ed. Note.—Cited in Luther v. Wheeler, 73 S. C. 94, 52 S. E. 874, 4 L. R. A. (N. S.) 746.

For other cases, see Corporations, Cent. Dig. §§ 1801, 1826; Dec. Dig. ⟸455, 465.]

Before Carpenter, J., at Columbia, October Term, 1873.

Action by the Central National Bank of Columbia, against the Charlotte, Columbia and Augusta Railroad Company.

*157

*The case is fully stated in the opinion of the Court.

Rion, for appellant.

McMaster, contra.

The following were the authorities cited upon the point on which the case was decided: For appellant—Moss v. Oakley, 2 Hill. N. Y., —; White v. Vt. & Mass. R. R. Co., 21 How., 277; Langston v. So. Ca. R. R. Co., 2 S. C., 248; Cockrell v. Milling, 1 Strob., 445; Giles, Davis & Hill v. Mauldin, 7 Rich., 11. For respondent—Eaves v. Cantzon, 1 Brev., 308; McKain v. Miller, 1 McM., 314; Abb. Law of Corp. 207, §§ 1, 4; Clark v. Farmers' Woolen Co., 15 Wend., 256; Delafield v. Harris, 2 Hill. N. Y., —; 8 Paige, 527; Morris' Canal v. Fisher, 1 Stock., 667; Carr v. LeFever, 27 Penn., 413; Chopin v. Vt. & Mass. R. R. Co., 8 Gray, 575; White v. Vt. & Mass. R. R. Co., 21 How., 575; Brainard v. N. Y. & H. R. R. Co., 25 N. Y., 496; 1 Pars. on Con., 291; 2 Pars. on Con., 721.

April 1st, 1874. The opinion of the Court was delivered by

WILLARD, A. J. The plaintiff sued upon a promissory note in the following form:

Treasurer's Office.

Charlotte, Columbia and Augusta Railroad Co.,

$7,000. Columbia, S. C., April 3, 1872.

Ninety days after date, The Charlotte, Columbia and Augusta Railroad Company promise to pay to the order of Jno. D. Caldwell seven thousand dollars, at Central National Bank, at Columbia, for value received. [Company's Seal.] (Signed) C. Bouknight,

Treas. C., C. & A. R. R. Co.

Endorsed:

Jno. D. Caldwell.

W. B. Gulick.

The plaintiffs are holders for value, having acquired the note before maturity, without notice of any defect of consideration. It is contended that the note is a specialty, and, as such, not negotiable; that the consideration was the sale and delivery of certain promises in writing to pay money, issued by the State, and void, on the ground that they were issued in violation of that clause of

*158

the Con*stitution of the United States that forbids the issuing by States of bills of credit, (see Auditor v. Treasurer, 4 S. C., 311,) and that, therefore, the note is void.

The Circuit Judge submitted to the jury, as a question of fact, whether it was the intention of the parties to the note to make a negotiable note or an obligation under seal. The jury found a general verdict for the plaintiff, which is equivalent to finding that the parties intended making a negotiable note. The Circuit Judge refused a request to charge that as matter of law the note was not negotiable, to which an exception was taken. The present question is whether that ruling is conformable to law.

The only feature of the note that is referred to as importing an intent to create an obligation under seal is the impression of the seal of the corporation on its face. The note would be perfect without this impression, being signed by the proper officer of the corporation. It is in the ordinary form of a negotiable promissory note, with nothing beyond the mere presence of the seal itself to indicate an intention to give it any other character. The seal of a corporation is not, in itself, conclusive of an intent to make a specialty. It is equally appropriate as a means of evidencing the assent of a corporation to be bound by a simple contract as by a specialty. It is true that, ordinarily, negotiable instruments, made by corporations, are attested by the officers of the corporation without its seal. The Act of 3 and 4 Ann. 2 Stat., 544, contemplated both classes of notes as possessing a negotiable character, namely: those made by a corporation as such, and those made by the "servant or agent" of a corporation. If it is competent for a corporation to make a negotiable promissory note by its direct corporate act, then it is equally competent for it to attest such a note by its seal without destroying its negotiable character thereby. That a corporation possesses such competency is evidenced by the statute just referred to.

The authorities cited by appellants do not reach to the case in hand. We are not prepared to go beyond them in a direction where every step is a loss to legal certainty and to the convenience of commerce. The Circuit Court properly held the note to be negotiable.

The appeal should be dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

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5 S. C. *159

*WATSON v. CITIZENS' SAVINGS BANK.

(Columbia. Nov. Term, 1873.)

[*Attorney and Client* ⟸43.]

Where in an action by a creditor against a banking corporation to wind up its affairs, on the ground of insolvency, a temporary order is made restraining the defendant, its officers and agents, from paying out the funds, or otherwise

disposing of the property and effects of the corporation, it is a constructive contempt by the attorneys of defendant to advise its officers and stockholders to file a petition in bankruptcy with the view of removing its property beyond the jurisdiction of the Court, but not a contempt of such a nature as to warrant the suspension or removal of the attorneys.

[Ed. Note.—Cited in State v. Nathans, 49 S. C. 224, 27 S. E. 52.

For other cases, see Attorney and Client, Cent. Dig. § 59; Dec. Dig. ⇐43.]

[*Bankruptcy* ⇐9.]

Notwithstanding the Bankrupt Act, the State Court has a general equitable jurisdiction, until proceedings in bankruptcy have been instituted, to wind up the affairs of an insolvent banking corporation incorporated by the State.

[Ed. Note.—Cited in State v. Nathans, 49 S. C. 203, 27 S. E. 52.

For other cases, see Bankruptcy, Cent. Dig. § 8; Dec. Dig. ⇐9.]

[*Injunction* ⇐143.]

A temporary order for injunction may be made without notice to defendant.

[Ed. Note.—Cited in Jordan v. Wilson, 69 S. C. 258, 48 S. E. 224.

For other cases, see Injunction, Cent. Dig. § 315; Dec. Dig. ⇐143.]

[*Injunction* ⇐148.]

A temporary order for injunction is not void because an undertaking is not required of the plaintiff.

[Ed. Note.—Cited in Smith v. Smith, 51 S. C. 379, 388, 29 S. E. 227.

For other cases, see Injunction, Cent. Dig. §§ 323–334; Dec. Dig. ⇐148.]

[*Attorney and Client* ⇐36.]

The general jurisdiction of the Circuit Court to punish attorneys for contempts is not affected by Sections 6, 7 and 8, Ch. 107 of Gen. Statutes.

[Ed. Note.—Cited in State v. Nathans, 49 S. C. 229, 27 S. E. 52.

For other cases, see Attorney and Client, Cent. Dig. § 49; Dec. Dig. ⇐36.]

[*Attorney and Client* ⇐50.]

An attorney need not be first indicted and convicted before he can be punished under Section 7, Ch. 107 of Gen. Statutes.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 65; Dec. Dig. ⇐50.]

[*Attorney and Client* ⇐43.]

An order to suspend or remove an attorney for contempt should not be made where the offence is not of so gross and serious a nature as to render him unworthy of his office.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 59; Dec. Dig. ⇐43.]

[*Motions* ⇐62.]

An order imposing an impossible condition is in effect absolute.

[Ed. Note.—For other cases, see Motions, Cent. Dig. §§ 84–87; Dec. Dig. ⇐62.]

[*Attorney and Client* ⇐43.]

For an attorney of defendant to receive payment of his fees after an order, wherein attorneys are not named, restraining the defendant from paying out its funds, if a contempt at all, is not such a contempt as warrants the suspension or removal of the attorney.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 59, 60; Dec. Dig. ⇐43.]

[*Contempt* ⇐58.]

A mere disclaimer of all intention of contempt does not purge the contempt or relieve the party from the consequences of the act committed by him.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 174; Dec. Dig. ⇐58.]

Before Carpenter, J., at Columbia, December, 1873.

The facts of the case are so fully stated in the opinion of His Honor the Circuit Judge as to render any further statement here unnecessary. The opinion is as follows:

Carpenter, J. The present proceeding arises upon rules issued by this Court, December 13, 1873, against J. D. Pope, A. C. Haskell, F. W. McMaster, L. E. LeConte, W. K. Bachman and L. F. Youmans, Esquires, as attorneys, solicitors, and counsellors of this Court, requiring them severally to show cause—

First. Why they and each of them should not be adjudged in contempt of the orders and authority of this Court; and,

Second. Why they and each of them should not be removed from their said offices as attorneys, solicitors and counsellors of the Circuit and Probate Courts of this State, and their names be stricken from the roll of attorneys.

The rules were made returnable December

*160

19, 1873; but by a *subsequent order the time for making the returns was extended to the 20th day of the same month, and the hearing thereon was fixed for the 23d day of the same month.

The returns of the several respondents were duly filed.

The return of J. D. Pope, Esq., avers that the respondent acted in good faith and conscientiously in whatever advice he gave to the Citizens' Savings Bank; denies that he advised his clients to disregard the orders or authority of this Court; denies that he intended, in anything done by him, any disrespect or contempt to the authority of this Court or its presiding Judge. The return further sets forth, in the ways of "pleas in bar," that the assets of the Citizens' Savings Bank passed into the custody of the Register of the Bankrupt Court, by operation of the bankrupt law of the United States, which Court has a jurisdiction paramount to and exclusive of the jurisdiction of the State Courts; that the orders of the Bankrupt Court, made in respect of such assets, are binding on this Court; that it is the right of any citizen of the United States to file his petition in bankruptcy, notwithstanding the existence of any orders of the State Court; that it was, under the bankrupt Act, the duty of the Citizens' Savings Bank to go into bankruptcy at the time in question; that the respondent is a duly qualified attorney, solicitor and proctor in the United States Court; that the United States Circuit Court has adjudged that the order of the Bankrupt Court, adjudicating the said

Citizens' Savings Bank a bankrupt, was properly granted, notwithstanding the Act of Congress, approved February 13, 1873, entitled "An Act to amend the bankrupt law;" that all advice given by him in the said bankruptcy proceedings was given by him as an attorney of that Court.

The return next sets forth, "as matters of demurrer," that the rule states no statutory offense which is sufficient cause for the removal of an attorney, solicitor and counsellor; that, unless guilty of some offense which is by statute sufficient cause for removal, an attorney is entitled to hold his office for life; that the Constitution of the United States forbids any State to enforce any law which shall abridge the privileges or immunities of any citizen of the United States, or deny to any person the equal protection of the law; that the laws made by authority of the Constitution of the United States forbid any Judge from, in any manner, hindering the operation of any laws passed in pursuance of the Constitution of the United States; that no State Court can in any manner im-

*161

pair *the jurisdiction of any Court established by authority of laws passed in pursuance of the Constitution of the United States; that this Court had no jurisdiction of the action instituted by the above named plaintiff, and could make no valid order therein; that this Court made no valid order in the above entitled cause; that no attorney can be held to answer in this Court for any advice given to any suitor in this Court; that no attorney can be held to answer in this Court for any advice given to a suitor in the United States Court; that this Court has no right to enjoin any person or corporation from the payment of fees to attorneys; and that this Court cannot punish an attorney for accepting fees from suitors in this Court.

By a supplemental return, made by the requirement of this Court, upon hearing the return now stated, the respondent states that he did demand and receive a retaining fee of five hundred dollars for his firm, which sum was paid by the Citizens' Savings Bank, on the 29th of November, 1873.

The returns of F. W. McMaster and Louis E. LeConte, Esquires, are identical with the return already stated.

The return of each of the other respondents denies that any contempt of the authority of this Court was intended.

The return of W. K. Bachman, Esq., avers that the respondent had distinctly in view that the order of adjudication of bankruptcy would place the assets of the Citizens' Savings Bank in the exclusive jurisdiction of the United States Court, and beyond the jurisdiction of this Court; and, further, that all the respondents concurred in advising the Citizens' Savings Bank to go into the Bankrupt Court, and to petition to be adjudged a bankrupt.

The return of A. C. Haskell, Esq., avers that an attorney cannot be held responsible to the Court for any advice given to his client, but that his sole responsibility in such case is to his client, and that his client is alone responsible to the Court for the acts done in pursuance of the advice of an attorney.

The foregoing statement embraces all the causes shown by the respondents which it is necessary to consider in deciding the present case.

It will be proper to state briefly at this point the state of facts out of which the present proceeding has arisen.

On the 22d day of November, 1873, John L. Watson exhibited before me his sworn com-

*162

plaint, in his own behalf and that of all *other creditors of the Citizens' Savings Bank of South Carolina, in which he alleged, among other things, that he was a creditor of said Bank, and had been refused payment of his demand; that the said bank had suspended payment generally, had ceased to do business as a bank, and was insolvent; that he was informed and believed that the officers of the said bank were wasting and misappropriating the funds and effects of the bank. The complaint demanded: (1) An account by the officers of the bank of the funds thereof; (2) an injunction restraining the bank from exercising its corporate powers, and from paying out, transferring, or delivering to any person any of its moneys, property or effects; (3) that a receiver be appointed; (4) that the creditors be called in to establish their claims; (5) that the plaintiff might have such other relief as might be equitable.

Upon hearing the complaint a rule was made on the defendant, returnable on the 3d day of December, 1873, to show cause why an injunction should not be granted, restraining its officers and agents from paying out, transferring, or delivering to any person, its money, property, or effects, and, also, why a Receiver should not be appointed, and why the plaintiff should not have such other relief as might be just. It was further ordered that, in the meantime, the defendant, its agents and officers, be restrained from paying out the funds, or otherwise disposing of the property and effects of the defendant corporation; and it was ordered that a copy of the complaint and of the order be served on the officers of the defendant corporation.

On the 4th day of December, 1873, the hearing upon the return to the above stated rule took place at my Chambers. The defendant presented two principal causes in his return to the rule: the first cause denying the jurisdiction of this Court over the subject-matter of the complaint, and denying that this Court had, by its restraining order of November 22d, 1873, obtained any custody or control of the property and assets of the

respondents; and the second cause showing that the respondent was adjudged a bankrupt on its own petition in the District Court of the United States for the Eastern District of South Carolina, on the 1st day of December, 1873, and that that Court had, by its Register, taken possession of the assets of the respondent.

Upon this return full arguments were heard, and on the 9th of December, 1873, the decision of this Court was rendered. The conclusions of the Court were thus stated in that decision:

*163

*1st. That this Court had jurisdiction of the cause.

2d. That the assets of the bank were legally and rightfully in its possession.

3d. That its jurisdiction was not ousted by the proceedings in bankruptcy.

4th. That its order made in the premises on the 22d of November, 1873, had been violated.

5th. That the next step taken in the administration of the assets of said bank is, necessarily, the return of said assets to the custody of this Court.

Further proceedings in the cause were then continued until the 12th day of December, 1873. The next step was the issuing of the rule against the attorneys of the Citizens' Savings Bank, as already stated, and at the same time a rule against the stockholders of the bank, to show cause why they should not be attached for contempt of the orders of this Court in removing the assets of the said bank from the custody of this Court, and in paying out its funds to its attorneys, in disregard of the order of this Court.

It is under such circumstances, and in view of the conclusion of law as above stated, that this Court is now called upon to consider these grave questions—

First. Have these respondents been guilty of contempt of this Court in the premises?

Second. If guilty of contempt in the first instance, have they purged themselves of such contempt, or shown good cause why no punishment should be inflicted on them therefor?

This Court is fully impressed with the serious nature of the questions thus forced upon it for decision; but it finds itself confronted by issues which must be met, and it has no alternative.

The contempt alleged to have been committed by these respondents consists—

First. In advising the stockholders of the Citizens' Savings Bank to file their petition for adjudication as a bankrupt, in the United States District Court, solely with a view of removing the funds of said bank from the custody and control of this Court; and,

Second. In accepting, and receiving from said stockholders, through the officers of the bank, large sums of money belonging to the assets of the bank, in violation of the restraining order of this Court, made on the 22d day of November, 1873.

*164

*That the acts which are thus alleged to constitute the contempt were committed by the respondents, and committed with a full knowledge of the terms and scope of the restraining order of this Court, made on the 22d day of November, 1873, is not denied; and the question to be decided first is, whether these acts are a contempt of the orders and authority of this Court.

Contempts of Court are of two classes:

The first class consists of acts done which are openly insulting or contemptuous in their nature towards the personal authority, dignity, and station of the Court, or the Judge or Judges composing the Court.

The second class consists of acts done in violation of the orders and authority of the Court, and may or may not be attended by any open manifestations of an intent to insult or deride the person of the Court.—4 Bl. Com., *283.

These two classes of contempt are sometimes denominated direct and consequential, and sometimes actual and constructive.

The power to punish for contempt of either class is as ancient as the Courts and laws themselves, and is inherent in all Courts of justice.—4 Bl. Com., *286; Bacon's Abr. Courts, E.; 1 Bouvier's L. Dict., 352, Contempt; United States v. Hudson, 7 Cranch, 32.

In the latter case, the Supreme Court of the United States says:

"Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. * * * To fine for contempt—imprison for contumacy—enforce the observance of orders, etc., are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others; and, so far, our Courts no doubt possess powers not immediately derived from statute."

In Yates v. Lansing, 9 Johns., 395, the Court remarked: "The right of punishing for contempt—by summary conviction—is inherent in all Courts of justice and legislative assemblies, and it is essential for their protection and existence. * * * The discretion involved in the power is, in a great measure, arbitrary and undefinable; and yet the experience of ages has demonstrated that it is perfectly compatible with civil liberty and auxiliary to the purest ends of justice. The known existence of this power prevents, in a thousand instances, the necessity of using it, and is, perhaps, the strongest reason why it is so seldom abused."

*165

*In respect to the first class of contempts, it may be remarked that an expression of

regret for the contempt committed is always held to be essential to purge the contempt.

In the returns of these respondents there is no expression of regret for the acts done, but only a disavowal of any improper motive. If the contempt here were no more than a personal affront to the presiding Judge of this Court, the returns herein would not furnish sufficient ground for releasing the respondents from the penalties of their contempt.

But the contempts now to be considered are not contempts of the first class named, but belong to the second class, and consist of acts done in violation of an existing order of this Court, well known to each of the respondents, and done with a view confessedly of defeating the effect of that order. The undisputed facts here are: 1. That this Court made an order on the 22d day of November, 1873, whereby it enjoined the Citizens' Savings Bank, its officers and agents, from paying out the funds or otherwise disposing of the property and effects of the said bank. 2. That this order was known to these respondents. 3. That, on the 1st day of December, 1873, the bank, by advice of these respondents, and represented by them as its authorized attorneys, filed its petition in the Bankrupt Court, and obtained an order adjudicating it a bankrupt, and a further order directing the bankrupt to surrender all of its property into the hands of the Registrar of the Bankrupt Court. 4. That all the property of the bank was, on the same day, surrendered into the hands of the said Bankrupt Court. 5. That, on the 29th day of November, 1873, two days before the said proceedings in bankruptcy, the respondents demanded and received from the Citizens" Savings Bank the aggregate sum of twelve hundred and fifty dollars, as fees to the respondents as the attorneys of the bank.

The character and effect of the acts done by the respondents, in connection with the proceedings in the Bankrupt Court, will be first considered.

The order of this Court, of November 22d, 1873, restrained "the defendant, its officers and agents," from doing certain acts. This order included these respondents, and was, in law, addressed to them.

They were the agents of the defendant corporation.

In People v. Sturtevant, 9 N. Y., 263, the

*166

Superior Court had *made an injunction order restraining the mayor, aldermen and commonalty from doing certain acts. The defendant, an alderman, and acting as such, joined with the Board of Aldermen in disregarding the order, and was thereupon attached for contempt. The Superior Court imposed a fine and imprisonment for the contempt, and this judgment was affirmed by the general term, and an appeal taken to the Court of Appeals. The Court says: "The effect of an injunction or decree restraining any acts of a corporate body, and addressed in the ordinary way to it or its agents, &c., is to bind, not only the intangible artificial being, but, also, all the individuals who act for the corporation in the transaction of its business to whose knowledge the injunction or decree comes. Unless this be so, it would be necessary, in order effectually to bind a corporation by an injunction, to make every person a party to the suit who could by any possibility be its agent in doing the prohibited act. No such practice has ever prevailed."

Nor is formal service of such an order essential to bind a party to obedience thereto. It is knowledge only that is essential, and the suggestion in one of the returns that no service of the order was made on the Vice President of the bank is wholly without force.

In the case just cited the Court says: "In administering the law in respect to the violation of injunctions, the Court of Chancery never lost sight of the principle that it was the disobedience to the order of the Court which constituted the contempt, and, therefore, although it required of the party availing himself of its order a substantial compliance with the rules of practice upon the subject, it would not usually allow the effect of its orders to be wholly lost, when the party sought to be bound by the order had actual knowledge or notice of its existence, although there might have occurred some slip in the formal method of bringing it home to him."—Hull v. Thomas, 3 Edw. Ch., 236; People v. Brower, 4 Paige, 405; McNeil v. Garratt, 1 Cr. and Phil., 98.

"If an order is served on the Solicitor, and knowledge thereof is brought home to the party whose duty it is to obey the same, he may be punished for a wilful disobedience of the order, in the same manner as if it had been personally served on himself."—People v. Brower, 4 Paige, 405.

"The defendants in a cause are guilty of

*167

a contempt in violating *an order which the Court had pronounced, and of which they knew, although the order was not entered or the process served."—2 Abbott's N. Y. Dig., 5.

The restraining order of this Court, made November 22d, 1873, was, therefore, by its terms and legal effect obligatory and binding on these respondents.

The returns of the respondents, however, raise the issues: (1) That the order in question was void for want of jurisdiction in this Court to make it. Our conclusion upon this point, together with our reasons, has already been announced, but the extreme confidence or pertinacity manifested by the respondents in still claiming that this Court had no jurisdiction in the premises, has led to a careful and full re-examination of the whole ques-

tion of jurisdiction as herein involved. It is not too much to say that in the present position of this case this Court would have at least cheerfully accepted the conclusion that there was a want of jurisdiction, if it had found any reasonable ground upon which to rest such a conclusion. The result has been, on the contrary, to strengthen the confidence felt, both upon grounds of reason and authority, in the correctness of the former conclusion, that this Court had complete jurisdiction, in all respects, to make its order of November 22d, 1873. The order was within the jurisdiction of this Court, was known to all the respondents, and forbade them, and each of them "from paying out or otherwise disposing of the property and effects" of the Citizens' Savings Bank; (2) but it is said that if the order of November 22, 1873, was an order which it was within the jurisdiction of this Court to make, still it was the right of the Citizens' Savings Bank, and of these respondents, to procure an adjudication in bankruptcy, notwithstanding the order of this Court.

Of the effect of the order adjudicating a party a bankrupt, it is not necessary now to inquire. The first question is, had these respondents a right to proceed in that Court, with the view of depriving this Court of the custody of the property in question? If it were admitted that the jurisdiction of the Bankrupt Court was so far paramount and exclusive as to operate to oust the jurisdiction of this Court immediately upon the making of an order of adjudication in bankruptcy, it would not be the less, but rather the more a contempt of this Court to procure an order of that Court for such a purpose. The order of this Court restrained the respondents from paying out or "otherwise

*168

disposing of the property and effects" of *the bank. When, therefore, these respondents, as the agents and attorneys of the bank, proceeded to apply to the Bankrupt Court for an order, the effect of which they believed would be to remove the property of the bank from the custody of this Court, they did, in fact and intent, "dispose" of the property, and it is little more than solemn trifling to now say that they did not remove it, but the law. As well might they have thrown open the doors of the bank and invited the passers-by to take its property, and when called to account for their conduct, inform the Court that they did not disobey its order, but the passers-by! In either case, they did an act which resulted in removing the property from the custody of the Court; in either case, they knew the order forbade its removal, and that the only result of their act would be to effect its removal.

That the voluntary, preconcerted action of these respondents in seeking the jurisdiction of the Bankrupt Court, avowedly in order to accomplish the removal of the property from the custody of this Court, and their obtaining an order which, in their judgment, could not but result in defeating entirely the order of this Court, by which they were then bound, is an act done in violation and contempt of the authority of this Court, does not require argument nor admit of doubt; and that, too, wholly irrespective of any question which may exist respecting the character of the jurisdiction of the Bankrupt Court in its relation to the jurisdiction of this Court in such a case.

But the offense of the respondents in the present case is aggravated by other conduct, which has been stated in the decision of this Court, filed December 19th, 1873. An application was made to this Court on the 22d of November to hear a motion to rescind the order of that date, and the Court consented to hear the motion on the 24th of November. At that time the respondents requested further time to make that motion, which was granted. The motion was never made. The only admissible proceeding on the part of the respondents was such a motion.

"When one is served with an order, apparently valid, he must obey it, or at once move to correct it, if he deems it necessary to have it changed; and, on motion to commit him for contempt in disobeying the order, the only issues to be considered are the excuses for disobeying it, and the regularity of the proceedings had under the order by the party seeking to procure the process for a contempt."—Hilton v. Patterson, 18 Abb., 255.

*169

*"An order for an injunction or an interim restraining order, must be implicitly observed, and every diligence must be exercised to obey it to the letter. However erroneously or irregularly obtained, the order must be implicitly observed so long as it exists. A party affected by it cannot disregard it or treat it as a nullity, but must have it discharged on a proper application. A man who does not obey it to the letter, so long as it exists, is guilty of a contempt, unless there is something to mislead upon the plain reading of the order."—Kerr on Injunctions, *638.

"The agents of a man against whom an injunction has been awarded will be committed for contempt, if, having knowledge of the injunction, they act in contravention of the order of the Court."—Kerr on Injunctions, *644, and cases there cited. To the same effect see Hilliard on Injunction, 165, 169, 170.

In High on Injunction, 498, it is said: "The party against whom an injunction issues will not be allowed to violate it on the ground of want of equity in the bill, since he is not at liberty to speculate upon the intention or decision of the Court, or to question the authority of the Court to grant relief upon the facts stated, except upon application to dissolve the injunction."

"The reason for this rule," says the same

learned author, "is found in the necessity of preserving the respect and obedience due to the mandates of equity, and of preventing the disastrous confusion which would inevitably result from allowing parties against whom injunctions were issued to be themselves the judges of the propriety of the relief or the regularity of the proceedings. From the nature of the case, the tribunal granting the writ must itself be the arbiter, and its mandates are to be strictly observed until properly revoked. And if the Court granting the relief had jurisdiction of the subject-matter, the fact that its prerogative was erroneously exercised does not render the injunction void, but only voidable, and, until set aside or revoked, it is entitled to implicit obedience."

Again, the same author, at page 498, says: "The violation of an injunction constitutes a contempt of the Court from which it issued and will be punished accordingly, nor does the question of the motive or intent with which the writ was disobeyed alter or vary the responsibility for the violation: on the contrary, it may be stated as a general rule, that when the writ has been duly served on the defendants they are liable for its violation in whatever capacity or from whatever motive they may have acted."

*170

*These respondents are, then, in this position: They have violated an injunction of this Court, issued in a case of which this Court had complete jurisdiction; they have never asked to have that order set aside or revoked; they have sought another tribunal, and, in flagrant and manifest contempt of the order of this Court, have placed the assets which they were enjoined from disposing of in any manner, in the custody of the Bankrupt Court; they have done this for the avowed purpose of defeating the order of this Court; they have proclaimed this purpose, not only in acts, but in a card over their names in the newspapers; they have further sought to defeat the jurisdiction of this Court by procuring an additional order restraining the plaintiff in the present suit and his attorneys from further invoking the authority of this Court; and, having done all this, they now come into this Court and again deny the jurisdiction of this Court over the subject-matter of the injunction, in the face of the decision of this Court upon that question, and without a word of regret for the contempt thus cast upon this Court, or an offer to repair the wrong done, ask that the present rule against them may be discharged. Such a course implies one of two things: either that this Court does not know its duty, or, knowing it, does not dare to discharge it.

Authorities without number might be added to those already referred to and quoted sustaining each of the conclusions already announced, but it will be sufficient to cite one other authority—the case of Hines and Hobbs v. Rawson, 40 Geo., 356. In that case, certain citizens of New York had filed their bill in the State Court of Georgia for foreclosure of a mortgage. In the progress of the cause, the State Court enjoined the plaintiffs from proceeding to judgment until certain assets should be marshalled and certain questions of priority in the distribution of those assets should be settled. While this injunction remained unmodified, the attorneys of the plaintiffs in the suit filed a bill in the United States Circuit Court for the Southern District of Georgia, against the defendant. Thereupon the Chancellor in the State Court issued a rule against the attorneys to show cause why they should not be punished for violating the injunction of the State Court. The Court, after argument, ordered the attorneys to dismiss the proceedings in the United States Court, and in default of doing so, that they be considered in contempt. This decision was brought to the Supreme Court for review. The Supreme Court held the judgment of the Chancellor

*171

*erroneous in requiring the attorneys to dismiss the proceedings in the United States Court, but expressly held that the act of the attorneys was a contempt of the State Court for which that Court might inflict punishment.

McCay, J., says: "When these parties filed their bill in Dougherty Supreme Court, and in the regular course of judicial proceeding there, they were enjoined from reducing their claims to judgment until the matters set up in the petition of Mrs. Rawson for the injunction was disposed of. It is a direct violation of the order of the Court in which, by their own motion, they are suitors, to seek another tribunal for the attaining of the very thing they are restrained from. We recognize fully the doctrine, that neither a State nor a Federal Court will restrain the other, even indirectly, by acting on the party, and admit that the rule so well understood as to foreign jurisdictions does not apply between the Federal and State Courts. But it will be found, on looking into these cases, that they are all cases in which the party sought to be enjoined was free to act when he sought the tribunal in which it was attempted to restrain him from proceeding.—2 Paige Ch., 404; 2 Story's Eq., Sec. 900. But in this case the defendant was not free to act. Of his own motion he had come into the State Court in the regular course of proceedings there. The injunction had been put upon him by a Court where he was a suitor, and when he sought the Federal tribunal, he disobeyed the order of the State Court. No tribunal can permit such an indignity. If its orders are improvident, it is to be presumed that it will, on motion, vacate them, or if it fails so to do, there is a writ of error to this tribunal, or if the party takes the

proper steps, the law authorizes a removal of the controversy to the Federal Court. But a contemptuous disregard of the order of the Court, by one who is a suitor in it, authorizes the Court to punish the offender, and we think, under the circumstances of this case, the Court was authorized to do so. * * * The State Court, as we have said, has the right to punish for disobedience of its order. If the defendant sees fit to take the consequences, let him do so. Each Court has its sphere, and should keep within it, and we doubt not the Chancellor below can find a mode of attaining his end, to wit: obedience to his injunction, other than an order directing the defendant to dismiss his proceedings in the Federal Court. We reverse the judgment on the ground that the Chancellor had no right to order the pro-

*172

ceedings in *the Circuit Court to be dismissed. But we have no doubt of his power to punish the defendant for violating his injunction, and to continue that punishment until he shows, by his conduct, that he is in fact obeying the process of the Court."

This decision is in principle wholly applicable to the case before us. Almost the only feature of distinction between the two cases is the fact that in the Georgia case the parties who defied the State Court were plaintiffs in the Court, whereas, in this case, they are defendants. But in either case they were before the Court, and they had been enjoined by the Court, and their subsequent voluntary proceeding in the Federal Court was pronounced "an indignity which no tribunal can permit."

It is said, however, by these respondents, that the Court of last resort, meaning thereby the Circuit Court of the United States, "has adjudged, after full argument and consideration had, that the order in bankruptcy was properly granted, notwithstanding the Act of Congress of February 13th, 1873, entitled 'An Act to amend the bankrupt law.'"

It is necessary here to remark that this Court has no legal or official relations whatsoever with the Circuit Court of the United States. That Court is neither superior nor inferior to this Court. It has no supervisory, appellate, or other jurisdiction over this Court. When presided over by a learned or upright Judge, its judgments are deserving of just so much regard from this Court as the reasons assigned for them will justify. In the present instance the judgment of that Court was rendered under circumstances which induced that Court to say that they "were allowed no time to file an opinion in writing, and only to state briefly the conclusions." No authorities are cited to sustain the conclusions, and the steps or methods by which the conclusions are reached, are known only to the presiding Judge himself. In view of such a judgment, it will hardly be expected that this Court will yield its deliberate opinions, and retire from positions which it has assumed as the result of careful study and reflection, and for which it has fully stated the reasons and the authorities. This Court will content itself with reaffirming all the conclusions stated in its decision of December 9th, 1873, respecting the relations of this Court to the Bankrupt Court, under the Act of Congress of February 13th, 1873.

But this Court does not now question the

*173

right of the Bankrupt *Court to make the orders in the bankruptcy proceedings upon the state of facts presented to that Court at the time the orders were made; it only questions the right of these respondents to seek the jurisdiction of that Court for the purpose of defeating an order of this Court addressed to them and binding upon them. The Bankrupt Court has its responsibilities, and this Court has its responsibilities. This Court is not now called upon to affirm or deny the propriety of any orders made by that Court. Its only concern is with its own authority and dignity, and its duty to enforce its own orders and to punish those who set them at defiance, in whatever place or for whatsoever purpose.

But if the orders made by the Bankrupt Court were admitted to be wholly proper and well advised, that fact would not tend to relieve these respondents from the consequences of their violation of the order of this Court. However clear the jurisdiction of that Court to make those orders, these respondents, under the order of this Court of November 22d, 1873, had no right to seek the jurisdiction of that Court, or to do any act whatever, the effect of which would naturally be to remove the property in question from the custody of this Court. Their entering that Court for that purpose was a violation of the order of this Court, and it is immaterial whether the jurisdiction of that Court is concurrent with this Court or exclusive of it. The disobedience of the order of this Court, by these respondents, is equally clear and flagrant in either case.

The second alleged contempt of these respondents consists in their demanding and accepting from the Citizens' Savings Bank "large fees out of the funds of the bank on the 29th day of November, 1873." The fact here alleged is expressly admitted by all these respondents.

Of the legal character and effect of the act, this Court has no doubt. The respondents and the bank, and all its agents, were forbidden, by this Court, on the 22d day of November, 1873, to part with any of its funds. This order was known to all the respondents. But on the 29th day of November, 1873, two days before the commencement of proceedings in bankruptcy, they demanded and received fees, as attorneys, out of the funds of the bank. There is but one

possible ground of excuse for such an act, and that consists in denying the jurisdiction of this Court to make the order. Upon

*174

that question this Court has reached its *firm conclusion, and, in accordance with that conclusion, it holds the act of these respondents in demanding and accepting fees from the funds of the Citizens' Savings Bank, on the 29th of November, 1873, to be a clear and palpable violation and contempt of its authority as a Court. If the payment of fees was required in order to protect the interests of the bank, another course was open to the bank and its attorneys, which would have involved no violation of the order of the Court. The property of the bank was a "fund in equity" from the moment this Court made the restraining order of November 22d, 1873, and these respondents had no right whatever to receive fees from that fund, except upon the order of this Court.

The only remaining question is the power and duty of this Court to inflict punishment for the several acts of contempt which these respondents have committed. Aside from the general power inherent in all Courts of justice to punish for contempts of its person or authority, power to punish for such offenses is conferred by Sections 6 and 7 of Chapter CVII of the General Statutes. By the first of these Sections, the power is conferred to punish for direct contempt in the presence of the Court. By the latter Section, the power is conferred to remove or suspend any attorney, solicitor or counsellor, who shall be guilty of any deceit, malpractice or misdemeanor, after the accused shall have been furnished with a copy of the charges against him, and an opportunity given him to be heard in defense. The present case falls within the terms and intent of the latter Section, and these respondents have each enjoyed the full protection afforded by that Section. It is now for the Court to determine the punishment which shall be most nearly commensurate with the offense committed.

In reaching the conclusions now stated, this Court has sought to divest itself of every trace of personal feeling, and to look with judicial calmness at the several questions involved. It has taken ample time, and has availed itself of every aid within its power to a right conclusion. It would gladly have listened to any arguments from the learned and eminent counsel who represented the respondents, but no arguments were submitted. The conclusion is irresistible, that if the orders of this Court are to be deliberately and systematically violated by its attorneys, and this Court is to sit idly by and overlook such contempts, then the juris-

*175

diction and *powers of this Court are held at the will and sufferance of its attorneys. In such an issue this Court would be false to its highest and most essential functions, and false to the community for whose protection Courts are instituted, if it did not lay aside all considerations save those of solemn judicial duty, and assert the supremacy of its authority under the Constitution and laws of the State.

It is, therefore, adjudged that each of the respondents, to wit: J. D. Pope, A. C. Haskell, F. W. McMaster, L. E. LeConte, W. K. Bachman and L. F. Youmans, Esquires, is in contempt of this Court, by reason of the several acts charged against him in the rules issued in this case.

And it is further ordered, adjudged and decreed that each of the said respondents, J. D. Pope, A. C. Haskell, F. W. McMaster, L. E. LeConte, W. K. Bachman and L. F. Youmans, Esquires, be, and he is hereby, suspended from his office of attorney, solicitor and counsellor in the Circuit and Probate Courts of this State, and forbidden to practice therein, until the property and effects of the Citizens' Savings Bank shall be restored to the custody of this Court, and until all fees received by him from the said bank since November 22d, 1873, shall be returned to the said bank, and to the custody of this Court; and the Clerk of this Court is hereby charged with the service on each of the said respondents of a duly attested copy of the decree of this Court, which will be filed herewith.

The respondents below appealed to this Court.

Campbell, Rion, Connor, Barker, for appellants.

S. W. Melton, Solicitor pro tem., contra.

April 4, 1874. The opinion of the Court was delivered by

MOSES, C. J. The importance of the issue presented in the case has been recognized by our consent, not only to allow it to be docketed, but to be heard in anticipation of the Term to which it properly belongs. While it affects on the one side the professional position and interests of the bar, it is not to be forgotten that on the other it involves the authority and dignity of the bench. Justice could not be enforced in the impartial and fearless spirit which should govern and direct its administration without full

*176

power on *the part of the Court to enforce obedience to its orders, subject alone to reversal or correction, in the mode provided by law.

The bar, in no small degree, contribute to the reputation of the Court. Where it is impressed with the high characteristics which give to the profession the lofty and eminent position which it maintains in the community as the champions and vindicators of public as well as of private rights, its salutary influence acts upon the Court by inspir-

ing it with the same ennobling principles, so essential and important to the proper dispensation of law and justice. The rights of the attorney, within his proper and prescribed sphere, are as sacred as those of the Court. Both must be respected and maintained within their just limits, untrammeled by all control, except that which the law enjoins.

Influenced by the proper considerations which the character of the case demands, while we have given to it all the deliberation necessary in our judgment to a correct conclusion, in our view we see nothing which requires an inquiry into many of the points submitted in behalf of the appellants. While they may involve abstract propositions of a very interesting nature, we do not perceive their bearing or effect upon the principles by which the case must be determined.

We do not propose to consider whether the restraining order of the 22d November, 1873, is of the class of remedies provided by the second Section of the Code, or whether, according to Title VII, it is a provisional remedy, auxiliary and subservient to the particular relief sought by the complaint, and operating for the immediate protection of the fund, the disposition of which is to depend on the final adjudication of the case. Nor do we regard it necessary to consider at length whether, in view of the bankrupt Act, before the action of the Court, which alone has the right to administer it, the State Courts have lost all jurisdiction in regard to insolvent corporations, and that, notwithstanding no interference by the United States Court, either on the motion of the corporation itself or of a creditor, a State Court which has a general equitable jurisdiction to settle the affairs of an insolvent corporation has lost it because proceedings may be instituted in the Court of Bankruptcy to withdraw from its jurisdiction the control of its assets, by subjecting the corporation to proceedings in bankruptcy in the only Court which is authorized to entertain them. In our judgment, until such adjudication, the Circuit Court of the State, under its general

*177

*equitable powers in relation to insolvent corporations, preserves its jurisdiction. Nor does the examination of the cases cited for a different conclusion at all affect our judgment in this particular. Such, too, seems to be the opinion of His Honor Judge Bond, as expressed in his order of 19th December, 1873.

The jurisdiction by virtue of which his Honor the Circuit Judge made the order of 22d November, 1873, appears to us to have been within the general powers conferred by the Constitution and existing statutes. The Sections of the Code in regard to injunctions, considered as a whole by the comparison of each of its parts, do not materially change the mode of practice which existed before the abolition of all distinction between legal and equitable remedies. It is clear that, by the 247th Section of the Code, the temporary order for an injunction may be heard without notice to the defendant. In fact, notice of the application might defeat the very object which the order was intended to secure. Nor did the failure of the Judge to require a written undertaking of the plaintiff to pay all damages which the corporation might sustain deprive him of jurisdiction in the motion then before him. It was not dependent on his compliance with every formal condition by which the Statutes proposed it should be conducted and regulated. There may be cases where the requirement of a bond becomes "a jurisdictional question," as in the administration of the attachment laws, where the whole power of the Court is conferred by statute, and, in enforcing it, it can have no aid or support from its common law or equitable powers.

The pressure of business on our time will not permit us to enlarge upon all the points made by the return, which assume error in the judgment of the Court, particularly when it is remembered that, from its peculiar character, this case is taken up for its decision out of its regular order. Without inquiring whether the power which is inherent in the Courts of General Sessions and Common Pleas, as a Court of general jurisdiction to punish attorneys for contempt, is restricted to that declared in the 6th, 7th and 8th Sections of Chapter CVII of the General Statutes, we concur with the Judge below in holding that the course of the attorneys, in respect to his order of 22d November, 1873, was a violation of that duty which they owed to his judicial authority. Those Sections, while not precluding his general authority, would seem to involve only his power to remove or suspend, and if considered a restraint on all other punishment of attorneys who may com-

*178

mit contempts, not deserving *suspension or removal, would deprive the Court of the right to impose an infliction of a less severe or excessive character. It could not have been intended that a slight contempt should meet with the excessive penalty of suspension or removal from the bar. Nor are we affected by the argument on behalf of the attorneys that before the Court can exercise authority under the 7th Section of the Chapter just referred to, "the attorney must be first indicted and convicted." That such could not have been the acceptation in which the Legislature intended the Section to be received is manifest from that portion of it which requires a copy of the charges, where the alleged offense is "deceit, malpractice or misdemeanor, to be delivered by the Clerk of the Court." The construction contended for would take from the Judge all right of determining the existence of the charge, and actually refer it as a question of fact to the jury. Suppose the contempt should be in a Court which decides

without the intervention of a jury, and yet may suspend or remove an attorney, the power would be entirely defeated. In Stevens v. Hill, 10 Excheq., 30, Lord Abinger said: "I never understood that an attorney might not be struck off from the roll for misconduct in a cause in which he was the attorney merely because the offense imputed to him was of such a nature that he might have been indicted for it. So long as I have known Westminster Hall, I never heard of such a rule as that."

The violation of an order of the Court involves a greater contempt of its authority than a mere personal affront to a Judge, even when presiding. The one, while it affects the dignity of the Court, may be repaired and atoned for by an acknowledgment by the attorney, or the punishment of the Court, but the other is calculated to impede the administration of the law by a disobedience and disregard of its orders, which, until reversed, must stand as the judgment of the Court, and from none should demand a more prompt submission than those who, by their relation to the Court, are its aids and advisers. If, until reversed, they do not at least command obedience from them, what may be expected from disappointed or dissatisfied suitors?

We do not know that, in the case before us, the question of the regularity, or even nullity, of the order of the 22d November can change the relations of the attorneys in their duty to the Court. On the very day that it was made they asked to be heard on a motion to rescind it. This was granted, and

*179

the twenty-fourth of *the same month fixed for a hearing. On that day, at their request, the time was extended, and yet the motion was never submitted. The application by the bank to be declared bankrupt was admitted to have been on the advice of the attorneys, and this must have been given on or before the 27th November, for, on that day, the stockholders of the corporation determined to subject it to the bankrupt law, which was accordingly done on the 1st of December following. In this we consider the wrong to the Court chiefly consisted. The character of the gentlemen engaged must prevent us from supposing that they had a deliberate intention to mislead the Judge, and thus quiet him in the assumption that his order would be respected, at least until the hearing of the motion on their part to rescind it. Their act, however, independent of their motive, was the matter for the consideration of the judgment of the Court, except so far as the absence of the improper motive could palliate or mitigate the sentence which he might impose for its commission. While he was induced to suppose that, so far as they were concerned, his order would be respected by their clients, it was upon their consent that steps were taken, not only to impair its validity, but to render it entirely void. The course which they proposed, in seeking its rescision by the motion before him, was the proper one to have been pursued, and it is to be regretted that it was not followed. Lord Eldon, in Partington et al. v. Booth et al., 3 Meriv., 149, said: "The injunction, however erroneously granted, was an order of the Court, and must be obeyed." Mr. Drewry, in his work on "Injunctions," p. 407, says: "The proper course is not to treat it as a nullity, but apply to the Court to discharge it for irregularity."

The application to the Court of Bankruptcy was to act directly on the order of the Judge, and it is no excuse to say that they applied to a Court which, by the jurisdiction it could assume over the fund and the party, would leave his order but barren words. That they employed the surest means to render it ineffective in no way extenuates the wrong.

While the extent of the punishment may not ordinarily be a matter of consideration for this Court, yet, looking to the intimate and delicate relations which must exist between the bench and bar, we may be permitted to say, that in our judgment an attorney should only be deprived of his license to practice when he has committed a contempt of

*180

a gross and heinous character, involving *either contumely or disrespect to the Judge, or a malpractice of so gross a kind as would render him an improper person to represent the rights of others. The voice of such an one should not contaminate the halls of justice. If it is to be held a proper punishment for an act involving no moral derelict, what punishment could a Court impose upon an attorney who has disgraced the honor of his profession in the course of his practice by falsehood or perfidy? The vocation of the lawyer is his source of living, and should he, and all dependent upon him for support, be deprived of the means of affording it when, although his act is in contravention of the rights of the Court, it has not been induced by any vicious or immoral incentive?

The condition imposed by the Court, on the performance of which the suspension "from his office of attorney, solicitor and counselor in the Circuit and Probate Courts of this State," was to terminate, cannot affect the judgment pronounced, which, in our view, must operate as an immediate deprivation of the office itself. And yet it was not intended by the learned Judge to be unmeaning and impotent. It could never be effective to terminate the suspension, and still it is clear that some benefit was proposed through its interposition. Its intent to effect a purpose favorable to them proceeded upon the assumption that in some mode they could obtain a restoration of the funds to the custody of his Court, so that his order in regard to them could attach. We cannot see how such a re-

sult could be accomplished. The corporation has been declared a bankrupt, its assets are in the charge of the Court of Bankruptcy, and no proceeding on the part of the bank, or a creditor, can transfer them to the control of the State Court. The order, as we have said, intended that a compliance with the condition should operate as an entire avoidance of it. Are we at liberty, with this fact patent in the order, to give to the qualification the effect which must attach to an impossible condition, and declare that it was intended to have no other force? This could only be done through a construction of the orders which we must assume was never intended. If a condition is impossible, and so we regard this, the act to which it is annexed takes effect, and so far, in this particular case, from avoiding the judgment, makes its terms binding and conclusive. This could not have been the purpose of the learned Judge. We do not agree with His Honor in respect to so much of the order as requires the fees received by the counsel to be "restored to the

*181

bank *and the custody of the Court." A fair construction of the order of 22d November only applied the restriction to "paying out the funds, or otherwise disposing of the property and effects of the said corporation, by its officers and agents." We do not regard the term "agent" in the significance which it is to receive in its application to the subject-matter as comprehending the attorneys of the corporation. The prohibition was against paying out, not against receiving.

Can the order be so understood as to prevent a creditor of the institution from accepting payment of his demand without rendering him liable to be charged with a contempt for so doing? It was not to be supposed that the services which the attorneys gave by any advice to the bank in relation to the order of 22d November, were to be without compensation. It is also in our judgment a clear violation of the injunction for the parties to pay out of the fund attorney's or counsel fees. The object of the injunction was to preserve the fund, in order that it might be placed in the hands of a Receiver, should it appear that one was necessary. A Receiver would not be justified in making payments of that character without the order of the Court, and the parties in interest, bound by the injunction, could not do what it is improper for a Receiver to do. As the attorneys in the cause were not named in the order, they are not directly liable for a breach of it, but, under their general duty, they are chargeable as for a contempt if they co-operate with parties to violate an injunction.

In any point of view, we cannot regard the mere acceptance of the money as a remuneration for their professional services, unless through some fraud practiced on the Court, as a contempt deserving so great a punishment as that which has been inflicted.

Cases of this character, fortunately rare in this State, from the high and honorable reputation of its bar, are of the most unpleasant nature. When contempts of Court, by its own counsel, are prompted by a purpose to attack its dignity, and depress the moral and official influence of those who preside over them, the punishment, no matter how severe, should, within judicial discretion, be adequate and sufficient to repress the evils which are their usual consequences. Where, however, they are charged against counsel of character, who, by their sworn returns, disavow all purpose of commiting them, the dignity of the Court is as well vindicated by a light as by a severe infliction.

*182

*We do not feel the force of the argument on the part of the counsel that a mere disclaimer of all intention of contempt, where it is of a constructive kind, so completely purges it as concludes all further proceeding. The authorities do not sustain the proposition to the extent stated. Such a rule would make the Court powerless to punish even a gross contempt on the mere disclaimer of all intention. While the intention is often the criterion by which criminal acts are judged, the absence of it in the perpetration of wrong does not always discharge one from the consequences which may follow. In High on Injunctions, Section 849, it is said: "Nor does the question of the motive, or intent with which the writ was disobeyed, alter or vary the responsibility for the violation."

It is true that a disavowal of purposes, with an expression of regret that such a construction has been put on the act of a party as to hold him answerable for a contempt, will operate to his benefit in the measure of the penalty. We would have been better satisfied if we had perceived in the returns of these gentlemen, which disclaim all intention of committing a contempt, a declaration of their regret that His Honor the Judge had misconceived their purpose and intention.

It is adjudged that the order of 12th January, 1873, be set aside, and the rule and returns remanded to the Judge for such further proceedings as he may regard proper thereon.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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5 S. C. 182

HAND v. SAVANNAH & CHARLESTON RAILROAD COMPANY.

(Columbia. Nov. Term, 1873.)

[*Appeal and Error* ⇐783.]

Appeal "dismissed for irregularity, without prejudice," because certain important questions were not directly, or in terms, decided in the decree appealed from.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3125; Dec. Dig. ⇐783.]

Before Graham, J., at Charleston, June Term, 1872.

The grounds and reasons for the dismissal of the appeal are fully set forth in the opinion of the Court.

[For subsequent opinions, see 6 S. C. 307; 8 S. C. 207; 10 S. C. 406; 12 S. C. 314; 17 S. C. 219.]

*183

*Campbell, with whom was Porter, McCrady and Magrath, for appellants.

Chamberlain, Buist & Buist, contra.

April 4, 1874. The opinion of the Court was delivered by

MOSES, C. J. It is a matter of regret to the Court that the case is not in a proper condition to be reviewed on appeal so that a judgment might be reached, which would be conclusive, at least, so far as its jurisdiction is concerned. This regret is much enhanced by the fact that, notwithstanding a re-argument has been had, it must be remanded to the Circuit Court for further proceeding to place it in a proper position for determination here.

The complaint, as we regard it, and we do not see any other aspect in which it can be viewed, is one filed by a creditor of the Charleston & Savannah Railroad Company on his own behalf, and that of "all other creditors standing in the same right, plight and condition as himself, who shall in due time come in and contribute to the expenses of the action."

It sets out the material provisions of the Act of 20th December, 1856, 12 Stat., 543, by which the State authorized the Governor, on certain conditions being complied with, to cause the Comptroller General to endorse the bonds of the said company to the amount of $505,000, bearing interest at the rate of six per centum per annum, payable semi-annually, and not to have more than twenty years to mature.

That, when so endorsed, the State shall be invested with a lien, without a deed from the company, upon the entire road, including the stock, &c., and all the property owned by the company, as incident to, or necessary for, its business, for the payment of the bonds so endorsed, and for the interest accruing on said bonds.

That it shall not be lawful for said company to give or create any lien, incumbrance or mortgage which shall have priority or conflict with the lien of the State therein secured, and any such lien, incumbrance or mortgage shall be null and void against the lien or mortgage of the State, which shall have priority over all other claims existing, or to exist against said company.

That the plaintiff is the holder of a large amount of bonds and coupons, issued under the provisions of the said Act. It then sets out the provisions of the Act of 21st December, 1866, 13 Stat., 438, *by which certain parties who had purchased the road of the said company, under a mortgage executed in 1858, to I. W. Hayne and others, as trustees, to secure an issue of bonds to the amount of one million of dollars, were constituted a body corporate and politic, under the style of The Savannah and Charleston Railroad Company, and invested with all the rights, powers and franchises of the C. & S. R. R. Co., requiring that the said company, thus substituted, should assume, and be held liable for the payment of the six per cent. interest-bearing bonds of the said C. & S. R. R. Co., whereon the guaranty of the State had been endorsed, and that the lien of the State was in every respect preserved, and thereby affirmed.

*184

That by an Act of March 2, 1869, 14 Stat., 201, the said S. & C. R. R. Co. were authorized to borrow not more than $500,000 to be used in rebuilding and extending their road.

That, as plaintiff has understood, under the authority thus given, bonds to a large amount were issued, and a mortgage of the road and its appurtenances to secure them, was executed to William Aiken, George W. Williams, and James Robb, as trustees.

That the creditors who, like the plaintiff, are the holders and owners of the said 6 per cent. bonds, or coupons, issued under the Act of 1856, and now past due, are entitled to the security of the mortgage created by it, for the sums now due them.

After the usual statement of demand and non-payment, he prays judgment: That an account may be taken of the amount due him upon the bonds and coupons; that, in default of payment by a certain day, the said S. and C. R. R., with all its rights, &c., may be ordered for sale to satisfy the claim so due him and the other creditors of the said company, whose claims, like his, are secured by the mortgage of the road created by the Act of 1856; that creditors may be called in, according to the usual course of the Court, to prove their claims under the said mortgage; that a Receiver may be appointed, and the plaintiff have such other relief, &c.

The parties made defendants are the S. and C. R. R. Co., William Aiken and his co-trustees, and D. H. Chamberlain, Attorney General of the State.

The statement attached to the complaint shows that the claim is only on coupons and interest, dating from March 1, 1861, to March 1, 1869, both inclusive.

*185

*The Attorney General, answering for and on behalf of the State, without affirming or denying any allegations of the complaint, submits the rights of the State to the judgment and protection of the Court, being content with the relief, if any, which may be afforded to the plaintiff, suing on behalf of himself and all other creditors of the S. and C. R. R. Co.

standing in the same plight and condition with him. After demurrers filed by the said company, and also by Aiken and his co-trustees, the plaintiff was allowed to amend his complaint, by alleging that the said S. and C. R. R. Co., organized as a body corporate, and accepted the provisions of the Act so incorporating it, and, among others, the 20th Section, which provides that it shall assume and be held liable for the payment of the bonds issued under the Act of 1856, and that therefrom it voluntarily assumed and became obligated and bound to pay to the plaintiff, and all other holders of said bonds, the principal sum thereof, and also the coupons thereto attached.

And, further alleging that the General Assembly, recognizing by said Act of March 2, 1869, the liability of the said company for the bonds issued under the Act of 1856, and the coupons thereto attached, with a view still further to assist it, authorized and required it to fund and redeem the interest on the said bonds which may be past due, or fall due before the 1st day of September, 1869, by issuing therefore an equal amount of the bonds of the said S. and C. R. R. Co., with coupons attached for interest payable semi-annually, at the rate of 7 per cent. per annum, the principal to become due in twenty years from the date thereof, and the bonds so to issue, in substitution of interest coupons, shall be guaranteed by the State, in the same manner and as fully as the original bonds of the C. and S. R. R. Co. are now guaranteed. And, further, by setting out the respective sums and interest on which judgment is demanded.

The answer of Aiken and his co-trustees admits the execution of the mortgage, under the Act of 1869, in trust for the purposes therein declared; that they are only trustees to provide for and secure the payment of the bonds and interest issued under its authority, and have nothing to do with the demands of the plaintiff against the C. & S. R. R. Co., nor have they anything to do with his demands against the S. & C. R. R. Co., except so far as he may be the holder of any of the bonds issued by the latter, as aforesaid.

The answer of the S. & C. R. R. Co., in ef-

*186

fect, admits the passage *of the various Acts referred to in the complaint, and brings particularly to notice the fifth Section of that of 1856, which is in the words following: "That the State expressly reserves the right to enact hereafter all such laws as may be deemed necessary to protect the interests of the State, and to secure it against any loss in consequence of the endorsing of bonds, under the provisions of this Act, but in such manner as not to impair the vested rights of the stockholders of the company."

It claims that the statutory lien is a counter security to the State to protect against loss by reason of the guaranty and endorsement of said bonds and not to the holders of them, and that, by virtue of the fifth Section of the Act, the said company is to deal with the State in respect thereof, and not with the holders of said bonds.

It admits that, by acceptance of the Act of 1866, creating them a body corporate, they fully recognized the statutory lien on their road, created by the Act of 1856, and that they agreed with the State to assume payment of the six per cent. bonds, and that the lien of the State should be preserved.

It claims that, under the Act of 1869, the only terms imposed upon them were the funding and redemption of the coupons for interest of the bonds of the C. & S. R. R. Co. then past due, and which would fall due on or before the 1st September, 1869, by issuing an equal amount of their bonds, with coupons for interest, payable semi-annually, at seven per cent. per annum on the principal, to become due in twenty years; that, accepting the terms of said Act, their agreement is with the State, and not the plaintiff, and the construction of it is for the State. That the statutory lien is a counter security to the State, and not to the holders of the bonds, and that, by virtue of the fifth Section of the Act of 1856, the said defendants are to deal with the State in respect thereof, and not with the holders. It denies, in conclusion, any cause of action on the part of the plaintiff.

We have set out at sufficient length so much of the pleadings as will at once present the issues raised between the parties. In our judgment, they involve two questions: First, the liability of the S. & C. R. R. Co. for claims of the character of those represented by the plaintiff, under the 20th Section of the Act of 1866; and, second, the right of this plaintiff, and all in his condition, to enforce the demands which they hold, as stated in the complaint, through and by virtue of the lien

*187

or mortgage created and imposed by the *Act of 1856, thus substituting them in the place of the State, and according to them the security which it provided to indemnify itself for the guarantee of the said bonds. This right is really the material matter in contest between the parties; for, assuming that the company under the Act of 1866, may be liable for the bonds and coupons issued under that of 1856, if its whole road and property are covered by a prior lien, of which the plaintiff cannot avail himself, a mere judgment against the company would not prove effectual in compelling satisfaction of the debts which they hold.

The judgment of the Circuit Court affirms the liability of the S. & C. R. R. Co. for the coupons and bonds issued under the Act of 1856, by the C. & S. R. R. Co., together with the accruing interest from the maturity of the same, by virtue of the requirement of the Act of 1866, which, in the language of the decree, "extended the liability of the first named company to the payment of the said bonds and the interest then unpaid; and this liability covers and attaches both to the bonds and

coupons, whenever and by whomsoever held."

It holds that "the Act of March, 1869, could not and was not intended to vary, impair or affect either the liability of the S. & C. R. R. Co., for the payment of the principal and interest of the bonds of the C. & S. R. R. Co., issued under the Act of 1856, or the liability of the State, by virtue of its endorsement, for the payment of the principal and interest upon the failure of the said company to do so."

It then orders a call for all persons holding past due coupons of the bonds of the C. & S. R. R. Co. to present and prove them by a certain day, or be debarred from the benefit of any decree which may be hereafter made in the case.

It orders the Referee to file his report by a certain day, "setting forth the amount due on coupons of the bonds of the said C. & S. R. R. Co. held by the plaintiff, and all others who are holders of the same, who shall prove their claims under the order, to the end that such further order may be made as the said plaintiff and other holders of the said coupons may of right be entitled to, for the satisfaction of their claims on the same."

Now, in our judgment, the character of the relief to which the said parties were entitled was the very matter to be determined in the case. This depended on the effect of the Act of 1856 creating the lien or mortgage, and

*188

the right reserved to the State by the *fifth Section to change or modify it, by the enactment of all such laws as might seem necessary to protect its interests. Not only did it involve the right of the State to impair the lien which it accepted as a security for its guarantee of the bonds, but rendered necessary the inquiry whether by the Act of 1869 it had so done, and how far the power to deal according to its mere will with its statutory lien could be restrained by those who, on the faith of its guarantee, had purchased the bonds.

While the Circuit decree establishes the liability of the S. & C. R. R. Co. for the bonds issued by the C. & S. R. R. Co. under the Act of 1856, it is nothing more than the declaration of a mere liability, to be enforced through an action at law, and not requiring the remedy to which the plaintiff has resorted. The plaintiff here claims to be subrogated to the rights of the State, and unless he can prevail in his assertion, the foreclosure for the purpose of providing the means of paying his demand set up in the complaint could not be ordered.

It was only through the foreclosure of the mortgage that his claim, under the proceeding which he has selected, could be satisfied, and if he was not in a position to enforce it he was without remedy in the jurisdiction to which he applied.

It would seem that the solution of the main question before the Circuit Court depended on the right of the State to postpone, as it proposed to do by the Act of 1869, the lien created by the Act of 1856, and make it a second lien, to the prejudice of the interests which the plaintiff contends he acquired under the first lien.

These are the material propositions to be decided before a foreclosure on behalf of the plaintiff can be decreed. There are others of less important consequence made by the answer, which, too, must first be determined before the relief sought by the complaint can be granted.

But, in fact, the right to a foreclosure has not been adjudged. So far from it, the order, to which "the said plaintiff and the other holders of the said coupons may of right be entitled for the satisfaction of the principal and interest on their claims," is to be made after the amount which may be due on them is ascertained and reported by the Referee. The proper course was first to determine their right to set up the lien or mortgage, and then, if this was decided in their favor, to ascertain the respective amounts due the holders of the coupons, who were to be satisfied by its foreclosure.

*189

*It is true that the case has been argued, as if the right of this plaintiff, and those in his position, to a foreclosure, by virtue of the Act of 1856, had been recognized by the decree, and the objection we now interpose should have been made at an earlier period. Nevertheless the questions involved are important, and we must forbear their decision until they reach this Court through the judgment of the Court below.

Nor do we intend to define the nature of the issues which may properly arise under the pleadings, or to limit the control of the Circuit Court over the case.

The appeal is dismissed for irregularity without prejudice.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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5 S. C. 189

WHALEY v. BANK OF CHARLESTON.

(Columbia, Nov. Term, 1873.)

[*Appeal and Error* ⇐1008.]

In an action to recover a money demand of a purely legal nature, no appeal lies from the finding of the Circuit Judge, upon questions of fact, the issues having been tried by him without a jury.

[Ed. Note.—Cited in Magruder & Co. v. Clayton, 29 S. C. 413, 7 S. E. 844.

For other cases, see Appeal and Error, Cent. Dig. § 3956; Dec. Dig. ⇐1008.]

[*Appeal and Error* ⇐842.]

The construction and effect of written evidence presents matters of law which may be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3316–3330; Dec. Dig. ⇐ 842.]

[*Banks and Banking* ⇐133.]

A bank published a resolution, of which A, a customer, had notice, that from and after the 6th September, 1861, "all credits will be given and payable in currency." A kept a pass book, in which the deposits were entered by the bank, and the credits by him. This book showed that on the 6th September, 1861, the balance in his favor, as then struck, was large; that no change was made in the account, except that the later deposits were entered either as "currency deposit," or "Treasury notes;" that balances were afterwards struck, the first on December 4th, 1861, and the last on February 18th, 1862; and that the account was continued until the 3d March, 1864, when the last credit was entered, the last deposit being of date 15th January, 1864. In an action by A against the bank to recover a balance alleged to be due, *Held* that the balance of the 5th September, 1861, which was then of value equal to gold, had not, by the resolution and the subsequent dealings between the parties, as shown by the entries in the pass book, been converted into a currency balance.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 339–352; Dec. Dig. ⇐ 133.]

Before Graham, J., at Charleston, September Term, 1872.

This case will be understood from the judgment of the Circuit Judge, which is as follows:

Graham, J. The plaintiff, for many years before and during the war a deposit customer of the Bank of Charleston, seeks to have his deposit account stated during the currency of Confederate Treasury notes.

*190

*The complaint is sworn to, and its leading statements are:

That plaintiff has been a depositor with the bank ever since its incorporation, in 1834, having large and regular balances to his credit.

That the account was last stated between him and the defendant on the eighteenth day of February, 1862, when there was due to him a balance in good money of thirty-three thousand four hundred and thirty-seven dollars and thirty-eight cents.

That until the fourth day of March, 1863, the credits in his pass-book continued to be made in the usual way. On that day a special entry was made of a deposit as "Treasury Notes," and from that time forward the dealings between plaintiff and defendant were exclusively in the notes of the Confederate States, and no account has been stated between them since February 18, 1862, when the balance was, as above stated, thirty-three thousand four hundred and thirty-seven dollars and thirty-eight cents.

The plaintiff admits that, notwithstanding the defendant received his deposits, and gave him credit as of good money, until the fourth day of March, 1863, yet that, by law, the defendant is entitled to show in accounting what was the real value of plaintiff's deposits from and after the sixteenth day of December, 1860, and the plaintiff is also entitled to show the real value of his receipts from the defendant, from and after the same date, and thereupon the plaintiff claims to have an account taken and stated accordingly, beginning from the last stated account prior to December 16, 1860, namely: The balance of November 13, 1860, $25,030.38, and continuing the same until the bank stopped, or the last entry in the account with the true value of such entry on either side, duly ascertained according to law, and that a balance thereupon be struck, and he demands judgment against the defendant for the sum of twenty-five thousand and thirty dollars and thirty-eight cents, the balance of account due in good money November 13, 1860, subject to being increased or diminished according to the result of the account prayed for.

He denies that there has been any account stated between them from the time of the special entry of "Treasury Notes." This is the plaintiff's case.

The defenses set up by the answer are:

1st. That on the 6th day of September, 1861, the bank "adopted and published in the daily papers of the City of Charleston a

*191

reso*lution, that from and after that date all credits will be given, and be payable in currency, in which term Confederate States Treasury notes are included; and that all deposits made by the said plaintiff after that date were in currency, and payable in currency."

"2. Denies that plaintiff's deposits, after September 6, 1861, were in good money; denies that they were entered as good money; and denies that the understanding of defendant was to account for the same in good money.

"3. Alleges that prior to April 1, 1864, the plaintiff drew, and the defendant paid, all moneys to his credit, and the account between them was closed. The defendant had not, on the first day of April, 1864, nor at any time since, any moneys belonging to the plaintiff."

During the pendency of the suit the plaintiff, Joseph Whaley, has departed this life, and his executor, William Whaley, has been made party plaintiff.

The plaintiff put in evidence two bank pass-books, containing the bank account from 1852 to March, 1864.

The deposit side is written by the bank officer, and the check side in the handwriting of the testator, with rare exceptions. So far as they go, these books contain the best evidence of the transactions between the bank and its customers.

The oldest book covers the period from 1852 to August, 1861, and by it there was then due to testator, November 13, 1860, $25,030.38. It had increased to $29,006.39 by January 2, 1861. The last deposit entered in this book is May 6, 1861, and there was then

at the credit of testator $34,238.08. The last check is August 15th, 1861, leaving then a balance of $33,541.61. The new book is opened November 6, 1861, and the balance then brought forward is $33,481.96, a difference of $59.65 only from August to November. This was two months after the resolution of September 6, 1861. The facts thus drawn from the books make it very clear that, at the date of the resolution, the balance due by the bank could not be less than the balance of November 6, 1861, namely $33,481.96, a few dollars more than the balance of February 18, 1862, which plaintiff alleges was in good money. These facts may explain the reason of that allegation. The first deposit after the bank resolution is November 7, 1861, entered thus: "Currency, $2,500." By currency, it is suggested, bank bills are intended, Treasury notes not being in circulation till much later, but by referring to the pass-

*192

*book it appears there was no change in the manner of entering the credits. They are entered sometimes "currency," sometimes "deposits," as far back as the books reach (1852), and the same style of entry was continued until March 4, 1863, when, as charged in the complaint, the change was made to "Treasury notes," and so continued to the close of the book.

William Whaley, Esq., the present substituted plaintiff, testified that there never had been any settlement between the bank and testator, his father; that he knew that his father did not accept these payments as in good money, and when asked by the Court how he knew it, answered: Because all or most of his business was transacted entirely through him, and he knew it; that testator never accepted it (Confederate money) for more than it was worth; he never entertained the idea of receiving it as in full. Witness says: "I transact most of his business, and I testify that he never received these payments for more than they were worth."

Mr. Whaley also testified that his father caused Mr. ——— to write to the President of the bank at Greenville about his account, and in reply was informed that they did not know him. He was asked as to his conversations upon this subject with the late Mr. Sass, President of the bank, but I sustained the objection to his answering.

For the defense, Mr. Honour and Mr. Thayer, two bank officers, were examined.

They proved the destruction, at Columbia, of the personal ledger of the bank prior to April 1, 1864. Mr. Honour produced the personal ledger after that date, which, he stated, contained the accounts of all parties who had money to their credit in the bank on the 1st of April, 1864. Witness made up the book from books in the bank. Mr. Whaley's account is not in the book. It would be there if he had any balance. Mr. Thayer's testimony was substantially the same; both failed to make the testator a party to any settlement with the bank. Mr. Honour was asked, "If you know of any reas[illegible] for saying that there was ever a settlement with Mr. Whaley in which he was a party, do state it."

He answered, "I do not know."

Mr. Thayer evaded a direct answer to similar questions. I think it must be assumed that Mr. Whaley was not a party to any settlement, and is not concluded from making the question as to the principle upon which the account shall be stated and the settle-

*193

ment *made. If, in fact, the transactions are partly in good money and partly in, or in reference to, Confederate money, and come within the terms of Sections 1, 2 and 3 of Chapter LV of the General Statutes, with respect to dealings in Confederate money, the question whether the balance was against the bank or against the plaintiff would only affect the result, not the principle, on which the account shall be stated.

The plaintiff urged the authority of Boyden v. The Bank of Cape Fear, (No. Ca. Reps., Vol. 65, page 13 to 20), very earnestly. The case there made is, undoubtedly, very similar to this, and the judgment of the Court sustains the views of the plaintiff.

But that case, though entitled to great consideration, is not authority binding on me. I am not willing to commit this Court to the full extent of the general principles there adopted as to such cases. I prefer each case should rest upon its own particular circumstances. It is essential that the evidence in each case should bring it within the operation of Sections 1, 2, and 3 of Chapter LV of the General Statutes. In North Carolina the law as to scaling Confederate money transactions is similar to ours, and the Court, in the case referred to, ruled as matter of law that the account was to be divided, and the part prior to the circulation of Confederate Treasury notes estimated in par funds, and the part which involved deposits and checks in Confederate money was to be scaled. That case, in several respects, is entitled to attention Mr. Justice Dick, in delivering the opinion of the Court, which seems to have been unanimous, says: "There was an ordinary deposit account running between the plaintiff and defendant before and during the war, and this action was brought by the plaintiff to adjust the matter and recover the net balance due him.

"If the mutual dealing between the parties had been in par funds there would have been no difficulty in ascertaining the par balance, as the books of the bank and the bank books of the plaintiff correspond in items and amounts.

"The ordinary relations subsisting at common law between a bank and its customers, on a general deposit account, is simply that

of debtor and creditor." (Grant on Banking, 2.)

"The deposits are regarded as loans without interest to the bank, and the money goes into the general fund, and is used by the bank for its own benefit in its usual financial operations.

"As a compensation for such benefit there

*194

is an implied obliga*tion on the part of the bank to honor and pay on presentation the checks and drafts of the customer until his deposits are exhausted and also repay on demand of the depositor any balance which may be due on the settlement of the deposit account. The deposit, in the absence of any special agreement to the contrary, creates a debt, and the payments of the checks of the customer discharges such debts pro tanto. The bank or the customer may at any time discontinue their dealings, and the balance of the account between them can be easily ascertained by a single calculation.

"In our case different principles are involved which complicate the matter, as par funds and depreciated currency of varying values entered into the transactions of the parties. It was in evidence that, previous to the first of October, 1861, there were no deposits of Confederate currency, and the balance then due the plaintiff was in par funds. Subsequent to that date the dealings between the parties were in Confederate Treasury notes, which soon commenced to depreciate in value, and that fact was fully known and acted upon by both parties.

"These transactions in depreciated currency are, therefore, to be settled according to the Ordinance of the 18th of October, 1865, and the Acts of 1866, Chs. 38 and 39, as construed by several decisions of this Court. These deposits were in Confederate currency, and the plaintiff is entitled to their value at the time of deposit, to be ascertained by the scale."—Acts of 1867, Ch. 44.

"The payment of the checks and drafts of the plaintiff discharges pro tanto the debt created by his deposits."—Brown v. Faust, 64 N. C., 672.

"When the final balance was struck in March, 1864, the defendant was not authorized by law to pay the balance due, 'in notes of like character and amount as those received,' but its implied contract was to pay funds equivalent in value to the funds deposited."—Marine Bank v. Chandler, 27 Ills., 525; Story on Bail., 66; 28 Ills., 90, 360, 463; Marine Bank v. Fulton Bank, 2 Wall., 252 [17 L. Ed. 785].

"The general rule in adjusting a running account between a bank and its customers, is 'the first money paid in is the first money paid out;' the first item on the debit side is discharged or reduced by the first item on the credit side.

"This rule is not strictly applicable to this case, as that part of the account which was in Confederate currency is not to be governed by principles of the common law, but is regulated by the legislation above referred to, which was enacted to meet such cases.

*195

*"The account must be divided, and the amount due October 1st, 1861, must be estimated in par funds. To give full effect to the payments of the defendant, and allow to the plaintiff the proper value of his deposits, each payment ought to be deducted from the next preceding deposit or deposits, and when the deposits are in excess of the payments, then a balance ought to be struck, and the value of such excess ought to be ascertained, according to the scale, and form a part of the general balance due the plaintiff; in this way the nominal amount of the payments will be deducted from the nominal amount of the preceding deposits, and this process can be continued until all the payments are allowed as credits.

"The value of the excess of the various deposits, at the time they were made, with the premiums added, will constitute the true balance of the Confederate currency transactions, and this sum, added to the amount of the par funds due October 1st, 1861, will constitute the amount due the plaintiff at the time of the demand made in March, 1864. The defendant cannot justly complain of this arrangement, for the currency was rapidly depreciating, and his payments are taken out of previous deposits, which were of higher value."

If the judgment from which I have so freely extracted were in our own Court, I should be bound by it. It would decide the case before me, but, as I have already said, I am unwilling to go so far as to say that, without special circumstances, such a bank account is as matter of law to be divided and scaled.

I think there must be something more. The question then is, are there any special circumstances in this case to entitle the plaintiff to recover? And, if so, what are they?

The solution of these questions, and of the whole case, in my opinion, depends upon the force and effect to be given to the bank resolutions set forth in the answer and the application of the statutes to them.—General Statutes, Chapter LV, Sections 1, 2 and 3.

The testimony, I think, has established that there has never been any settlement of the account between the parties.

There is one consideration which neither party has brought to the view of the Court, but which it seems proper to mention.

It may explain the difference between Mr. Whaley's books and the schedule of balances after April 1, 1864, referred to by the bank officers. Is it not a fact that, on the first day

*196

of April, 1864, *the banks, in consequence of a public law as to the currency, funded all balances due their customers on that day,

and if this was so, will it not explain why on Mr. Whaley's book there would appear a balance to his credit on that day, but none on the books of the bank?

We are then to consider how the settlement is to be made.

On the sixth day of September, 1861, the bank gave public notice to its customers "that after that date all credits would be given and be payable in currency, in which term Confederate Treasury notes are included;" and all deposits made after that date were in currency, and payable in currency.

The effect of this upon all future transactions is clear and plain enough, but as to credits, deposits, debts of the bank already existing, there is no pretence set up, no attempt made to put such debts within the resolution, or payable otherwise than according to original contract.

The implication is very conclusive that such debts were to remain as they then were. The caution and provision was for the future, not affecting the present or the past.

The bank saw fit to make a rest in the accounts of its customers, and to take a new departure as to future dealings. It had a right to do this; but it could have no right, if it had pretended or attempted it, to change the character of its then existing debts or make them payable in Confederate currency.

It could not convert its debts to Joseph Whaley—a very large part of which had existed for several years—into a debt payable in "Confederate States Treasury Notes," unless by his clear consent.

It is not disputed, and may be assumed, that Mr. Whaley had notice of, and acquiesced in, these bank resolutions. Under them dealings of a new character and a new account were to commence between him and the bank, namely, an account, practically, as it soon turned out, in Confederate notes only. Of course the account was to be reciprocal in the same currency on each side. Mr. Whaley had no cause to understand otherwise.

The bank resolutions do not include in their meaning the old debt to plaintiff's testator, for which the bank received funds of the par value of gold. This debt could not be paid in Confederate notes without the testator's consent, and the testimony is very positive that he never did consent. The new departure was as to future dealings, not as to past transactions.

*197

*If thenceforth Mr. Whaley received credits, they were credits of Confederate Treasury notes. If he drew checks they were paid in the same currency, and when charged to his debit, each charge was for so much Confederate Treasury notes, and nothing else. They were not part payment on account of the old debt, but items in the new account.

The same rule must apply to them as to the credits. Is there any reason why this should not be so? I can find none.

The resolutions of the sixth day of September, 1861, reduce all subsequent transactions between the bank and its customers to transactions in Confederate money or its equivalent, and they are within the words and meaning of Sections 1, 2 and 3 of Chapter LV of the General Statutes, which fix a way of determining the value in good money of "all debts created or contracted in Confederate States notes or with reference to" them. I am constrained to hold that the dealings between the bank and the testator after September 6th, 1861, were "in Confederate States notes, or with reference to them as a basis of value." The debts thereby created are subject to the provisions of Sections 1, 2 and 3 of Chapter LV of the General Statutes.

I am also of opinion that the debt due by the bank to Joseph Whaley, on or before the sixth day of September, 1861, had no "reference whatever to Confederate notes as a basis of value," and the bank is chargeable with it in funds of par value. I make the amount of this debt not less than $33,481.96, but if there is any doubt, it may be ascertained by including it, on motion of either party, in the order of reference to be made as to the subsequent accounts.

I agree with the ruling in the case from the No. Ca. Reps., that the general rule, as there stated, as to adjusting an account between a bank and customer, namely: "The first money paid in is the first money paid out," is not strictly applicable to a case like this, but it is to be regulated by the legislation enacted to meet such cases.

The account between the parties subsequent to the sixth day of September, 1861, is to be stated, and the value of each side of it to be ascertained by ascertaining the value of each item at its date according to the provisions of Sections 1, 2 and 3 of Chapter LV of the General Statutes.

The deposits on one side, and the checks

*198

on the other, upon the *footing up of the amount of these items, thus ascertained, a balance can be struck, and if the value of the deposits exceeds the value of the checks, the excess must be added to the debt of September 6, 1861.

If the value of the deposits is less than the value of the checks, then the difference is to be deducted from said previous debts and a final balance struck, for which balance, with interest from date of commencement of this suit, the bank is liable to the plaintiff. It is ordered that this cause be referred to W. J. Gayer, Esq., Special Referee, to take and state the account between the parties as herein directed, and that he do report the same, and also any special matter appropriate to the case.

And on the 18th November, 1872, the Referee filed his report, as follows:

Under the decree in this case, I am directed, as Referee, "to take and state the account between the parties."

I. "The account between the parties, subsequent to the sixth day of September, 1861, is to be stated, and the value of each side of it is to be ascertained by ascertaining the value of each item at its date, according to the provisions of Sections 1, 2 and 3 of Chapter LV of the General Statutes."

II. "The deposits on one side and the checks on the other, upon the footing up of these items thus ascertained, a balance can be struck, and if the value of the deposits exceeds the value of the checks, the excess must be added to the debt of September, 1861."

III. "If the value of the deposits is less than the value of the checks then the difference is to be deducted from said previous debts, and a final balance struck, for which balance, with interest from the date of commencement of this suit, the bank is liable to the plaintiff."

I have endeavored to take the account as strictly as possible in accordance with the decree.

There was some difference of opinion as to two checks drawn by the plaintiff, one on the 27th February, 1864, and the other on the 3d March, 1864. After careful consideration, I am of the opinion that the check drawn the 27th February, 1864, was for $16,500, and the other, drawn 3d March, 1864, was for $1,488.05.

I respectfully report that the amount due

*199

the plaintiff, as per *statement appended hereto, is $26,185.31, which, with the interest thereon from the 30th June, 1870, the date of the commencement of the suit, shows an aggregate of $30,553.88, at the date of this report.

The report having been confirmed, with leave to the plaintiff to enter judgment thereon, the defendant appealed on the following grounds:

I. That the testimony in the case shows conclusively that there was no account existing between plaintiff and defendant to be stated, audited or settled, and His Honor should have so held.

II. That the testimony in the case shows that the account formerly open and existing between Joseph Whaley and the bank was closed and settled by Joseph Whaley prior to April 1st, 1864, and a settlement voluntarily made by Joseph Whaley, and acquiesced in by him for six years, cannot now be opened. The plaintiff is estopped by his own act, and the Court should have so held.

III. That His Honor erred in holding that the pass-book was the "best evidence of the transactions between the bank and its customers," for it is respectfully submitted—

1. That the pass-book is not a book of original entry, is not kept by the bank, and in law and practice is tested and corrected by the entries in the books of the bank.

2. That the pass-book is in law only a receipt or memorandum, and is open to explanation by evidence aliunde, and in this case was corrected by the entries in the books of the bank and other evidence.

IV. That His Honor erred in ruling that there had been no settlement between the bank and Whaley, for the books of the bank and other evidence in the case proved that Joseph Whaley had settled and closed his accounts with the bank by checking out all moneys to his credit in the bank.

V. That if the relation of debtor and creditor existed between Whaley and the bank, as maintained in the decree, then the evidence shows that the creditor had demanded payment of the debt; that the debtor had paid it in full; that the creditor had received payment without protest or exception, and closed the account and terminated business relations with the bank; and the transaction having been executed and closed be-

*200

tween parties sui juris, is, under *the laws of this State, final, and the plaintiff is estopped from all action on said executed contract, and His Honor should have so held.

VI. That there is no evidence in the case that Mr. Joseph Whaley had ever in person, or through agents, protested against the reception of Confederate money, or objected to its receipt, or had ever received the same for what it was worth, and that the testimony of Mr. William Whaley, that Mr. Joseph Whaley so received it, is only his opinion of Mr. Joseph Whaley's intention, or is the report of a conversation between himself and Mr. Joseph Whaley, and does not in any way commit the bank, and in either event is incompetent to establish any claim, or to alter, modify, or destroy the acts of the parties and the legal rights arising therefrom, and His Honor should have so held.

VII. That the decree of His Honor affirms the doctrine that the payment of a running account, in Confederate money, is invalid, and the payment can be set aside, and the transaction opened and the account stated, although there was no fraud, covin or misrepresentation, and the parties were sui juris, and dealing with their own property, and payment was demanded by the creditor and was received by him in Confederate currency without objection. Whereas it is respectfully submitted that the decisions of the Supreme Court of the State from 1865 to the present date were and are uniformly to the contrary.

VIII. That where there is neither fraud, covin, nor misrepresentation, the payments in Confederate money made by the defendant to the plaintiff cannot be scaled, but are valid for the face thereof, and His Honor should have so held.

IX. That the suggestion in the decree that the difference between the plaintiff's and defendant's book can be explained by the Funding Act, is not only unsustained by the evidence, but is controverted by the evidence, for the testimony shows that the books of the bank were balanced to the 1st of April for the purpose of funding all balances, and that Joseph Whaley had no balance to be funded.

X. That the decree is against the law and the testimony.

Porter & Conner, for appellant.

Campbell, contra.

April 7, 1874. The opinion of the Court was delivered by

MOSES, C. J. We must hold the cause of action a mere money demand, arising out of a contract, and to be treated exclusively

*201

as *one of a purely legal character. The answer raised issues of fact, which were triable by a jury, and as no objection was made to the hearing of the case by the Judge, we must assume that a jury was waived in the formal mode required by the Code of Procedure. It is not disputed that on and before the 6th September, 1861, the testator, Joseph Whaley, had on deposit with the appellant a balance to his credit, in gold, or its equivalent, nor that after said date all the transactions between them were understood and agreed to be on the basis of Confederate States Treasury notes. That he had such a credit is conceded by the appellant, and it is admitted in the argument, on his behalf, that from the time named his deposits were made and his checks payable in what was known as Confederate currency. The 6th of September, 1861, is referred to as the date on which the change in their course of dealing commenced, because on that day the bank published a notice, the knowledge of which was admitted by Mr. Whaley, "that from and after that day all credits will be given and be payable in currency," in which it is not denied that Confederate Treasury notes were included.

The first, second and fourth grounds of appeal allege error in the Circuit Court in holding that there was any account existing between the parties to be stated, audited or settled, and in ruling that there had been no settlement between them. These involve questions of fact, which have been passed upon by that Court, and its conclusion in regard to them is not subject to our review. The views of this Court as to its jurisdiction "in cases in chancery," and as "a Court for the correction of errors at law," are so fully expressed in Sullivan v. Thomas, 3 S. C., 531, that it is only necessary to refer to it to show that no appeal lies to this Court, in a case at law, to review the findings of fact in a judgment of the Circuit Court. Where the judgment, however, is totally devoid of facts to sustain it, the error then becomes one of law, and this Court has power to correct it. All the testimony was before the presiding Judge, and his inference from it is that there had been no settlement of the account before complaint made. This we must regard as an established fact in the case.

But the solution of this question by no means precludes the appellant from showing that nothing remained due to Mr. Whaley at the time of his demand, for, although there might have been no actual adjustment or settlement of the accounts between them, still their mutual transactions may have been of

*202

such a character as to *leave nothing due from one to the other. This was the matter to be decided by the Court, and it depended on mixed questions of law and fact. The principal among these arises out of the resolution of 6th September, 1861. That it was passed by the bank and brought to the notice of Mr. Whaley are conceded. Its construction was for the Court, and the conclusion of the Judge as to its effect on the mode by which the debtor and credit side of the account is to be adjusted, as it involves a proposition of law, is subject to review and examination here.

For the question thus raised, it is not necessary to determine whether the pass-book is "the best evidence of the transactions between the bank and its customers." It seems to have been so considered by the Circuit Judge in his discussion of the matter of the alleged final settlement by the bank and Mr. Whaley. In Grant on Bankers and Banking, 605, referring to De Vaynes and Noble, 1 Mer., 535, 536, it is said to be "the only general mode of stating and adjusting accounts between bankers and their customers." Mr. Morse, in his work on the same subject, at p. 481 to 485, in comparing the relative weight of the books of the bank and the pass-book in raising presumptions favorable to their correctness, rather accords to the latter a higher rank in the grade of testimony. We cannot doubt that as to a charge against the bank by a depositor, the credit in the pass-book is the highest evidence, and the same of an entry of a check to discharge pro tanto the credit side. That mistake may be shown on either in no way detracts from its high character or value. The error charged in the construction of the pass-book consists in not extending to the credit side due consideration of the effect of the resolution published by the appellants. In other words, that wherever a balance is struck on the book between the debtor and credit side, and a sum remains as a credit to Mr. Whaley, the result of all his deposits, diminished by the amount of his checks, that credit fulfills the meaning and intention of the resolution, and is subject to its effect. It does not so appear to us.

On the day that the resolution was promulgated Mr. Whaley had to his credit in the

bank $33,481.96, in value equal to gold. It was the result of his deposits and checks up to that day, and if there had been no subsequent transactions between them it could not with any reason be contended that at any after period he would not be entitled, on demand, to be paid the amount in a currency

*203

*equal to that for which the bank was liable on the 6th of September, 1861. If he had, however, on the next day, drawn a check for $100, and the bank had, in his pass-book, struck a balance in his favor less the last check, the same argument would hold that the whole balance thus made would at once be converted into a liability on the part of the bank, to be removed by the payment of Confederate Treasury notes, no matter what might be their depreciation, when compared with gold or national currency. A result so unreasonable cannot be found to have the sanction of law.

A fair and legitimate construction must apply it to future "credits." It was to have effect "from and after that day" on all credits which might be given out after that day. How could it act on credits for which the bank was before liable? On what consideration could it found its right to convert a liability for money at par value into one to be paid and satisfied by a depreciated currency, and the character of that to be determined by itself? The words of the resolution seem to lead but to one conclusion, and in their application to Mr. Whaley, unless something has been done amounting to consent or acquiescence on his part to treat his whole running account with the bank as based only upon Confederate currency, we can see nothing in the judgment below that requires our interposition.

It is not necessary that this acquiescence should be by some express admission or act; when it amounts to a ratification of something done it may be equally conclusive, if necessarily and obviously implied from the conduct of the party to be bound by it. The course of dealing in regard to the subject-matter may often be the best and safest medium through which consent and compliance may be inferred. Does the conduct of Mr. Whaley in regard to his dealings with the bank afford evidence of such acquiescence?

The argument assumes that, by striking the balance, a new and lower value was given to the deposits as they stood on 6th September, 1861. How could this consequence follow when nothing was in fact done that could produce such a result? If a balance had never been struck between the two sides of the account in the pass-book, the sum due would nevertheless have appeared upon it. Striking a balance, from time to time, was a mere matter of convenience, making the difference in the amounts of the two sides at once apparent, and dispensing with the trouble of the addition of long lines of figures, but it in no way changed or varied the re-

*204

*sult to be ascertained by casting up all the items on each side and then deducting the smaller from the larger. No item of the same, to the credit of Mr. Whaley, on 6th September, 1861, could, by possibility, be converted into a new credit, or one to arise "from and after" a following day. It then had an existence—a credit to be given "from" and "after" could not be one which had been given before. The credit of $33,481.96 was really due him on August 15, 1861. Between that date and the 6th of November following he made no deposit, and drew no check. On the day last named his pass-book was balanced, showing no change in his account as it existed on August 15, and yet it is claimed that, by merely prefixing the word "balance" to the credit side as it actually stood before the passage of the resolution, its whole character, as to value, was materially changed. To sustain the construction given to the resolution, in the argument on behalf of the bank, its language should have been of a different character, at least of a kind so plain and significant as to prevent any misapprehension on the part of its customers. To subject the amount due Mr. Whaley before the 6th September, 1861, to the provisions of the first Section, Chapter LV of the General Statutes, p. 310, would be treating it as a debt "created or contracted in Confederate States notes." It would determine its value by a provision intended only to affect obligations so arising. While it applies to a debt contracted with a view to Confederate money, as did that which resulted from the deposits and checks after the 6th September, 1861, we can see no reason why, in the particular cause before us, the Court is bound to give such a construction to the terms of the resolution as must change its whole tenor and apparent purpose, unless compelled to do so by some principle of law. Nor do we perceive such acquiescence on the part of Mr. Whaley, in the construction of the resolution for which the bank contends, as binds him to their conclusion. Was there any circumstance apparent from the book, with his view of the resolution, as was naturally calculated to prompt inquiry or explanation? According to the authorities, no inference can be drawn from passiveness or silence, either as to conduct or language of others. Unless the conduct was known or the language fully understood, the circumstances must be such as would naturally or properly call for action or reply from men similarly situated.—See 1 Green. Ev., Sec. 197.

We do not see in the conclusion we have

*205

reached any contraven*tion of the rule applicable to a bank and its creditors, which regards "the first item on the debit side discharged or reduced by the first entry on the credit side." The rule remains unchanged in

its application, but the value of each deposit and check is to be determined by the standard which the parties imposed upon it by their agreement. The acceptance of the Confederate money in payment of the checks must be held qualified by the resolution; its letter and spirit must control the result which would otherwise follow such payments. Mr. Morse, in his work to which we have already referred, at page 28, concedes exceptions founded on "express contemporary arrangement or understanding."

It is urged that Mr. Whaley has himself afforded a construction to the language of the resolution by drawing at some time between November 6, 1861, and March 3, 1863, in excess of his deposits, unless his checks can be supposed to refer to the amount which, on November 6, 1861, he had to his credit, as well as to the deposits he afterwards made. So far from exhibiting any inconsistency, it is reconcilable with the view which he took of the resolution of the bank. If it is correct, his supposed over-drafts were only to be valued at the rate of Confederate money, and discharged pro tanto, the balance due him in good money.

The other grounds of appeal object to the judgment of the Circuit Court "because it affirms the doctrine that the payment of a running account in Confederate money is invalid, and the payment can be set aside or opened, though there was no fraud, covin or misrepresentation." We do not see how this conclusion can be reached from anything which appears in the judgment to which it refers. In no regard, in affirming it, do we consider ourselves as at all impugning the principle, which we have maintained in several cases, that "a creditor, though entitled to demand payment in lawful money, may waive his right and accept any substitute he pleases, and his voluntary acceptance of such substitute, as payment, makes it so." It has no application here, because the resolution which we think affected all the transactions after 6th November, 1861, looked to a continuance of their dealings to be regulated, determined and settled in a mode which was to be consistent with the terms and conditions which it imposed.

The motion is dismissed.

WILLARD, A. J., dissenting. The cause of action was one "arising on contract for the recovery of money only."—Code, Section

*206

152. *This is indicated by the form of the summons, and by the complaint, both in the stating part, and in the prayer for relief. The complaint cannot be regarded as, in substance, an equity proceeding in the nature of a bill to open a stated account on equitable grounds, for the requisites of such a bill are not set forth. The characteristics of such a bill were considered and stated by this Court in McDow v. Brown, (2 S. C., 95,) nor is any other ground of recovery stated appropriate for the consideration of a Court of Equity. The plaintiff probably assumed that the cause of action was of an equitable character, for the reason that the amount of his recovery could not be ascertained without the taking of an account. The relation of defendant to the plaintiff was in no respect fiduciary, and an accounting between them was not necessarily an equitable proceeding. The taking of an account is within the jurisdiction of the Courts of law as well as those of equity. The practice of referring issues of fact, in actions at law, where the examination of long accounts is rendered necessary, to referees, existed in New York prior to the adoption of its Code of Procedure. The Section of the Code of that State from which the provisions of the first sub-division of Section 295 of our Code were taken was designed to continue that practice under the Code of that State without essential change. It was not necessary for the plaintiff to leave unstated in his summons the exact amount for which he sought judgment. He was at liberty to insert in his summons and in his prayer for judgment such amount as he considered properly due to him. Such a statement was contemplated by the provisions of Sub. 1, Sec. 152, of the Code, prescribing the requisites of a summons in an action on a money demand arising on contract, although the want of a statement of a specified sum cannot prejudice the plaintiff at the present time. It cannot, on the other hand, change the essential character of his complaint. The issue joined was primarily triable by a jury. Code, Section 276. How the case came to be tried before the Judge without a jury does not appear; but we are compelled to assume that the trial by jury was waived, as no objection on this account is brought before us by a proper exception. The action must be regarded as one arising at law, and we are limited to correcting any errors of law that may appear in the record.—Sullivan v. Thomas, 3 S. C., 531.

The decision of the Circuit Judge places an erroneous construction upon the testimony furnished by the plaintiff's bank book,

*207

and *such error enters into and affects the whole judgment below. The plaintiff's case rested chiefly upon the proof afforded by his bank book, in which the various credits to which he was entitled were entered by the officers of the bank. The proper understanding of the force and effect of the credits thus given, as evidenced by the bank book, was a question of law for the Court to pass upon, and that we are competent to review. The error of the Circuit Court consisted in construing the credits as they stood in the bank book, without proper regard to the effect of the notice given by the defendants. That notice was given prior to September 6, 1861, to take effect on that day, and was that "all

credits will be hereafter given, and be payable in currency, in which term the Confederate Treasury notes are included." A credit appears in the bank book previous to the date of the notice, which, it is not disputed, represented gold values. The first credit that appears after September 6, 1861, stands under date of November 6, 1861, and is "to balance, $33,481.96." It appears that this balance embraces all transactions prior to November 6, 1861, belonging to this account. This balance was on that day placed to the credit of plaintiff's testator. As the subsequent portions of the account rest upon this balance and upon deposits of currency, it becomes necessary to inquire whether, under the operation of the notice, that credit must be regarded as made with reference to values as existing in Confederate currency. The notice states that "all credits will be given and payable in currency." It explains what is meant by currency, making it to include Confederate treasury notes. The credit given by way of balance, November 6, 1861, was already one of the credits intended to be affected by the notice. In order to read "all credits," as excluding a certain class of credits, namely, balances of former accounts, carried forward as credits, the language employed by the parties must be limited by the nature of their dealings or something attendant upon such transactions capable of entering into and modifying the terms employed. The inquiry, is then, whether the nature of the dealings between the parties or the attendant circumstances can operate to limit the terms of the notice in the manner stated. It must be assumed that at the time in question no very great disparity between gold and currency values existed, and we cannot assume that the vast disparity that subsequently occurred was in the contemplation of the parties. That the defendants desired

*208

that their accounts with *their customers should assume the single and simple form of currency accounts, may be reasonably assumed. That they intended by their notice to carry forward gold accounts as separate and distinct from currency accounts, is not warranted, in view of the fact that both parties continued to deal on the footing of a single account, embracing deposits made both before and after the notice. That defendant intended that the gold balance should be carried forward into the currency account without losing its essential character is hardly credible, and not a reasonable assumption. Such a mode of keeping the accounts would tend to create constant ground for dispute between themselves and their customers, on account of the intricacies arising from the constant change in the relation between gold and currency values, the solution of which could hardly be anticipated short of litigation. There is no construction that can be put upon the terms of the notice so as to sustain the plaintiff's view of the case but what would suppose that the defendant intended something utterly at variance with commercial usage and convenience, and too cumbersome to enter into the practical relations between the bank and its customers. On the other hand, assuming that the intentions of the defendant was that all balances struck after the 6th of September, 1861, should be regarded and treated as currency balances, no possible injury could result to the customers who had a gold balance on deposit at the time notice was given, for he could withdraw it, and, if he chose, convert it into currency and make a currency deposit. It is not reasonable to engraft upon the language of defendant's notice terms leading to such intricacies as those involved in the plaintiff's view of the case. It is too late for the plaintiff to urge that the balance of November 6 was improperly stated, inasmuch as it did not allow the value of the gold deposits in currency. Many years of acquiescence in the correctness of this entry, with full notice, precludes any inquiry into its original propriety. The balance stated and credit, November 6, 1861, was, under the operation of the terms of the notice, to be regarded as a currency credit. Such being the case, it would follow that all subsequent transactions evidenced by the bank book, resting either on that balance or on currency deposits, must be regarded as representing values estimated upon the basis of the current value of Confederate treasury notes. A new trial should be granted.

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5 S. C. *209

*STOLBRAND v. HOGE.

(Columbia. Nov. Term, 1873.)

[*Convicts* ⇐13.]

An action does not lie by the Superintendent of the Penitentiary to recover, in his own right, as upon a contract implied by law, for articles manufactured at the Penitentiary by the labor of convicts, and delivered to defendant, and it makes no difference that the articles, in their crude state, were the private property of the Superintendent, and that he had settled with the institution for hire of the convicts whose labor he had used.

[Ed. Note.—For other cases, see Convicts, Cent. Dig. § 35; Dec. Dig. ⇐13.]

Before Carpenter, J., at Columbia, October Term, 1873.

This was an action for the price and value of certain articles of manufactured marble sold and delivered by the plaintiff to the defendant.

The case was this: The plaintiff had been Superintendent of the Penitentiary, but had ceased to be so before the action was commenced. During the time he was Superintendent the articles in question were manufactured at the Penitentiary upon the order

of defendant, and delivered to him. The labor of convicts were used in making them. Evidence was given on behalf of plaintiff tending to show that he was the owner of the crude marble out of which the articles were made; that it had been purchased by him from agents of the State who had sold it under a concurrent resolution of the General Assembly, authorizing them to do so; that the labor of convicts had been used with the consent of the Directors of the Penitentiary; that the plaintiff had charged himself, in his accounts with the institution, with the hire, and that his account had been settled with the Board of Directors. The value of the articles, but no express contract to pay for them, was proved.

The plaintiff having closed his case, the defendant moved the Court to dismiss the complaint, on the ground that the plaintiff had not shown such a property in the articles as entitled him to maintain the action. His Honor overruled the motion and submitted the case to the jury, who found for the plaintiff.

The defendant appealed.

Melton & Chamberlain, for appellant.
Melton & Clark, contra.

April 8, 1874. The opinion of the Court was delivered by

WILLARD, A. J. The ground of appeal is the refusal of the Court to dismiss the complaint for want of proof.

*210

*The complaint alleges the sale and delivery of certain goods by the plaintiff to the defendant. There is no proof of an express contract with plaintiff personally. It is not disputed that goods, consisting of manufactured marble, were ordered by the defendant of the plaintiff, who was at the time Superintendent of the Penitentiary, but ceased to be such before the commencement of this suit: that the work was performed at the Penitentiary by the labor of convicts confined in that institution under the supervision of the plaintiff; and that the goods were delivered to and accepted by the defendant. A mixed question of law and fact is presented, whether the marble manufactured was the property of the State or of the plaintiff.

The question is, whether upon this state of facts the jury were entitled to find a verdict for the plaintiff. If, not, the motion to dismiss the complaint should have been allowed.

Had it appeared that the plaintiff was, at the time the goods were ordered, acting lawfully in his own behalf in the business to which the order related, the law would presume from the facts a contract of sale between the plaintiff and defendant, and the defendant would be excluded, while enjoying the property, from controverting the title of the plaintiff.

Does the fact that the plaintiff was Superintendent of the Penitentiary that furnished the labor, and was known to the defendant as such, give rise to a legal presumption, in the absence of proof to the contrary, that it was in that official character that the defendant treated with him?

The Superintendent of the Penitentiary is a public officer, possessing large powers over a class of persons committed to his care. His powers and duties are prescribed by law, and all persons dealing with him in regard to matters appertaining to his office are presumed to act in view of his legal powers and duties in the premises. Chapter 145 of the General Statutes prescribes his powers and duties. It is made his duty to confine, employ and govern all offenders committed to his charge, according to their convictions, whether to solitary confinement or hard labor. He is required to purchase all the provisions and materials, and all other articles necessary for supporting and employing the prisoners, and for effecting the objects of the institution; to make necessary repairs to the prison, and superintend their construction; to make sale of such articles produced

*211

in or belonging to the institution as *are proper to be sold; to take the charge and custody of the buildings, furniture, tools, implements, stock and provisions, and every species of property belonging to the State.

These provisions cover all that is requisite to enable the Superintendent of the Penitentiary to apply the labor of convicts sentenced to hand labor to useful work for the benefit of the State, to aid in liquidating the cost of maintaining the institution. He can apply moneys subject to the general uses of the prison to the purchase of tools, implements, and stock or materials, and can use the labor of the convicts for the manufacture of saleable wares. He can sell and dispose of such wares. It is also provided that the Superintendent for the time being may maintain suits at law, among other purposes, to recover any debt or demand accruing from the business transactions at the Penitentiary.

It is clearly his duty to employ the labor of the convicts for the benefit of the State. There is no authority of law for him to become the purchaser of the labor of the convicts for his own use and benefit, and to carry on business by the use of such labor on his own account, nor could the sanction of the regents of the institution confer any such right or legalize such conduct. Such authority cannot be implied in the absence of distinct legislative sanction, for it is wholly inconsistent with the nature of his duties that he should unite in himself the characters of an official custodian of convicts, and of their taskmaster for his private profit and emolument. Such a relation is not only inconsistent with the interests of the State, but violates the dictates of humanity that re-

quire that those who are the instruments of inflicting the hardships imposed by the law on the violators of its provisions shall be free from direct temptations to abuse their trust.

The defendant, in ordering the goods in question, must be deemed to have dealt with the plaintiff in view of his official character and duty, and the result would be that a contract would arise between the State and the defendant, in which the plaintiff would stand as the agent of the State.

It is not important to consider whether the plaintiff was or was not the owner of the marble out of which the goods in question were manufactured.

If the plaintiff used his private property in the course of a contract between the State and the defendant he may have a claim against the State, but that fact cannot change the character of the contract itself.

*212

*It is a serious question whether the plaintiff acquired any rights to the marble against the State. He claims to have purchased it from a person having no other authority to dispose of it than what could be conferred by a concurrent resolution of the General Assembly. A concurrent resolution is understood to be one which is passed without the customary readings in the respective houses, which, by the Constitution, (Art. 2, Sec. 21,) are requisite, in order to give to the action of the Legislature the force of law. Such a resolution could not confer authority to transfer the title of the State in personal property.

The judgment should be set aside and a new trial granted.

WRIGHT, A. J., concurred.

MOSES, C. J., dissented.

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5 S. C. 212

BURGE v. WILLIS.

(Columbia. Nov. Term, 1873.)

[*Courts* ⇐472.]

The Court of Common Pleas has concurrent jurisdiction, under the Constitution, in civil cases cognizable before Justices of the Peace.

[Ed. Note.—Cited in State v. Harper, 6 S. C. 471; Walker v. Russell, 10 S. C. 85, 88; State v. Glenn, 14 S. C. 133.

For other cases, see Courts, Cent. Dig. § 1208; Dec. Dig. ⇐472.]

[*Courts* ⇐472.]

[A court vested with general original jurisdiction under the Constitution cannot be divested thereof by an act establishing another court with the same or like jurisdiction.]

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1224; Dec. Dig. ⇐472.]

Before Graham, J., at Charleston, July Term, 1872.

This was an action by W. T. Burge & Co., against W. W. Willis, to recover $54.58, balance of an account for goods sold and delivered.

The defendant demurred on the ground that it appeared on the face of the complaint that the Court had no jurisdiction of the subject of the action.

His Honor sustained the demurrer, and judgment was entered for the defendant.

The plaintiffs appealed.

Brewster, Spratt & Burke, for appellants.

Smythe, contra.

April 23, 1874. The opinion of the Court was delivered by

WRIGHT, A. J. The real question in this case is, has the Court of Common Pleas jurisdiction in certain cases which are made cognizable before Justices of the Peace?

*213

*The Court of Common Pleas is a Court of general original civil jurisdiction, and has the right to exercise such jurisdiction in all cases, unless expressly taken away.—State v. Walker, 14 Rich., 37. Where a Court is vested with general original jurisdiction under the Constitution, it cannot be divested of that jurisdiction by the Legislature establishing another Court with the same or a like jurisdiction.

The jurisdiction of the Court of Common Pleas is defined in Section 15 of Article IV of the Constitution as follows: "The Court of Common Pleas shall have exclusive jurisdiction in all civil cases and actions ex delicto which shall not be cognizable before Justices of the Peace, and appellate jurisdiction in all such cases as may be provided by law."

The Court of Common Pleas being a Court of general original jurisdiction in civil cases, and, having exclusive original jurisdiction in certain other cases mentioned, it has concurrent jurisdiction in those cases which are cognizable before Justices of the Peace.

The motion is granted and case remanded.

MOSES, C. J., and WILLARD, A. J., concurred.

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5 S. C. 213

HORDE v. LANDRUM.

(Columbia. Nov. Term, 1873.)

[*Dower* ⇐46.]

Under proceedings in Equity for partition of the estate of an intestate, a certain tract of land was decreed to be assigned to A, one of the heirs, on his giving bond, with sureties, to the Commissioner, to pay the assessed value of the land. The bond was given, and, afterwards, judgment was recovered thereon, and the land sold by the Sheriff under the execution: *Held*, That A's widow was entitled to dower against the purchaser.

[Ed. Note.—Cited in Whitmire v. Wright, 22 S. C. 453, 53 Am. Rep. 725; Morgan v. Smith, 25 S. C. 339.

For other cases, see Dower, Cent. Dig. § 149; Dec. Dig. ⇐46.]

Before Carpenter, J., at Edgefield, June Term, 1873.

This was a petition for dower, filed by Susan E. Horde, against Lewis D. Landrum, in the Court of Probate.

Under proceedings in the Court of Equity for partition of the intestate estate of Evelina V. Horde, deceased, a decree, dated 14th November, 1862, was made by Chancellor Carroll, assigning a certain tract of land to Grenville Horde, a party to the proceeding and one of the heirs of the intestate, on con-

*214

dition that the *title should not vest until he had given bond, with sureties, to the Commissioner of the Court, to pay the sum at which the land had been assessed by the Commissioners in partition. The bond was given, and an action afterwards brought upon it against Grenville Horde, judgment recovered and execution issued. Under this execution, and others, the land was sold by the Sheriff in December, 1871, and purchased by the defendant.

Grenville Horde died after the sale by the Sheriff. The plaintiff is his widow. They were married on the 11th April, 1862.

The plaintiff claimed that she was entitled to dower in the land, and the Judge of the Court of probate decreed in her favor.

The defendant appealed to the Circuit Court, on the following grounds:

1st. Because the land was subject to a statutory lien of A. A. 1791, to secure the payment of the purchase money, and was sold by the Sheriff and purchased by the defendant, under a judgment and execution obtained against the said Grenville Horde, in his lifetime, for the purchase money.

2d. Because the sale of the Sheriff, under the judgment and execution for the purchase money, secured by the statutory lien, was the destruction of the plaintiff's inchoate possible right of dower.

3d. Because dower does not attach to land mortgaged by the husband to secure payment of the purchase money, and sold by the Sheriff under a judgment and execution obtained for said purchase money during the life-time of the husband.

4th. Because plaintiff's right of dower has never attached to said land. There is no controversy as to the facts.

His Honor, the presiding Judge, affirmed the judgment of the Court of Probate, and the defendant appealed to this Court.

Addison, for appellant.
Youmans, contra.

April 23, 1874. The opinion of the Court was delivered by

WRIGHT, A. J. All the grounds presented by the appeal involve a single proposition of law, to wit: Whether Landrum, the appellant, who purchased the land at the Sheriff's sale, under judgment against Horde, the

*215

deceased husband, one of the judg*ments having been on the bond given to the Commissioner in Equity, for the sum at which the land was assigned to him, on the partition referred to in the brief, can, by force of the Act of 1791, 5 Stat., 164, bar the widow of her dower in the said land. His argument is, that the seizin of the husband is not of such character as will confer on the widow the right of dower; that under the Act the husband stands in the relation of a mortgagor, and that he (the appellant) is entitled to all the rights of those for whose benefit the lien was provided, as his purchase money satisfied it. The appellant holds under the deed of the Sheriff conveying the property sold under judgment against the husband. It is, in law, the deed of the husband (McKnight v. Gordon, 13 Rich. Eq. 223 [94 Am. Dec. 164]), and he cannot aver want of seizin in the husband, nor in any way impugn the title under which he himself holds, so as to bar the dower of the wife.—Plantt v. Payne, 2 Bail., 319; Pyles v. Reeve, 4 Rich., 559; Gayle v. Price, 5 Rich., 525; Pickett et al. v. Lyles, MSS., decided at this Term [5 S. C. 275].

The deed operates as an estoppel, and so our Courts have always held. If, as the Judge of Probate says in his decree, the plaintiff in the judgment had also taken a mortgage to secure the bond given for the purchase money, and Horde had afterwards sold the land to Landrum, who, with the proceeds of the sale, had satisfied the bond, and thus extinguished the mortgage, could Landrum have set it up to defeat the claim of dower on the part of the wife of Horde? That the sale was through the Sheriff in no way changes the relation in which the appellant stands to the mortgage.

Assuming, notwithstanding the order of Chancellor Carroll that the title should vest in Horde on his entering into bond with surety to the Commissioner for the sum at which the land was assessed, (with which he complied,) a lien was created by the statute, still the appellant is not in a position so to avail himself of it as to preclude the right of the wife to her dower. It enures only to the benefit of those for whose security it was intended, and they were the other distributees who were to be compensated by Horde, for their interest in the land, which, on the partition, had been allotted to him. The lien, in its consequences, is to be considered as if a mortgage had been executed to secure the payment of the amount at which the land was assessed. This could have operated as a bar to the dower only so far as the mortgagees and those claiming under them was concerned. Hitchcock v. Har-

*216

ington, 6 John., *290, in which the opinion pronounced by Chief Justice Kent, and Collins v. Terry, 7 John., 282, put the question

beyond dispute. See, also, Wilson v. McConnell, 9 Rich. Eq., 500.

In Rickard v. Talbird, Rice's Eq., 170, Johnston, Ch., says: "Where mortgaged lands are sold under a mortgage, whereupon dower has been released, the purchaser takes not only the fee but the dower also. Where a mortgage is satisfied by payment of the debt, the dower reverts to the wife eo instante."

The appellant claims, by his purchase at a Sheriff's sale, under judgment against Horde, the interest of all the other heirs of the intestate, of whom he was one. But the land was sold as his property. No interest of the other distributees had been levied on, nor does the deed under which the appellant holds pretend to convey any interest but that of the defendant in execution, nor could any such interest have been sold when the judgment was against Horde only. The appellant has no title through a foreclosure of the mortgage, or the enforcement of any lien under the statute, but holds the interest of Horde through his purchase under the judgment. He stands only in his stead, and has no equity through which he can be substituted in the place of the other distributees, for whose benefit the lien was created.

The motion is dismissed.

MOSES, C. J., and WILLARD, A. J., concurred.

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5 S. C. 216

KIRKPATRICK v. CHESNUT.

(Columbia. Nov. Term, 1873.)

[*Wills* ⇐821.]

Testator declared as follows: "I direct that my executrix and executors shall require of each of my sons, as they become entitled to their respective portions of my estate under this will, to bear his proportion in the gift of two thousand dollars, which shall be given to each of my daughters, in lieu of the lands which were bequeathed to the sons, in bond or otherwise, at the discretion of my executors:" *Held*, That the pecuniary legacies to the daughters were not charged upon the lands demised to the sons.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2115; Dec. Dig. ⇐821.]

[*Wills* ⇐821.]

Before lands devised will be charged with pecuniary legacies, an intention to charge them must clearly appear, either by the direct terms of the will, or by an implication too plain to be mistaken.

[Ed. Note.—Cited in Moore v. Davidson, 22 S. C. 101; Allen v. Ruddell, 51 S. C. 375, 29 S. E. 198.

For other cases, see Wills, Cent. Dig. § 2115; Dec. Dig. ⇐821.]

*217

*Before Carpenter, J., at Camden, April Term, 1873.

This was a proceeding for settlement of the insolvent estate of John Chesnut, deceased. It was commenced by a petition filed by James D. Kirkpatrick, as administrator of the decedent, praying for a sale of the real estate for payment of debts. James Chesnut, L. L. Whittaker, as administrator of Ellen Chesnut, deceased, and others, were made parties defendant.

The case, so far as it relates to the questions considered by this Court, is stated in the opinion of the Court.

Both sides appealed from the decree of the Circuit Court.

Shannon, for petitioner.

Workman & Davis, for defendants.

April 23, 1874. The opinion of the Court was delivered by

MOSES, C. J. The late Col. John Chesnut, by his last will, disposing of a large real and personal property, devised (with the exception of a life estate to his wife of a town and country residence), all the real estate of which he died seized, to his two sons, James Chesnut and John Chesnut, and provided for the purchase, by his executors, of lands for his son, Thomas W. Chesnut, of equal value with that which he had devised to either of the other sons. His personal property he bequeathed to his wife and children, which last, also, included three daughters. The time when the devises and bequests were to vest in possession is fixed by the terms of the will, but it no wise bears on the question before the Court.

The contest in the case arises out of the following clause of the will: "I direct that my executrix and executors shall require of each of my sons, as they become entitled to their respective portions of my estate under this will, to bear his proportion in the gift of two thousand dollars, which shall be given to each of my daughters, in lieu of the lands which were bequeathed to the sons, in bond or otherwise, at the discretion of my executors." It appears that the two sons, James and Thomas W., paid, respectively, to two of the sisters, two thousand dollars, as required by the said clause. It is contended on behalf of the distributees of the sister Ellen W., who departed this life in December, 1862, that the devise to their brother John is charged by the said section of the will, with a lien in his favor, for the payment of

*218

the $2,000 directed by him to be *made. This is resisted by the administrator and creditors of John, who claim that such a charge never existed, and that, even if it had, it was satisfied and discharged by a compliance by the said John with all its requisitions.

This is not a devise for the payment of debts, which only vests in the devisee a title for the mere purpose of fulfilling the trust which it creates. It is, however, claimed to be a devise, charged with the payment of a legacy, and so connected with, and attaching to, the subject of it, as to bind it by a spe-

cific lien, until discharged by full satisfaction.

The cases in which the question so often arises as to the fund out of which the debts of the testator are to be paid, and how far pecuniary legacies may be chargeable upon real estate, have no decisive bearing on the question here. They are of use, however, as discussing and presenting the general principles which, to some extent, are involved in the matter now before us. These lead to the conclusion that the intention to charge real estate with the payment of pecuniary legacies, or to impose upon a devise a condition that it is to be subject to such a legacy to another, must be clearly disclosed by the will, or attested from it, by inference or implication too plain to be mistaken.

It is not pretended that the testator intended "the gift" of the $2,000 to the daughters to be paid by his executors out of his estate, or that the liability for it did not personally attach on each of the sons. If it did not operate as a charge on the property devised and bequeathed to them, it was at least a personal obligation, which they could not avoid wtihout relinquishing the benefits of the will. Whether it was more than a mere personal obligation remains to be considered.

It is not necessary to refer to authority to show that a devise of real estate to one may be bound by a charge for the payment of a pecuniary legacy to another. But the intention must appear from the will—there must be something to denote that such was the design and purpose of the testator. To annex conditions to a devise in fee is to subject it to restrictions which not only affect its value but qualify its free enjoyment.

Where the words make the devise an absolute fee simple, an intention to charge it with a debt must appear from the will.

Judge Harper, in Warley v. Warley, Bail. Eq., 409, says "every devise of land is specific. Where a testator gives property specifically, of course he does not intend that it shall pay debts."

*219

*To render it thus liable he must so declare by his will, either in express words, or such intention must be inferred from its whole tenor. "Real estate is never to be charged with the payment of legacies, unless the intention of the testator so to charge it is either expressly declared or fairly and satisfactorily to be inferred from the language of the will."—See note, 2 Jar. on Wills., 262. Mr. Story, in delivering the opinion of the Court in Wright v. Denn, 10 Wheat., 229 [6 L. Ed. 303], says, "there is no doubt that a charge on lands may be raised by implication, as well as by an express clause in a will, but then the implication must be clear from the words."

"Doubtful words in a will will never so operate."—Seaver v. Lewis and Wife, 14 Mass., 87. Can this intention be inferred from the will in question?

The immediate clause from which the charge is supposed to arise directs the executors to require each of the sons—as they become entitled to their respective estates under the will—to bear his proportion in the gift of $2,000, which shall be given to each of the daughters, in lieu of the lands which were bequeathed to the sons, in bond, or otherwise, at the discretion of the executors.

It established a debt against the sons, and required the executors to see that it was received. As the large bequests of slaves and other personalty to the sons were subject to the assent of the executors, they had in their own hands the means of executing the direction of the testator, and could readily have enforced the requisition which the will imposed upon them. The testator had provided a large fund, which supplied the sons with the ready means of meeting the comparatively small sums they were to pay the sisters.

The clause looks rather to a personal obligation than the creation of a lien or charge, for the contribution was receivable "in bond, or otherwise, at the discretion of the executors."

Having devised no land to his daughters, his object was to compensate them by a further gift, and his declaration that it was in lieu of the land given to the sons only disclosed the motive which prompted it. The whole context of the will indicates that the several devises and bequests to the sons were to vest absolutely, free from all liens or incumbrances.

In Roseborough v. Rutland, (2 S. C., 378), Mr. Justice Willard well says: "The legacy is not in terms charged upon the lands devised. To made out an intention to charge it by construction, the first step is to shew the

*220

existence of a motive which can be pre*sumed to have influenced the mind of the testator." Can such a motive be discerned here? He had provided large resources for the sons, out of which it was in the power of the executors to secure the payment to the daughters, "in bond, or otherwise," and the testator, having regard to the surrounding circumstances, could not have considered that there would be any probable loss, unless the amount was secured by a charge on the property given to the sons.

Was the claim of Ellen W., the daughter, on her brother John, for his contribution to the $2,000, ever satisfied? The Referee holds that it was, while the Circuit Judge sustained the exception to his conclusion. We are disposed to concur with the Court, for we see nothing in the testimony from which payment can be inferred.

We do not hold ourselves bound, on a question of fact, to present at length the reasons

which affect our judgment. It is enough to say that the onus was on the administrator of John Chesnut to show payment. No discharge or receipt was produced, and no parol testimony of any adjustment was offered. The prudence and care of the acting executor, in the management of the estate and the regularity of all the papers produced in relation to his settlement with the devisees and legatees, in the absence of any memorandum in respect to the claim, rather tend to the belief that no payment had been made. The death of Ellen, in 1862, having attained her majority but a few months before the late war, which caused much interruption in all kinds of business, is a circumstance adding weight to the conclusion of the Circuit Judge. But the positive declaration of John himself, in December, 1866, received in evidence without objection, that he had never paid the said sum of money, seems to leave no ground for any mere inference to the contrary.

The motions are dismissed, and the case remanded to the Circuit Court for such further orders as may be necessary.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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5 S. C. *221

*ZEIGLER v. RAILROAD.

(Columbia. Nov. Term, 1873.)

[*Railroads* ⟸337.]

A railroad company is not responsible to a traveler, on a public highway, for striking with their train the wagon and horse of the latter at a place where the highway crosses the track of the former, where the injury was the result of accident alone without negligence or fault on the part of the company or its servants.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1090; Dec. Dig. ⟸337.]

[*Railroads* ⟸316, 350.]

A railroad company is not responsible for not slackening the speed of their train at a place where a public highway crosses their track unless special circumstances existed which rendered such slackening necessary, and whether such necessity existed is for the jury.

[Ed. Note.—Cited in Bamberg v. Atlantic Coast Line R. R., 72 S. C. 392, 51 S. E. 988.

For other cases, see Railroads, Cent. Dig. §§ 1006, 1164½; Dec. Dig. ⟸316, 350.]

[*Railroads* ⟸324.]

As well a traveler upon a public highway as a rail company is bound to use ordinary care at a place where the highway crosses the track of the company, and there is no rule of law which absolves the traveler from looking out for the train.

[Ed. Note.—Cited in Edwards v. Southern Ry., 63 S. C. 281, 41 S. E. 458; Cable Piano Co. v. Southern Ry., 94 S. C. 145, 77 S. E. 868.

For other cases, see Railroads, Cent. Dig. § 1022; Dec. Dig. ⟸324.]

Before Graham, J., at Charleston, March term, 1872.

Action by G. H. Zeigler against the Northeastern Railroad Company to recover damages for injuries sustained by the plaintiff through the negligence of defendant.

The complaint alleged that as the plaintiff was traveling in his wagon along a certain highway, at a place where the highway crossed the road of defendant, the defendant carelessly and negligently caused one of their locomotives, with a train of cars attached thereto, to approach said crossing, and then and there to pass rapidly over the track of said railroad, and, that by reason of said negligence, the locomotive struck plaintiff's horse and wagon, and injured the same, and the plaintiff himself, &c. The answer denied the allegations.

At the trial the plaintiff gave evidence tending to show that the injuries arose from the negligence of the defendant, and the defendant gave evidence tending to show that the accident was not caused by defendants, but by plaintiff's own negligence.

The defendant requested the Court to instruct the jury—

1. That the jury, in order to find a verdict for the plaintiff, must not only find that the railroad company was guilty of negligence, but must also find that the plaintiff did not neglect proper precaution on his part to avoid danger.

2. That the railroad company was bound to observe ordinary care.

The Court refused to charge in the language of the instructions asked for, and in lieu thereof, among other things, said to the jury:

"I suppose all of you know the point where this accident occurred, that has been testified

*222

to be a public road leading into the *city across the railway, on a level with the road bed. The law requires that the railroad, at such a place as that, at such a thoroughfare, should observe great care in crossing. Have they done that? That is for you to decide. And in the next place, as far as the negligence of the plaintiff is concerned, ordinarily the rule is that where an accident or misfortune occurs from negligence or fault of the plaintiff, the plaintiff cannot recover. But so far as the railroad is concerned, the rule of law is a little stronger against a railroad than when the injury is inflicted by an individual. Let us apply the law to the facts in this case as has been developed by the testimony.

"Suppose, for instance, that the plaintiff was coming along that road, and in crossing that railroad track, what was he to do? The law requires ordinary diligence on his part. Judging from the location, what would be ordinary diligence? The law requires great care on the part of the railroad, and only ordinary care on the part of the individual. * * * He was to look out for the signals and warnings. Did the railroad give these signals? If you find that the railroad com-

pany did not give those signals, then you will find for the plaintiff, because the railroad is guilty of gross negligence. But suppose they did give those signals and those warnings, the Court would instruct you that if Mr. Zeigler heard those signals and warnings, and rushed heedlessly across that track, then his own negligence was the cause of the accident. But if the railroad company had given those signals and warnings, and Mr. Zeigler did not hear them or see them, the railroad company is responsible nevertheless.

"The rule is this, that those signals and warnings should be given. The reason of it is this, that the company so slacken their speed as to prevent an accident occurring. Just as I have supposed in this case. That is, they may have given the warnings, and the person not hearing them or seeing them in crossing the track, and the injury occurs. The reason is, that they must so regulate their speed as to prevent an injury; but, as I tell you, if Mr. Zeigler saw the cars coming, or heard those signals, and took the responsibility upon himself and went across that track, then the accident was the result of his own negligence."

The counsel for defendant asked for the further instruction, that plaintiff was bound to listen, on his approach to the railroad crossing, and also to look out for the train,

*223

which instruction the Court *also refused to give to the jury, as asked for, but charged as follows:

"I do not think it necessary for him to look out for the train. I think all that is necessary is to listen for signals that the road gives."

To the granting of which instructions, and the refusal of those prayed for, the defendant excepted.

The verdict was for the plaintiff, and the defendant appealed.

[For subsequent opinion, see 7 S. C. 402.]

The opinion of the Court was delivered by

WILLARD, A. J. The proposition submitted by the charge of the Circuit Judge was, that a railroad company is responsible for injuries done to persons and vehicles while passing along a highway, at a point where the track of the railroad crosses such highway, in consequence of being struck by a locomotive belonging to such railroad company, running in the course of its ordinary and lawful business, and under the management and control of its servants, even though such injury was the result of accident alone without negligence or fault on the part of such company or its servants.

The case of Danner v. Railroad, (4 Rich., 329 [55 Am. Dec. 678],) while carrying the liability of railroad companies, in cases of injury to third persons other than passengers, to the farthest point reached in this country, yet concedes that no such liability results as a consequence of mere accident alone.

It appears from the record before us that the evidence submitted to the jury bore on the question of negligence alone. That of the plaintiff tended to establish negligence on the part of the defendants, and that of the defendants to refute the charge of negligence as against themselves and to establish it on the part of the plaintiff.

It was for the jury to say what force this evidence was entitled to receive in its bearing on the issue of negligence presented by the pleadings. The Circuit Judge was called upon by the nature of the pleadings and evidence simply to state the law applicable to a case of alleged negligence. To submit, under such circumstances, the proposition that liability ensued, though negligence was not proved, was not only an error in point of law, but one operating necessarily to the prejudice of the defendants.

It remains to consider whether the language of the charge supports the conclusion already stated as to its character.

*224

*The charge holds that notwithstanding signals and warnings of the approach of the locomotive may have been given, yet, if the plaintiff did not see them or hear them, in the absence of proof that such failure to see and hear them was the result of negligence on his part, the company is responsible. This proposition virtually holds that plaintiff may recover although negligence is not imputable to the defendants; in other words, it renders the defendants responsible for mere accident alone, without intermixture of fault on their part or that of their servants.

The charge assigns as the reason of this rule that the defendants were bound to slacken their speed so as to prevent an accident occurring. This assumes that there was a legal obligation to slacken the speed of the train at the time and place of the accident. There was no such legal obligation. If they were bound to slacken their speed at that time and place, it was because special circumstances existed rendering that course necessary under the rule of law imposing due and ordinary care upon the defendants. As to the existence of such a necessity it was the province of the jury to determine as matter of fact.

Again, the charge holds that it was not necessary for the plaintiff to look out for the train. There is no rule of law absolving a person from looking for the train. He is bound to use ordinary care, and that involves a reasonable use of all his senses. The question, whether reasonable care was employed by the plaintiff to prevent injury, is one for the jury alone, to be determined according to the facts of the particular case.

We must, therefore, conclude that the rule, as submitted to the jury, tended to render

the defendants responsible, though the injury was the result of an accident alone.

It is contended by the appellants that the charge that the defendants were responsible for "great" care is inconsistent with the rule of ordinary care by which railroad companies are bound under such circumstances. The charge is certainly obscure in this respect. It is true that on applying the rule of ordinary care, the actual amount of care required under the facts of any particular case is varied according to whether the instrument occasioning damage is readily controlable, or in its nature dangerous, so that in one sense greater care is demanded from one who runs a locomotive engine than from one who drives a cart. The rule of ordinary care is, however, equally applicable

*225

to both, but must be *applied with reference to the nature of the instrument involved. Taking the portion of the charge just considered in connection with the other portions of the charge already referred to, and it is clear that it placed before the minds of the jury an erroneous view of the law of the case. It would have been scarcely more erroneous had it charged that the liability of the defendants was that of insurers against accident not occurring through want of care on the part of the plaintiff.

There should be a new trial.

MOSES, C. J., and WRIGHT, A. J., concurred.

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5 S. C. 225

COLUMBIA WATER POWER COMPANY v. COLUMBIA.

(Columbia. Nov. Term, 1873.)

[*Specific Performance* ⇐6.]

A contracted with the City of Columbia to build, within two years, certain specified new water works, having sufficient capacity to force 1,500,000 gallons of water daily into the distributing reservoir of the city; to furnish sufficient water power to force into the distributing reservoir the number of gallons of water required by the city daily; to operate the works at his own expense for twenty years, and, at the expiration of that period to turn them over to the city; and, in consideration thereof, the city agreed to pay to A $16,000 per annum, during the twenty years, and to appropriate to such payment all the water rents collected by the city. A assigned the contract to B, and B having completed the works and furnished the water power, the city refused to allow him to supply its distributing reservoir with water, and to perform the contract on its part: *Held*, That B was entitled to relief in the nature of specific performance to compel the city to perform its part of the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 11; Dec. Dig. ⇐6.]

[*Specific Performance* ⇐73.]

To the general rule that contracts relating to personal rights will not be specifically enforced, there are well established exceptions, and this case comes within the principle of one of those exceptions.

[Ed. Note.—Cited in Murray v. Northwestern R. R. Co., 64 S. C. 536, 542, 42 S. E. 617.

For other cases, see Specific Performance, Cent. Dig. §§ 206–208; Dec. Dig. ⇐73.]

[*Specific Performance* ⇐32.]

There was sufficient mutuality in the contract, in the equity sense of the term, to enable B to maintain the action, and the character of mutuality was not destroyed by the assignment.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 89–99; Dec. Dig. ⇐32.]

[*Municipal Corporations* ⇐251.]

The contract was assignable so as to enable the assignee to maintain an action in equity to enforce its provisions.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. ⇐251; Assignments, Cent. Dig. § 26.]

[*Specific Performance* ⇐93.]

The contract was not performed by B within the two years fixed by its terms: *Held*, That B was not deprived thereby of his right of action, time not being of the essence of the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 245–248; Dec. Dig. ⇐93.]

[*Specific Performance* ⇐32.]

[A contract provided for the building by plaintiff of a water works system for defendant city, the operation of the same at plaintiff's expense for 20 years, payment by defendant of a certain sum per year, and at the expiration of the term the system to become the property of defendant. There was a further provision that after the expiration of the term plaintiff would furnish power to operate the plant at a price to be fixed by arbitration. On the completion of the works, defendant refused to perform, and plaintiff brought suit. *Held*, that the provision in regard to arbitration did not so deprive the agreement of mutuality as to preclude its specific enforcement.]

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 92; Dec. Dig. ⇐32.]

Before Carpenter, J., at Columbia, July Term, 1873.

This was an action by the Columbia Water Power Company, a body corporate, against the city of Columbia. It was founded upon a contract, under seal made August 23d, 1870, between the city of Columbia, of the first part, and Samuel A. Pearce, Jr., "both

*226

for *himself, and as trustee of William Sprague, of the State of Rhode Island, their heirs, executors and assigns, of the second part," the terms of which are as follows:

"That the said party of the second part covenants and agrees to and with the said party of the first part, to build such parts of a new water works as are required to force one and a half millions of gallons of water daily into the distributing reservoir now used by the said city, namely: To construct a new reservoir, near the Columbia Canal, for the purpose of collecting water from streams below the present receiving reservoir; to erect a building for the protection of the pumps and machinery; to lay a

suction pipe from the pumps to Broad River, to be used to obtain water therefrom, should the other streams fail to furnish a sufficient supply; to furnish a filtering apparatus for purifying the water from said river, if such water should be required; to furnish sufficient water power to force into the distributing reservoir the number of gallons of water required by the city daily; said works to be completed within two years from the date of the signing of this contract; and all the labor and management of the machinery and appurtenances thereto to be furnished by the party of the second part.

"And the said party of the first part covenants and agrees to pay unto the said party of the second part, in consideration of his performance of his above named agreement, the sum of sixteen thousand dollars, annually, in good and lawful money of the United States, in equal quarterly payments; and the said party of the second part shall give the said party of the first part ten days' notice, in writing, of the time in which he will furnish the city with its supply of water, under the terms of this contract. The day which such notice designates shall be the one from which the first quarterly payment shall date, and the subsequent payment shall be made quarterly each year until the expiration of this contract.

"This contract shall extend for the period of twenty years, and upon the expiration thereof, the reservoirs, pipes, pumps, buildings, machinery, and all and every other matter or thing in any way appertaining to the said water works, which shall have been built or furnished by the said party of the second part, shall revert to and vest as the property of the same in the party of the first part, and shall be turned over by the party of the second part at that time to the said party of the first part in good order and repair.

*227

* "At the expiration of this contract the said party of the first part shall have the privilege of leasing from the said party of the second a sufficient water power, at the same point or place used by the party of the second part for supplying water under this contract, to force into the said distributing reservoir of the said city the daily supply of water required for use by the party of the first part, at such a price and upon such terms as shall be agreed upon by three disinterested persons, one to be selected by the said party of the first part, one by the said party of the second part, and the third by the two thus chosen; and the basis upon which such price and such terms shall be fixed by the three persons thus selected shall be the number of gallons required to be forced daily into the distributing reservoir of the said city; and should a larger supply of water at any time be required than is herein specified, then additional machinery and water power are to be furnished by the said party of the second part at a price proportionate to that named in this contract.

"Should the capacity of the distributing reservoir now in use by the said city be found at any time insufficient to contain the daily quantity of water required by the said city, then it shall be obligatory on the said city to so enlarge the capacity of the said distributing reservoir as to render it capable of holding the daily supply at any time demanded.

"And it is further agreed between the parties of the first and second part that the steam engine and all the apparatus now used by the said city for forcing water into the distributing reservoir be and remain in the place and condition it now is in for the period of two years from the time when the party of the second part begins to supply the city with water, as above specified, subject to the use of the party of the second part, at his expense, should any accident or unforeseen event occur which would temporarily render his machinery inoperative.

"In order, in part at least, to secure the prompt payment of the above named consideration as it becomes due, the City Clerk or Treasurer is hereby authorized and required to pay over to the said party of the second part all water rents collected by the said city, or so much thereof as may be necessary to meet such payment. The taxes and water rents to be assessed and fixed by the party of the first part; and the said party of the first part hereby binds itself to make the rate of such taxation sufficient to raise an amount of money at least equal to the yearly compensation herein specified.

*228

* "And for the true and faithful performance of all and every of the covenants above mentioned the parties to these presents bind themselves, each unto the other, in the following penalties, to wit:

"Should the said party of the second part fail to comply with the terms of this contract, he shall be bound in the penal sum of ten thousand dollars, to be paid over to the said city within ninety days from the date of such failure, provided, that the said party of the second part does not within such time be in readiness to comply with the terms of this contract.

"And should the said party of the first part, for any reason whatsoever, fail to comply with the terms and provisions of this contract, then the absolute, unqualified, unobstructed, sole and separate use of all the reservoirs, buildings, machinery, pumps, pipes, plugs, and all and every other matter or thing pertaining or belonging to the said water works, in the distribution of water throughout the said city of Columbia, together with the proceeds arising therefrom, and all the rights, immunities and privileges now belonging, or in any way appertaining to the said city of Columbia,

shall vest absolutely in the party of the second part, within sixty days from the date of said failure, for the unexpired term of this contract:

"Provided, however, That the acceptance of this penalty by the party of the second part shall in no way preclude the said party from his proper and legal redress in the Courts, should the net proceeds of the water rents fail to amount to a sum equal to the compensation stipulated by the party of the first part to be paid to the party of the second part on his performance of his agreements entered into in this contract:

"And provided, further, Should the net proceeds arising from said water rents exceed the said yearly compensation of sixteen thousand dollars, then such excess shall be paid over by the said party of the second part to the said party of the first part:

"And still further be it provided, That at any time should the said water works, and all and every matter and thing in any way belonging or appertaining to the same, under the provisions of this penalty, fall into the hands of the said party of the second part, the said party of the first part, on the payment of all the dues that shall have accrued to the party of the second part, shall be entitled to take immediate re-possession of the said works, and all and every other matter or thing in any way belonging or appertaining to the same."

*229

*On the 9th November, 1871, Samuel A. Pearce, Jr., and William Sprague assigned the contract to the plaintiff, "with full power and authority to execute and perform" the same, "and to receive and take to the proper use of" the plaintiff "all moneys, profits and benefits that may arise therefrom," and on the same day the plaintiff covenanted and agreed with Pearce and Sprague to perform all the covenants and agreements imposed upon them by the contract.

The object of the action, the issues made by the pleadings, the facts found by the Court below, and its conclusions of law, are stated in the opinion and judgment of His Honor the Circuit Judge, which is as follows:

Carpenter, J. The plaintiffs filed their complaint, setting forth, for a first cause of action, that a contract was duly made and entered into by and between the defendant, the city of Columbia, as the party of the first part, and Samuel A. Pearce, Jr., and William Sprague, their heirs, executors and assigns, as the parties of the second part, whereby they agreed and contracted to build certain works, or parts of works, and to perform certain duties and services for furnishing the defendant, the city of Columbia, with water for a period of twenty years; that, after the execution of said contract, the said Pearce and Sprague became, with Amasa Sprague, associated and incorporated by articles of agreement, and pursuant to the provisions of the statute, under the name of "The Columbia Water Power Company;" that subsequently the said Pearce and William Sprague duly assigned and transferred to the said "The Columbia Water Power Company," the plaintiffs, all their interest, rights and privileges under the said contract, with full power and authority to execute said contract, and to take and receive all profits and benefits arising therefrom; that the plaintiffs thereupon undertook to perform in all respects the said contract; that the plaintiffs, under said contract, expended large sums of money in constructing works, procuring machinery and pipes necessary to furnishing a supply of water required by said contract; that they built such parts of a new water works as were required to force 1,500,000 gallons of water daily into the distributing reservoir of the city, constructed a new receiving reservoir, and in all particulars performed the agreements and covenants contained in said contract; that, being ready to furnish the supply of water required by said contract, they gave notice to the defendant, as required

*230

by the con*tract, that on the 21st day of November, 1872, they would commence to furnish said supply; that on the said 21st day of November, 1872, they were fully prepared to furnish said supply, and that they have been and are at all times prepared to do so; that the defendant, by the passage of a certain resolution of its Council, has declared itself absolved from all obligations, on its part, to fulfill said contract, and has refused to comply with the covenants on its part therein contained; that its officers and agents have refused, in various particulars, to permit the plaintiffs to enter upon and continue the furnishing of the city with the supply of water required by the contract.

For a second cause of action the complaint sets forth, that by the said contract it was further stipulated that the City Clerk and Treasurer be authorized and required to pay over to the plaintiffs all water rents collected by the city, and to assess the same at a rate sufficient to raise an amount of money at least equal to the yearly compensation of sixteen thousand dollars to the plaintiffs; that under the contract the fund arising from the said water rents should remain as a security to the plaintiffs for the payment of their yearly compensation, and should not be appropriated to any other purpose; and that the City Clerk, without other authority than is contained in said contract, should apply such proceeds of water rent to the payment of the said yearly compensation of the plaintiffs as the same should fall due; that the said water rents and water taxes are now being collected by the city, but the plaintiffs are well assured that the defendant is not intending to apply the same to the payment of the plaintiffs; and that the defend-

ant intends to appropriate said water rents to other purposes, and to deprive the plaintiffs of their security under said contract.

The plaintiffs, therefore, demand judgment, that it be adjudged and decreed: (1.) That the plaintiffs have fully performed the covenants of said contract and are entitled to be let into the full performance and enjoyment of the same for furnishing the city with the stipulated supply of water for the period of twenty years. (2.) That the defendant shall do and perform, on its part, all the covenants of said contract. (3.) That the defendant be restrained from any interference with the plaintiffs in the performance of the contract. (4.) That the plaintiffs are entitled to have set apart and reserved the proceeds of the water rents for the payment of their annual compensation, and the defendant be enjoined

*231

from making *any other use of the said water rents; and (5.) That the plaintiffs may have such other relief as may be just.

The plaintiffs also exhibited with their complaint a copy of the contract therein set forth.

The defendant filed its answer, admitting the execution of the contract in question between itself and Samuel A. Pearce, Jr., for himself, and as trustee for William Sprague, in the terms set forth in the complaint, disputing and denying the interpretation put upon the contract by the plaintiffs in various essential particulars; denying that any exists between itself and the plaintiffs; denying the right of the original parties of the second part to assign or transfer their contract without the consent of the other contracting party; denying that such consent has been given; denying that there is mutuality in said contract; denying that the plaintiffs have performed the said contract on their part, as alleged in their complaint; denying that the water works were completed within the time required by the contract, or, are, in fact, now completed according to the contract; denying that it has done any injury or wrong to the plaintiffs in the manner set forth in their complaint; and denying the right of Pearce and Sprague, or either of them, to any use or control of the old water works, or any part thereof.

For answer to the plaintiffs' second cause of action, the defendant denies, in general, the allegations of the complaint; avers that the plaintiffs have failed to perform their covenants, and denies that the defendant has deprived the plaintiffs of any security required by said contract.

After the filing of the complaint, and before the filing of the answer, the plaintiffs moved before me for a temporary injunction, pending the full hearing of the cause, to restrain the defendant from interfering with the plaintiffs' use of the old water works, and the general execution of their contract to furnish the city with its supply of water, and to restrain the defendant from appropriating to other uses than the payment of the plaintiffs the proceeds of the water rents and water taxes. Upon the proofs and arguments then submitted, I granted the injunction restraining the defendant from all interference with plaintiffs in using the old water works, and in furnishing the city its supply of water, but denied, as premature, the application for an injunction to restrain the defendant from appropriating to other uses the proceeds of water rents and water taxes collected by the city. By a special

*232

assignment of *the Court, and upon agreement of counsel, the cause came on to be heard before me at Chambers, in Columbia, July 3d. A large number of witnesses were offered and examined by both parties, and full arguments were submitted by the respective counsel. After careful consideration and examination of the whole case, I now proceed to state my conclusions, with the reasons therefor. I may premise, however, that during the hearing of the case I refused several times to allow the defendant to introduce evidence upon points not presented by the pleadings, and in my decision I shall notice nothing except the issues which are properly embraced and presented by the complaint and answer. Those issues, in my opinion, are, in general, these:

First. As to the right of the plaintiffs, as assignees, to maintain this action.

Second. As to the fact of the performance, by the plaintiffs, of certain work which, by the contract, they were required to perform.

Third. As to the plaintiffs' right, in general, to relief, and particularly, to the special relief prayed for in the complaint.

One of the questions most elaborately discussed by the counsel for the defendant was the character and nature of the action. For the defendant, it was argued that it was strictly an action for specific performance of a contract, and subject to all the rules and principles of law governing such actions under the general equity jurisprudence. I do not, however, consider it necessary for me to determine this question specifically. It will not be found essential to the conclusions at which I have arrived to determine whether or not the present action is primarily and characteristically one for specific performance, since under either view I find no great difficulty in reaching my conclusion. It may be remarked in passing, that regarding the present action as one for specific performance, the chief argument relied on by the defendant's counsel—want of mutuality—is thus defined: "A contract, such that it might, at the time that it was entered into, have been enforced by either of the parties against the other of them."—Fry on Specific Performance, § 286. If, in the present case, there was an original want of mutuality in the contract, and if the contract were now

unperformed by the party seeking specific performance, the objection of the want of mutuality might be important. But if the party seeking relief has fully performed his part of the contract with the permission and acquiescence, and literally in the presence of

*233

the other party, it is now plainly too *late to interpose the objection of a want of mutuality at the time the contract was entered into.

Proceeding now to examine the first of the main issues presented, I find that the first objection on the part of the defendant to the plaintiffs' rights, as assignees of the original contract, to maintain this action, is that the complant does not correctly state the contracting parties—that it states (in Paragraph I,) that the contract was made by "Samuel A. Pearce, Jr., and William Sprague," whereas, in fact, it was made by "Samuel A. Pearce, Jr., for himself, and as trustee of William Sprague."

Under the former system of pleading, this objection might have availed as a variance between the contract alleged and the contract proved. But in equity it would not have so availed, unless it operated to the defendant's prejudice. By our Code, § 192, the equity rule has been practically adopted. "No variance between the allegation in a pleading and the proof shall be deemed material, unless it have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." By the answer, the defendant admits the execution of the contract, and states the parties correctly, thus showing that the defendant was not misled. No prejudice is alleged, and it is evident that none has arisen.

The second objection urged by the defendant is, that the contract has, in fact, not been assigned, which objection means that the contract was made with Samuel A. Pearce, Jr., and Samuel A. Pearce, Jr., as trustee of William Sprague, while the assignment to the plaintiffs is made by Samuel A. Pearce, Jr., and William Sprague. But it is to me a novel objection to an instrument intended to convey the interest of a cestui que trust, that it is signed both by the trustee and the cestui que trust. If it were not signed by the latter, the objection would have possible force, but certainly it has none because it is so signed. The assignment is made by the parties, and by the only parties who have any known or alleged interest in the things assigned. It purports to be an assignment of the entire contract, and operates to convey not alone the interest of Pearce, but the interest of Pearce as trustee. His signature avails to carry both of their interests, and the signature of Sprague himself carries the interest of the cestui que trust. What the term "trustee" in the contract imputes, does not clearly appear. Colonel Pearce testifies that he was acting for Sprague, under a power of attorney. As such, he was "trustee

*234

*of an express trust." The law makes him so in cases where he does not disclose the name of his principal, and he may in cases where he does disclose the name of his principal so style himself.—Vourhies Annot. Code, "b," to § 113, N. Y. Code.

The third objection is, that the contract is not, in its nature, assignable, and hence, that the assignment made without the assent of the defendant is null and void. Certain kinds of contracts are notoriously non-assignable—contracts, for instance, to render what is termed "personal service"—contracts in which reference is had to the peculiar fitness, by reason of personal skill or knowledge, of the party contracting to do the work or render the service, and when such personal qualities are plainly the chief consideration which moves the other party to enter into the contract. But nothing of this sort appears in the present contract. Neither Pearce nor Sprague can be supposed, or are shown to have had any peculiar personal fitness to perform their contract. Contracts of this character—contracts for buildings, railroads, canals and other works and structures, are every day assigned. But it is not necessary to consider this ground further. This contract is, by its own express terms, assignable, being made, not alone with Pearce and Sprague, but also "with their heirs, executors and assigns." Would it be denied that the executors of these parties might enforce the stipulations of this contract? This they might do independently of the use of the word "executors" in the contract; for the general rule of law is, that "where the contract with the deceased is of an executory nature, and the personal representative can fairly and sufficiently execute all that the deceased could have done, he may do so and enforce the contract."—1 Pars. on Con., 131, (5th Ed.) "E. Converso, the personal representative, is bound to complete such contract, and if he does not, may be made to pay damages out of the assets."—1 Pars. on Con., note "r," 131.

A fortiori, would this be true, where, as here, the executors are expressly named. There is as little doubt about the force of the word "assigns," when embodied in a contract, as in the present case. Its use engrafts upon the instrument as the express agreement of the contracting parties, independently of the assignable nature of the contract, that it shall be assignable. The law upon this point is too plain and familiar to require more than a statement. If it had been the intention of these contracting parties, that the contract should not be assign-

*235

able, it is inconceivable that *they should not only fail to make it in terms non-assignable, but actually adopt the word "assigns." To the further objection, that without the as-

sent of the defendant there is no such privity as will enable the plaintiff to maintain this action, it is only necessary to say that if the contract be assignable, the assignment, of itself, creates privity, and operates to place the assignees in the stead of the original parties. It is only in case the contract is not in its nature or terms assignable that assent is necessary.

The second general issue presented by the pleadings involves the fact of the performance by the plaintiff of that part of the contract, upon the completion of which the plaintiffs were entitled to furnish the city with its daily supply of water for twenty years. In the investigation of this question, it is important to consider what was the contract which the plaintiffs undertook to perform, as a contract precedent to the right to assume the performance of the second and main purpose of the agreement. What the contract is between the parties, its terms, conditions and meaning, is a question for the Court—to be determined upon an examination of the written agreement applied to its subject-matter. The construction of contracts "must depend upon the intention of the parties, to be collected in each particular case from the terms of the agreement itself, and from the subject-matter to which it relates." "It cannot depend upon any formal arrangement of the words, but on the thing as it is to be collected from the whole contract."—2 Pars. on Con., 527.

The Court, must, therefore, construct this contract, and develop its terms and provisions upon an examination of the whole agreement with reference to its subject-matter, general scope and purpose. From the pleadings and proof, it appears that at the time said contract was entered into, the defendant had in operation a system of water works complete in itself, with which the city was then supplied with water; that these works were then being operated with steam power; that the only supplies of water then available for the use of the city were the springs then supplying water to the reservoirs; that the supply of water from these sources was something over two hundred thousand gallons daily; that it was deemed desirable, in view of the possible present and certain prospective wants of the city, that the capacity of the existing works should be increased, and other and greater supplies furnished for the use of the city; and that the works should

*236

there*after be operated by water instead of steam power, which water power was then owned and controlled by the plaintiffs. The stipulations of the agreement on the part of the plaintiffs involved the construction of such parts of the new water works as should be required to give to the then existing water works the desired increase of forcing capacity; the furnishing of the city during the term of the contract with its daily supply of water; furnishing the water power for the operation of the works, and all the labor and management of the machinery and appurtenances; and the turning over to the city, upon the expiration of the contract, of the works, "in good order and repair."

On the part of the defendant, the agreement was to pay to the plaintiffs, in consideration of the performance by them of said contract, the annual sum of sixteen thousand dollars, in quarterly installments, the payments to commence from the time when the plaintiffs should begin to furnish the city its supply of water under the contract. Other stipulations are embodied in the agreement, which need not, in this connection, be considered, except in so far as they tend to the proper understanding of the foregoing salient elements of the contract. It is clear that, by the terms of the agreement, it was a condition precedent to the plaintiffs' right to enter upon the contract to furnish water, that they should first construct the additional parts of the works which were required to be by them constructed. The whole contract may be considered as an agreement on the part of the plaintiffs to furnish the city its daily supply of water for the stipulated term, using for that purpose all of the old water works except the steam engine and forcing apparatus, together with the newly constructed parts, and furnish their own water power, labor and management.

The plaintiffs, in their complaint, aver that they have, in every particular, fulfilled their contract as to the construction of the additional works required to be by them constructed; that on the 21st November last they were ready, in all respects, to furnish to the city its supply of water; that they had repeatedly undertaken so to do, but that they were prevented by the interferences of the defendant from so doing. This fact as to the performance by the plaintiffs of their contract, and as to their ability to perform it, in respect of furnishing the supply of water, the defendant denies; and this denial presents the main issue of facts to be determined by the Court.

*237

*The relief which the plaintiffs ask by their complaint is an injunction (in the nature of a perpetual injunction) against all such interferences by the defendant as hinder them in the performance of their contract to supply the city with water during the term of their contract.

To entitle them to this relief it is incumbent upon them to show that, by reason of their performance of the condition precedent, to wit, the construction of the additional works, &c., they are entitled to have the enjoyment of the further contract to supply the city with water, and the emoluments incident thereto.

The conduct of the defendant, in the matter of the alleged interferences, is predicated

upon a denial of the plaintiffs' right to the enjoyment of this contract. In the resolution of the Council of September 3, 1872, they say (in reply to plaintiffs' communication of August 22) that the plaintiffs "have failed entirely in the performance of said contract, thereby disregarding the necessity and endangering the property of the corporation," and thereupon resolve: "That the City Council is absolved from all obligation to fulfill the said contract, and in its behalf the said City Council refuse to comply with the covenants on its part therein contained." See MS. copy Council Proceedings. On the 12th November, 1872, the City Council, in reply to plaintiffs' communication of the 11th November, wherein defendant was informed that, on the 21st November, the plaintiffs would be prepared to furnish, and would furnish, the city with its supply of water, re-affirm their action of September 3, and state that "although there may have been a binding contract between the parties previous to the 21st day of August last, (1872), that then and after that the same became null and void, as to the city of Columbia, by reason of the failure of the said Samuel A. Pearce, Jr., for himself, and as trustee of William Sprague, to comply with the terms thereof on their part." From this action of the City Council, as well as from the contents of the testimony offered by defendant, and from the argument of defendant's counsel, it is seen that the denial of the plaintiffs' right to the enjoyment of this contract is predicated on these grounds, to wit:

1. Upon the ground that the plaintiffs have forfeited their contract by reason of non-performance within two years.

2. Upon the ground that they have "failed entirely in the performance" of the contract, thus entitling the defendant to treat the agreement as a nullity.

*238

*3. Upon the ground that the contract has not been performed by the parties with whom the defendant contracted.

The first of these grounds proceeds upon the assumption that the limitation of two years, within which the additional works were required to be constructed, was "of the essence of the contract," in such sense as to entitle the defendant to treat the contract as a nullity, because not performed within the time limited. Although this point appears not to have been insisted on in the argument it is, nevertheless, proper to give it some consideration. The general rule in equity is, that "time is not of the essence of a contract." It is said, however, that "parties may contract on what terms they will, and may declare, if they think fit, that it shall be so considered," or "time may be implied as essential in a contract, from the nature of the subject-matter with which the parties are dealing."—Adams' Equity, 88; Fry on Specific Performance, § 713.

To make the time to be a matter of essence, it is, however, not enough that a time is fixed within which a certain thing shall be done. "In order to render time thus essential, it must be clearly and expressly stipulated that it shall be so."—Fry on Spec. Perf., § 712. "The mere fact that a day has been specified for completion, will not, per se, render it essential."—Adams' Eq., 88.

An examination of the authorities on this point will show that time is in no case deemed essential in such sense as to entitle a party to disaffirm the contract, unless:

1. It was expressly stipulated that the time should be essential.

2. Or the essentiality is implied from the nature of the subject-matter with which the parties dealt.

3. Or, is made essential by reason of injuries sustained by reason of the non-performance within the time.

These principles are fully recognized by decisions in our own State, to which I need not refer at large. In Doar v. Gibbes, Bail. Eq., 371, it is said: "Time is not usually of the essence of a contract, but may become so, if the delay is injurious." In Sarter v. Gordon, 2 Hill Eq., 126, it is said: "To be sure, great, and long continued non-performance, will in some instances, in which circumstances are greatly changed, be construed into an abandonment of the bargain. This, however, is rare, and takes place only when the conduct of the parties indicates the intention to abandon the contract, or the delays have produced great injury to the one seeking to get rid of the contract."

*239

*There is, in this connection, still another principle to be noted, to wit: That in cases where it is not expressly stipulated that the time shall be essential, or where it is not essential, from the very nature of the subject-matter, if a party intends to rely upon it as essential, he must give to the other party reasonable notice of such purpose, and act promptly upon the non-compliance.—Fry on Spec. Perf., § 724, etc.

"Time may be always made material by either party if he chooses. Either may demand performance on the stipulated day, and if the other do not then comply, may elect to rescind, which rescission will free him from the obligations of the contract in law and equity."—See authorities in note 1, Adam. Eq., 88, 5th Am. Ed.

"But if time is to be considered of the essence of a contract, the point must be made promptly."—See Adam. Eq., 88, note 1.

In Thomas ads. Woodruff, 2 Sp., 148, "the limitation of time within which the work was to be done"—digging a well—"was not insisted on by the defendant, at the moment of its expiration. He suffered the plaintiff to continue digging the well for nearly two months afterwards. This was a waiver of the limitation."

It is further held, that "the notice, thus

to engraft time into the contract, must be express, distinct and unequivocal. Thus a notice that one party would consider the non-performance, by a certain day, as equivalent to a refusal to perform, the contract would then be considered as rescinded."—Fry, § 728.

"The time specified by the notice must be long enough for the proper doing of the things required to be done, and if it be not so, the notice will fail in engrafting time into the essence of the contract."—Fry, § 724.

To apply these principles: It is not asserted that, by express stipulation, the term of two years was made of the essence of this contract. Nor can it be assumed, from the very nature of the contract, that time was a matter of essence, or that it became so by reason of injury caused. Neither is it averred that, by any timely and reasonable notice, the defendant has engrafted the time into the essence of the contract. On the contrary, not only was there no such notice given prior to the expiration of the time, or at the moment of its expiration, but not until the 3d September was there given to the plaintiffs any intimation of a purpose to disaffirm the contract because of its non-performance. On the contrary, the plaintiffs

*240

were constructing their works all *this time, with the knowledge and supervision of the defendant. But without pressing this inquiry further, it is manifest, from the very face of the contract, that the parties did not regard the limitation of two years as a material or essential element of the contract. On the contrary, having in view the contingency of failure in this regard, they agreed to insert a penalty for such a failure, to be paid to the defendant, provided that the plaintiffs should not, within three months after such failure, "be in readiness to comply with the terms of the contract." A fair and reasonable construction of the agreement points this stipulation to the contract to supply the city with water, and imports an extension of the time of two years, within which extension, if the plaintiffs should be in readiness to comply with their contract, there should then exist no right in the defendant to exact the penalty, much less a right to disaffirm the contract.

The second ground of denial of the plaintiffs' right to the enjoyment of the contract to supply the city with water, proceeds upon the allegation of an entire failure on the part of the plaintiffs to perform their contract as to the construction of the additional works. "Defendant denies that the new water works were fully completed and finished in the month of November, 1872; denies that the parties of the second part were ready to enter upon the performance of that part of the contract whereby they were required to furnish the supply of water; denies that on the 21st November the parties of the second part were prepared to supply the city with water, according to the terms of said contract. On the contrary, defendant avers that the said parties of the second part were not then, have not been since, and are not now ready to furnish the city its supply of water under the terms of the said contract."

From the language of the denial, and from what follows in immediate connection in the answer, it resolves itself into three heads, to wit: 1. A denial that the works were constructed. 2. A denial of their sufficiency. 3. A denial of the plaintiffs' right to use "the old receiving reservoir, the distributing reservoir, and certain piping—being part and parcel of the old water works."

(1.) What were the "parts of a new water works" which the plaintiffs contracted to build are enumerated in the first paragraph of the agreement. They are also stated in paragraph 1 of the complaint, the correct-

*241

ness of which is admitted in paragraph 1 *of the answer; "but for a more complete statement the defendant prefers the words of the contract itself." No issues of fact are raised in the testimony, either as to the construction of the new reservoir, the erection of the building to protect the machinery, or as to the laying of the section pipe to the river. The defendant assumes, in its answer, and contended in argument, that by the agreement the measure of the water power capacity to be furnished by plaintiffs was one and a half millions of gallons daily. I have not been able to take this view of the contract. It seems clear that the agreement discriminates between the capacity of the forcing machinery and the water power. The former was to have a capacity equal to one and a half millions daily; the latter was to be sufficient for the daily supply of the city. It is inconceivable to suppose that the contracting parties intended to provide power for one and a half millions daily, when they well knew that the distributing reservoir would contain only one million of gallons, and when they expressly stipulated for the enlarging of the reservoir, if at any time it should be found "insufficient to contain the daily supply of water required by the city." It seems, therefore, that by the letter of the agreement, and its manifest purpose, that the plaintiffs are required to furnish a sufficient water power for the daily supply of the city only, and not a power sufficient to force up one and a half millions of gallons, unless that amount shall hereafter be required for the daily use of the city. As to the quantity of water now required by the city, the witnesses on that point, without exception, concur in the statement that the supply from the springs, utilized before the completion of the new works, has been ample; that it was so even when, during the war, the population of the city was much greater than now. The evidence further shows that, taking the highest esti-

mate for manufacturing cities in the United States, and estimating the population at twelve thousand, the city would require but four hundred and eighty thousand gallons daily; and that the present water power furnished by plaintiffs is adequate for that amount cannot be seriously doubted. I am of the opinion, from the testimony, that the plaintiffs have now sufficient water power to force up into the distributing reservoir daily the full amount of one and a half millions. It is also contended by the defendant that there will not remain for plaintiffs' use that amount of water power if the Penitentiary

*242

be allowed its complement under the *contract with the State; and that plaintiffs must fail as to one or the other of their contracts. It will be observed, by reference to the plaintiffs' contract with the State, that the power to be furnished is so much as may be necessary for the Penitentiary. According to the testimony, that institution now requires about twenty-five horse power three or four hours in each day, and under no circumstances could such power be used for more than ten of the twenty-four hours, and that fifty horse power will, in all probability, be the maximum that can be required during the continuance of the contract. But assuming that more power will be required by the State than plaintiffs now furnish, that would compel them to raise the dam at the head of the canal, or in some other way provide the increased capacity required.

The plaintiffs cannot be required to provide against a willful waste of water power by the State any more than they could be required to provide against a wanton and malignant destruction of their machinery. The proofs show that, from some unexplained motive, the State has now a Turbine wheel for the use of the Penitentiary, of two hundred and seventy horse power, when one of twenty-five would be ample for all purposes. This causes an enormous waste. It is not only a serious infringement of the plaintiffs' contract with the State, but is against its settled policy, and the highest interests of both city and State. The object the General Assembly had in view when the sale of the canal at a nominal price was made to the assignors of the plaintiffs, was the development of this gigantic power, and the consequent influx of capital and people; in brief, to compete successfully with our sister cities of the North and West, in the race of wealth and population. To do this, great as our resources are, they must be husbanded, not squandered.

Much stress was laid in the argument upon the failure of the plaintiffs to furnish the filter required by the contract. The evidence shows conclusively that the first patent filter provided broke down, under experiment, and was wholly inadequate for the purification of river water. According to the agreement, the suction pipe and filter are required in a certain contingency; the one "to be used to obtain water" from the river, "should the other streams fail to furnish a sufficient supply," the other "for purifying the water from said river, if such water should be required." Plaintiffs having purchased, in good faith,

*243

the filter *first tried, finding it inadequate, and within a reasonable time substituting another that is adequate, is a substantial compliance with that portion of their contract. Much testimony was offered by the defendant tending to show the insufficiency of the supports, props, gearing, &c., of the new works. It is not considered necessary to examine these questions in detail. The plaintiffs have constructed their works, and are compelled, by their contract, not only to supply the city with water during the time designated, but, at the expiration of the time, to turn them over to the city "in good order and repair." For a breach of either covenant the plaintiffs will be liable to the city. Whether these are properly or improperly constructed, the works are, and have been for months, in successful operation, and, in the face of that fact, such testimony cannot avail as a ground of exception to their sufficiency.

The assumption upon which the denial of the performance of the contract in one respect is based, is, that the plaintiffs, in furnishing the city its daily supply of water, have no right to use any portion of the old works, and, without their use, they were not, on the 21st of November last, and are not now, ready to furnish any water for the city. The defendant charges that the plaintiffs, in the use of the "receiving and distributing reservoirs and piping, have wrongfully seized upon the old city water works," and with having "seized the property, and usurped the rights of the defendant," that the same is "wholly outside of any contract, and, measured by the terms of the contract, is a trespass." The denial assumes that, under their contract, plaintiffs were required to build reservoirs in lieu of the old receiving and distributing reservoirs, and to lay entire new piping. The views entertained by the defendant in regard to the meaning of the agreement as above stated, and, in reference to the plaintiffs' being bound to furnish one hundred horse power for the Penitentiary, night and day, would seem to be the result of a distempered imagination, or chronic personal feeling, but for the exalted character of the learned counsel, and the earnestness and gravity with which they are maintained. By the terms of the contract, plaintiffs were to build such parts of a new water works as are required to force one and a half millions of gallons daily into the distributing reservoir. "Parts" of a thing are less than the whole. The construction of new reservoirs instead of

*244

the old, and the laying of new *pipes from one or the other, are not things enumerated to be done in the contract, nor are they, or either of them, necessary, in order to give the works the increased capacity. Besides this, there is an express stipulation in the contract, that should the distributing reservoir be found, at any time insufficient for the daily supply of water it was to be enlarged by the defendant. The old receiving reservoir, having a capacity of six hundred thousand gallons, was sufficient, always had been, and always would be, to hold the daily accumulations from the springs. The additional supply provided for in the contract to meet the future wants of increased population, whether from the springs below the old receiving reservoir or the river, could not fall into this reservoir; and hence the provision for the construction of a new receiving reservoir "near the Columbia Canal." It is unreasonable to suppose that the party intended to take out of use "forty thousand dollars' worth of piping" that was in good order, and answered all the purposes of the city as well as any that could be made. New pipes would not give increased capacity; they are not stipulated for in the contract, nor is there any implication therein warranting their construction. The old pipes, part of the old works, are fully adequate to meet the demands of the city for water, and to quadruple that demand. As the plaintiffs are bound by their contract "to build such parts of a new water works as are required to force one and a half millions of gallons of water daily into the distributing reservoir," how can it be contended that they are bound to build "parts" which are not required for that purpose. The old line of pipes being already sufficient, nothing was required except to connect the new with them, so as to form a continuous line. It is contended by the defendant, the plaintiffs have no right to use the old pipes. What is the meaning of the provisions of the contract, that "the steam engine, and all the appurtenances now used by the said city for forcing water into the distributing reservoir, should remain in their then condition for two years after the new water works should be completed, subject to the use of the plaintiffs if their machinery should be out of order? The steam engine and apparatus were connected with the old pipes, and if entire new piping was to be built, wholly unconnected with the old, of what use would the engine and apparatus be to the city or to the plaintiffs?

The obligations of the plaintiffs are "to furnish sufficient water power to force into the distributing reservoir the number of

*245

gallons *required by the city daily," * * * and all "the labor and management of the machinery, and appurtenances thereto." These obligations impose the duty on the plaintiffs of furnishing in the distributing reservoir all the water required for the needful supply of the city, and to furnish the best water obtainable from the sources mentioned in the contract. To carry out this part of the agreement the pipes that conduct the water to the receiving reservoir, and the reservoirs, must be kept clean and in otherwise good order. The undertaking of the plaintiffs begins with taking water from the springs, or river, in case the supply from the former is inadequate, and ends by the water being kept in the distributing reservoir, in good condition for the reception of the same, by defendant. Not only are the plaintiffs to furnish the necessary machinery and apparatus to accomplish the result, but "the labor and management," and this involves, in my judgment, the whole process of collecting the water and forcing it into the distributing reservoir. To enable the plaintiffs to do this successfully, the entire management and control of the old and new works, under the contract, vests in the plaintiffs—not the property itself, which is owned by the city, but the use of it during the life of the contract. The city has nothing to do with its management, and no responsibility for the labor required for that purpose. The control of the plaintiffs over so much of the works as are required to place in the distributing reservoir the supply of water daily required for the city, is as absolute as though they were the lessees, with a covenant for quiet enjoyment. The distributing pipes, hydrants, &c., are wholly outside of the contract; they are parts of the old works, but not parts required to force the water into the distributing reservoir. Hence over the supply pipes and appurtenances the control of the defendant, as owner and possessor, is unquestionable. The city has the same police superintendence over the receiving and forcing works that it has over any other property in the corporate limits; but the plaintiffs are charged, by their contract, with the legal custody, control and operation, and this custody and operation is a part of the consideration for the payment of sixteen thousand dollars a year. The contract is silent upon this point, but this construction seems necessary to carry out its provisions.

The other question raised by the pleadings is as to the plaintiffs' right, in general, to relief, and specially to the relief prayed for. The interference by injunction "rests on the

*246

principle of a clear and *certain right to the enjoyment of the subject in question, and an injurious interruption of that right, which, on just and equitable grounds, ought to be prevented."—Hill. on Injunc., 12.

The plaintiffs having complied with the condition precedent by building such parts of the new works as they were required to do by their contract, and having entered upon its performance by furnishing the city with

the particular water specified in their agreement, their machinery and works being sufficient to enable them to carry out the full provisions thereof, the defendant interfered, by cutting off the plaintiffs from access to the supply of water which they were required to furnish by preventing plaintiffs' communication with the distributing reservoir, and in continuing to use the old steam power, thereby endangering the safety of the pipes. Under this state of facts, I am of the opinion that the plaintiffs are entitled to the relief prayed for in their complaint.

I find, as matters of fact:

1. That the contract referred to in the pleadings was duly executed between Pearce and Sprague, and the defendant.

2. That the said contract was by Pearce and Sprague assigned to the plaintiffs for a valuable consideration.

3. That the plaintiffs had constructed such parts of the new water works as their contract required, prior to the 21st November, 1872, and were then, and ever since have been, prepared to supply the city with water according to the terms of their contract.

4. That the plaintiffs have, in good faith, complied with the provisions of their agreement.

I find, as matter of law:

1. That the contract was assignable.

2. That time was not of the essence of this contract, and that the completion of the works prior to the 21st of November, 1872, was a legal compliance with its provisions.

3. That under their contract the plaintiffs are entitled to use all such parts of the old works as are necessary to the forcing the required supply of water into the distributing reservoir.

It is, therefore, ordered and adjudged:

1. That the temporary injunction heretofore granted in this cause be made permanent.

2. That the defendant is hereby enjoined

*247

from appropriating the *moneys arising from the water rents for any purpose other than payment to the plaintiffs according to the terms of their contract.

3. That the defendant pay the plaintiffs the sum of $12,000, within ninety days from the finding of this judgment, with interest on $4,000 from the 21st day of February, 1873, with interest on $4,000 from the 21st day of May, 1873, and with interest on $4,000 from the 21st day of August, 1873.

4. That the defendant pay the costs of this action.

The defendant appealed upon the following grounds:

1. That His Honor should have held that the proceeding instituted by the plaintiff, as the title of the cause expresses in terms, as the facts set forth in the complaint clearly show, and as the prayers for relief expressly ask, was a proceeding invoking the extraordinary powers of the Court to enforce as an equitable remedy the specific performance of a contract stated in the several causes of action, and was governed by the recognized rules of equity applicable in such case; and to hold otherwise was error in the decree, and misleading to the defendant.

2. That, having held the first proposition, His Honor should have next held that, by the terms of the contract, there was a want of mutuality between the original parties to the agreement, in this, that the chief feature, if not the very hinge of the contract, to wit, the acquisition of a water power to be substituted for the old steam power heretofore used, was to be determined by an arbitration, as to which stipulation a specific performance could not be enforced in equity against either party, and as a specific performance of a contract will not be decreed unless a performance of the whole contract can be so decreed and enforced specifically, the Court should in this case have refused to decree a performance for the want of mutuality between the original parties to this contract, this inherent defect necessarily extending itself to any assigns under the same, thereby creating a want of mutuality beween the parties to this action; and for this reason the complaint should have been dismissed, and to hold otherwise was error in the decree.

3. That, having held the two last propositions, His Honor should have next held that the contract was made by and between the city of Columbia on the one part, and by Samuel A. Pearce, in his own right, and by Samuel A. Pearce, as trustee, on the other part; that William Sprague, individually,

*248

was a stranger to the contract, and *as such, was not bound in person or estate by its terms; that between William Sprague and the city of Columbia there was no privity of contract, and no mutuality of obligation whatsoever; and to hold otherwise was error in the decree, and a misunderstanding of the defendant's argument.

4. That having held these three last propositions, His Honor should have next held that there is no such thing in law as making a contract with the personal representatives of any living person, nor with the assigns of any contracting party; on the contrary, a contract is in law with the principal himself, who undertakes when bound himself, to bind his executors, administrators and assigns according to the nature of the contract. That by the terms of this contract, William Sprague was not a party, and had entered into no covenant with the defendant to bind either himself or his executors, administrators or assigns; that Sammuel A. Pearce could not assign the equitable interest in the contract, as trustee, without a power in that behalf duly made and strictly pursued, which power was not produced or proved; that the said Samuel A. Pearce, Jr., by

his own covenant, seal and signature, could, in no sense, bind the said William Sprague personally, much less could he bind the personal representatives and assigns of William Sprague to a contract to which William Sprague was not himself a party, and his executors, administrators and assigns, necessarily, neither in law nor in fact parties; and to hold otherwise was error in the decree, and a misunderstanding of the points made in defendant's answer and in his argument.

5. That, having held these last four propositions, His Honor should have next held that in the supposed assignment made by William Sprague and Samuel A. Pearce, each for himself, of the said contract to plaintiff, the interest of Samuel A. Pearce, as trustee, was not assigned, and William Sprague, being not personally a party to the contract, had no personal interest in himself to assign to any one by his individual assignment; that, by the supposed assignment, therefore, the plaintiff took no interest except several interest in the contract of the said Samuel A. Pearce, whatever that may mean, (the extent of his personal interest not having been proved at the trial;) that the contract, being a joint contract, on the part of Samuel A. Pearce for himself, and Samuel A. Pearce as trustee, the interest of one joint contracting party could not be assigned in severalty, and the plaintiff, as the supposed

*249

assignee, *took nothing by the assignment which created a privity of contract between the plaintiff, as such assignee, and the defendant; and to hold otherwise was error in the decree and a misunderstanding of defendant's argument.

6. That having held these last five propositions, His Honor should have next held that the plaintiff, under such supposed assignment, could maintain no action asking a specific performance, as assignee, (if no other objection existed) against the defendant, and the defendant could institute no action against plaintiff upon which a prayer for a specific performance could be predicated, the foundation of said jurisdiction resting in privity of contract, and in mutuality of obligation, without which the Court must refuse its aid in equity, and leave the parties to their action for damages as they may be advised: and to hold otherwise was error in the decree and a misunderstanding of defendant's argument.

7. That having held these last six propositions, His Honor should have further held that in a real covenant, or a covenant running with land, the assigns in the land will be bound, (usually whether named or not,) because the covenant binds the land and follows it into the hands of all holders or assigns under the covenanter, but in a personal contract to perform a debt or duty the executor or administrator of the covenanter will be bound (usually whether named or not,) but the assigns (whether named or not) will not be bound by such contract, and the contract would, in all respects, stand as if the word "assign" had been stricken from the contract as unmeaning surplusage; and to hold otherwise was error in the decree.

8. That having held these last seven propositions, His Honor should have next held, where the defendant could have, under such contract and assignment, no remedy against the assignee for a specific performance, that in such case the obligation is not mutual, and the relief by way of a specific performance should be withheld from both parties or either seeking it in this Court, and for the reasons herein assigned the complaint should have been dismissed; and to hold otherwise was error.

9. That His Honor should have further held that from the beginning of the contract the defendant had its dealings entirely with Samuel A. Pearce, one of the original parties to the same, without notice of any kind of the assignment of the contract to the present plaintiff, the only evidence of notice being

*250

the recording of the *assignment, of which fact the defendant was wholly ignorant, the said instrument not being of such a nature as was required by law to be recorded, and could not therefore operate even as constructive notice to the defendant: it was, therefore, not true that the party now "seeking relief has fully performed his part of the contract with the permission and acquiescence, and literally in the presence of the other party;" on the contrary, at the earliest moment that the information came to the knowledge of the defendant, prompt objection was interposed, to wit: on the 3d September, 1872, and reaffirmed on the 12th November, 1872; and to hold otherwise was error in the decree.

10. That the contract not having been complied with by the parties who contracted with the defendant at the time specified, their rights under the contract were forfeited, time being of the essence of the original contract, and if not so originally, being made so by the notification of the defendants to the parties who contracted with it; and to hold otherwise was error in the decree.

11. That refusing to dismiss the complaint, His Honor should have certainly held, with the contract before him, that a Court will never undertake to "construct" a contract for parties who are bound to "construct" their contract for themselves, however the Court may anxiously endeavor to construe a contract according to the terms in which it may have been constructed, and by that means arrive at the true intention of the parties to the same; that upon this rule the contract, when clear, mutual, equitable and capable of being specifically enforced, will receive the aid of the Court, and not otherwise.

12. That having held the last proposition, His Honor should have next held that the object of the contracting parties was evidently to confer upon each other mutual benefits, duties and responsibilities; and when it clearly appeared by the evidence that the city of Columbia had heretofore been amply supplied with water, at the cost of between six and seven thousand dollars per annum, and when it appeared by the contract that the city of Columbia was, for a term of twenty years, to pay to the other contracting party the large sum of sixteen thousand dollars per annum, aggregating during the term the great sum of three hundred and twenty thousand dollars, the Court would zealously inquire into the benefits to be derived under the contract by the city of Columbia, and before decreeing a specific performance would narrowly examine and ascertain the quid pro quo.

*251

*13. That, having correctly held that "parts of a thing are less than the whole," His Honor should have then held that the "whole" water works of the city meant the collecting reservoir and pipes, the collecting and the forcing appurtenances thereto, together with the distributing reservoir and the distributing pipes appurtenant thereto, making a set of works in whole; that the distributing reservoir and pipes appurtenant were to remain as they were, and the "parts" to be supplied under the contract by the parties of the second part were a new collecting reservoir and pipes appurtenant thereto, and all other things necessary to fulfil their express undertaking to deliver a certain quantity of water daily into the distributing reservoir of the city; that by the express terms of the contract the water was to be collected from two sources, to wit: "From streams below the present receiving reservoir," and should these streams "fail to furnish a sufficient supply, then the water was to be drawn from the river;" that the object of the contract was to develop new and distinct sources of supply; that certain specified things were named to be done, but as water could not be collected in the new collecting reservoir, to be built without pipes, from the new springs that were to be developed, and could not be forced into the distributing reservoir, according to the express terms of the contract, without connecting pipes between the new collecting reservoir at the river and the distributing reservoir in the city, these appurtenances became part and parcel of the contract, which could not otherwise be fulfilled, as there was no other provision for it in the contract; and to hold otherwise was error in construing the contract and error in the decree.

14. That, having held the last proposition, His Honor should have next held, that so far from the contract having been complied with by the contracting parties of the second part or the plaintiff, they had then and before that time, and have ever since been wrongfully appropriating to their own use the old collecting reservoir of the city, and drawing their supply of water from sources not named or ever contemplated by the contract, viz., from springs and through pipes that belong to the city, which have never been granted to said parties, and from the beginning have been and are now forcing the water thus collected wrongfully through pipes, also the property of the city, which are part and parcel of the old collecting and forcing works of the city, and are not named in the contract except in so far that as ap-

*252

purtenances in the steam engine *and all the apparatus now (then) used by the said city for forcing water into the distributing reservoir, they are to be and remain in the place and condition it now is (then was) in for the period of two years from the time when the party of the second part begins to supply the city with water, subject to the use of the party of the second part, at his expense, should any accident or unforeseen event occur which would temporarily render his machinery inoperative; and herein the decree granting an injunction order against the defendant, being dated the 6th day of February, 1873, whereby its property was thus in effect taken from the possession of the city and delivered to the plaintiff, was error, and comes up now for review in this appeal, and the final decree extending the injunction order and making the same perpetual is, for the same reasons, also error, and should be reversed.

15. That, having held the last proposition, and it appearing by the evidence that neither the parties of the first part, nor the present plaintiff, had developed, as contemplated by the contract, any new springs below the old receiving reservoir, except one, furnishing but a few thousand gallons of water daily, and had furnished no proper filterer for the water drawn from the river, and had constructed no connecting pipes between the new collecting reservoir at the river and the distributing reservoir in the city, they had not complied with their contract, and could not, in fact, supply one drop of water to the city, much less the quantity stipulated to be by them supplied under the contract; and to hold otherwise was error in the construction of the contract, against the plain meaning of the parties, and was error in the decree.

16. That, failing to hold the last proposition, His Honor should certainly have held that the plaintiff was bound by the terms of the contract, and for the large consideration of sixteen thousand dollars per annum, to construct such "works" and supply such "power" as were capable of furnishing one million five hundred thousand gallons of water to the city daily, (although the same may

not of necessity have been immediately called for,) that the "power" to be furnished could not, under the contract, be separated from the capacity of the "works," the one being useless without the other; and, further, that the plaintiff could not at any time, and could not at the trial, have furnished one million five hundred thousand gallons of water of any kind, fit for the use of the city, for the reason that all of the springs together were

*253

wholly inade*quate for such supply; that the water from the river was not available without filtration: that there was no proper filterer constructed by the plaintiff; that the one first used was worthless, and the subsequent one a mere sham, containing as an area only one hundred and eleven square yards, while, by works of authority admitted in evidence, it was conclusively shown that to filter for use one million five hundred thousand gallons of water in twenty-four hours would require a filterer containing an area of at least two thousand square yards; that the filterer being otherwise wholly defective, no supply of water whatever could be drawn from that source: and to hold otherwise was error in the decree.

17. That, having held the last proposition, His Honor should have next held that so far from the present capacity of the distributing reservoir, one million of gallons of water, being assigned as a reason for constructing the contract in such manner as not to require, under the said contract, the full capacity of one million five hundred thousand gallons of pure water daily, the obvious fact that nearly as much water would daily run out of the distributing reservoir as could be forced daily into it would not only negative any such construction, but when taken with the further provision in the contract for enlarging the distributing reservoir, if more than one million five hundred thousand gallons should be required in the future, it was conclusive of the meaning of the contract as to the prerequisite collecting, forcing and purifying capacity, as well as permanent strength of the works, to be built within two years from the date of the contract; and to hold otherwise was error in the decree.

18. That His Honor should have next held that, by the terms of the sale from the State to the parties of the second part, of the Columbia Canal, "it was expressly stipulated that one hundred horse-power should be reserved to the State for the use of the Penitentiary," that this "power" so reserved did not belong to the contracting parties of the second part, and in attempting to show that they had sufficient "power" under this contract to force one million five hundred thousand gallons of water daily into the distributing reservoir, it was first necessary to show that this supply "power" remained, after deducting what was allowed by law for the Penitentiary, inasmuch as the surplus was all that the contracting party of the first part could rely upon as available at all times under this contract; the fact of the neces-

*254

sity of working the Peni*tentiary works night and day to exhaust the power reserved, being wholly beside the question made in the argument; and to hold otherwise was error in the decree.

19. That His Honor should have next held that, in estimating the present character and structure of the works, the cost in constructing the same, and all evidence going to show that the works were temporary and not permanent, should have been received in evidence and gravely considered, and for His Honor to hold, in this regard, that it was not necessary to examine the evidence "tending to show the insufficiency of the supports, props, gearing, &c., of the new works," and that "whether these were properly or improperly constructed," cannot "in the face" of the present "successful operation," avail as a ground of exception to their sufficiency, was error in the decree.

20. That His Honor should have held that, from the very nature of the contract, it could not be specifically enforced as an equitable remedy, not even if the Court should undertake, or could condescend to make itself an overseer of the contract for the next twenty years.

21. That, taking the construction of the contract contended for by the plaintiff, it is neither clear, reasonable nor equitable, but, on the contrary, it is a hard bargain, unequal, unrighteous, and against conscience, and His Honor should have so held, and declined the aid of the Court to enforce the same, and the decree for so much money rests upon no part of the complaint, as set up in the plaintiff's sworn causes of action, and was, in fact, not a question for the Court, but upon a properly formed complaint, would have presented a question to be determined by a jury.

Tradewell, City Attorney, with whom were Pope & Haskell, Butler & DeSaussure, Bachman & Youmans, for appellant.

Melton & Clark, with whom were Melton & Chamberlaim, contra.

The opinion of the Court was delivered by

WILLARD, A. J. The first exception contends that the judgment of the Circuit Court is erroneous in not treating the action as one of an equitable character, based on the equitable doctrines of specific performance. If what is intended by specific performance by the exception is the proceeding in equity

*255

to specifically enforce a *contract incapable of enforcement at law, as, for instance, where the contract conflicts with the statute of frauds, then clearly the rules governing that

proceeding have, as a whole, no application to the present case.

In an enlarged sense of the term, the present action is based on specific performance, and was so regarded and treated by the Circuit Court. Usually the terms of contracts relating to personal rights are not specifically enforced, but the party aggrieved by want of performance or by improper performance is left to his action at law to recover damages for the injury sustained by him. There are, however, well established exceptions to this general rule, and one of these exceptions embraces the present case. Where a party, by grant, covenant or contract, upon consideration, provides for something to be done on his own land of such a nature that the products of the labor and materials supplied by the other party may be either rendered valueless to him or become, by operation of law, the property of the owner of the land through the exercise of the right of dominion over the land vested in its owner, and such owner attempts to exercise his right of dominion for the purpose of depriving the opposite party of the benefits of his grant, covenant or contract, equity will interfere, where necessary, to restrain the exercise of such dominion, and to establish the grant, covenant, or contract rights, between the parties. To this principle the protection of mining rights and certain servitudes and franchises by the Courts of equity as against the owner of the land in which they are enjoyed may be ascribed.

The view of the case taken by the Circuit Court does not essentially differ from that just presented.

The second exception is based upon a provision of the contract having reference to the period of its expiration. The plaintiffs' assignors being the owners of the water power by which the hydraulic works were intended to be actuated, a provision was inserted in the contract to the effect that at the expiration of the contract the defendants should be entitled to be supplied with water power at a price to be fixed by arbitrators chosen by the respective parties. It is now contended that the enforcement of this provision, as it regards the appointment of arbitrators and the proceedings for fixing the price to be paid by the defendants for the use of the requisite water power, is, from its nature, incapable of attainment in equity, and, therefore, that

*256

the contract lacks mutuality *and as such is incapable of enforcement under the rules governing specific performance.

It is not pretended that, in order to accomplish the objects of the present complaint, this provision must be executed. We are not called upon at the present time to say whether relief could or could not be afforded in the nature of fixing the terms contemplated by the parties in the event that either party should throw obstacles in the way of its attainment by the means contemplated by the contract.

It is not a practical question between the parties, neither of them, so far as appears, having done any act or made any declaration looking to any dispute as it regards this clause of the contract, and it would be manifestly improper for this Court to anticipate any such controversy at the present time. The whole effect of the decree is to restrain the defendants from unlawful interference with the exercise on the part of the plaintiffs of their contract rights, and to protect a special fund set apart as security for the payment of the amount contracted to be paid by the defendants, and to compel the payment of certain installments already due upon the contract. This can all be accomplished without resort to the provisions of the contract under immediate consideration.

The third exception contains nothing material to the issue between the parties. It is quite immaterial at the present time what was the precise relation created by the contract as between W. Sprague and S. A. Pearce. The plaintiffs, if they have any right to enforce the terms of the contract, unite in themselves all the rights of S. A. Pearce individually and as trustee of W. Sprague, with the individual rights of Sprague, and an inquiry into the original status of W. Sprague is of no value at the present time. The complaint asks nothing for or against W. Sprague individually, and therefore his status under the contract need not be considered. To determine that Sprague had more or less interest under the contract need not affect the question of mutuality raised as to the contract itself, for it would still leave in Pearce an interest and duty adequate to support it.

The fourth exception is merely an amplification of the third, and presents nothing important to be noticed beyond what has already been considered.

The fifth exception objects to the validity of the assignment of the contract by Pearce, for himself, and as trustee for Sprague, to

*257

*the present plaintiffs. Sprague does not object to the assignment as affecting his interest, but, on the contrary, became a party to the assignment itself. Why the defendants should attempt to raise a question as between Pearce and Sprague affecting no one but those parties, and which they show no disposition to agitate, is not made clear. This Court cannot treat the case as involving any such controversy, nor the defendants as having any interest whatever in its solution.

The sixth exception is argumentative, and simply summarizes the results which the defendants contend should flow from the preceding exceptions.

The seventh exception argues that the plaintiffs can derive no benefit from the use of the word "assigns" in the contract. The right of the plaintiffs to bring an action in the nature of a bill in equity on the contract does not depend on the use of the word "assigns" in the contract, but upon provisions of law that

will be hereafter considered. Still the word "assigns" is not without importance as indicating that the parties did not consider the contract as one calling for strictly personal performance by the original contracting party. The matter of this exception is, therefore, wholly immaterial.

The eighth exception insists substantially that the assignment of the contract destroyed its mutuality. The question of mutuality, as affecting the right to a specific performance, related to the original character of the obligation assumed. To say that a contract originally mutual is deprived of that character by the mere fact of assignment is to misconceive the legal meaning of the term mutuality, as applied to contracts. If the defendants mean that they have lost any rights or remedies that they possessed prior to the assignment, they misconceive the effect of the assignment on such rights and remedies. This and the next succeeding exception involve, though not distinctly presented, the idea that the contract was not assignable, so as to authorize an action by the plaintiffs to enforce its provisions. The action is equitable in its nature, and, without the aid of Section 134 of the Code of Procedure, it could be brought by an assignee, where the thing assigned is capable, either at law or in equity, of being assigned.

This Court is entirely satisfied with the grounds upon which the Circuit Judge placed his decision sustaining the right of the plaintiffs to maintain their complaint as as-

*258

signees. We are also satisfied *with the conclusions of the Circuit Judge as it regards the question whether want of complete performance within the time prescribed by the contract is ground for refusing the relief prayed for. It does not appear that the defendants have been in any way prejudiced by any delay that may have occurred in the execution of the contract. To allow the defendants to take possession of the fruits of the plaintiff's labor and expenditures without relief, or to throw them valueless on the plaintiff's hands, is the very evil that the rules of equity were in part framed to prevent. It was to cover such cases that the rule was laid down that time is not of the essence of the contract, and in administering relief of an equitable nature an exception should not be interposed to that general rule, the effect of which will be to do manifest injustice to the parties.

The eleventh exception contains a play of grammatical criticism upon the language of the Circuit Court that might well have been omitted. The expression employed by the Circuit Judge is perfectly intelligible in a sense consistent with the established rules of construction.

The propositions advanced by the twelfth exception are entirely inadmissible. This Court has nothing to do with the question of the fairness of the price agreed to be paid by the defendants, under the issues raised in this case. The right and authority to determine that matter rested with the City Council. They have fixed the terms of contract, and, unless upon proper issues, it is found to be void, inoperative, or terminated by competent authority, it must be enforced by the Courts without regard to any opinion which they may form as to the fitness of its provisions. We cannot refuse a specific execution of a contract, where otherwise proper, upon any such ground.

We cannot assent to the construction of the terms of the contract advanced by the thirteenth exception. It is forced and unreasonable. The true construction called for an extension and adaptation of the then existing works to accomplish the end in view, namely, a supply of water to the required amount. To duplicate the works requisite to supply the city with water would be a senseless and extravagant expenditure that cannot be assumed to have been the intention of the contract. It is obviously so when it is considered that, as appears, the sources of water supply for the use of the city include water of both a superior and inferior quality, the one derived from springs and the other from

*259

the river. That to draw *as much as possible from the best water and a minimum amount from the poorest, is clearly the dictate of prudence. The effect of the construction contended for by the defendants would be to shut out from use a large part of the best of the water available, and to compel resort to impure river water to take its place.

The fourteenth exception simply traces positions previously assumed to their logical consequences, and is already sufficiently disposed of.

The fifteenth exception, in addition to the matters already considered under the last two preceding exceptions, advances a single proposition, that there was a want of compliance with the terms of the contract as it regards providing for the filtration of river water required to be used. On the assumption that the contract only called for the means of filtering such quantity of river water as was required to supply the daily consumption of the city, we concur with the Circuit Court in the conclusion that no want of due performance on the part of plaintiffs or their assignors has been established. The question as to the extent of the means of filtration demanded by the contract arises under the next exception in order.

The sixteenth and seventeenth exceptions take the position that, by the terms of the contract, plaintiffs were bound to construct works and furnish power with an immediate capacity equal to the daily supply of one million five hundred thousand gallons, notwithstanding that a much less amount was actually required for actual consumption, and may be sufficient for many years yet

to come. On the other hand, the plaintiffs contend that they are only bound to provide the requisite means to supply the city with all the water required for daily consumption, to an extent not to exceed one million five hundred thousand gallons daily.

The argument in behalf of the defendants rests mainly upon the first clause of the contract, which reads as follows: "That the said party of the second part covenants and agrees to and with the said party of the first part to build such part of a new water works as are required to force one and a half millions of gallons of water daily into the distributing reservoir now used by the city, namely, &c.;" then follows a specification of the details intended to be embraced in the requirement, which concludes as follows: "to furnish a sufficient water power to force into the distributing reservoir the number of gallons of water required by the said city

*260

daily." The *city engages to enlarge the present distributing reservoir should it prove insufficient to hold the daily supply requisite for the use of the city. The contract provides also that the contracting parties shall furnish a filtering apparatus for purifying the water from said river, if such water was required.

It is not disputed that the works constructed and the power supplied are adequate for the immediate wants of the city, and admit of a largely increased consumption. There can be no doubt that, should the consumption increase, the contracting parties would be bound to provide means, in accordance with the terms of the contract, for supplying such increased demand to the limits of supply called for by the contract. The construction contended for is, that they were bound to furnish at once, and by the time fixed by the contract, namely, two years from its signature, the full means requisite to supply the maximum amount that, under any circumstances, may be demanded under the contract.

The evidence does not put in doubt the capacity of the works to supply even the maximum amount, except as to the amount of water power provided and the capacity of the filter. It will therefore only be necessary to look into the question raised so far as it relates to the amount of water power supplied and as to the capacity of the filter.

The special provision of the contract in reference to the amount of water power to be supplied, already cited, and which limits it to the amount required for daily consumption, evidently embodies the intent of the parties as affecting this question. It is entirely reconcilable with the general clause requiring the erection of works equal to the full capacity of one million five hundred thousand gallons daily. The general clause embodied the full measure of duty imposed upon the contracting parties under all the contingencies contemplated by the contract, while the special provision furnishes the means of ascertaining the extent of performance due on any particular day or under any given state of circumstances that may arise in the course of executing the contract.

We are of opinion that, unless it is made to appear that there has been a failure on the part of the plaintiffs to supply the amount of water power required to furnish the amount of water required for daily consumption, no want of performance can be maintained.

The clause bearing on the capacity of the filter also has reference to a supply for daily consumption merely. It provides that the

*261

*means of filtration shall be sufficient "for purifying the water from the said river, if such water was required." This clause would not be conditional if the water supply contemplated was the full amount of one million five hundred thousand gallons, for all the evidence shows that that amount could not be supplied without using river water to a large amount. It must be concluded that what was meant by "if such water was required," was that if it was required to supply the daily consumption of the city at any time during the contract. It is clear that the required extent of the means of filtration to be supplied must be determined under the contract by the amount of river water required to make good the amount needed for daily consumption, and not by the maximum amount of one million five hundred thousand gallons.

As we have seen, the special provisions of the contract limit the duty of the plaintiffs, as it regards the supply of water power and the means of filtration, to what is requisite for daily consumption. This view disposes of the whole question without rendering it necessary for us to look into the evidence supporting the conclusion of the Circuit Judge, that, in all respects, the works are sufficient to supply the maximum daily consumption of the one million five hundred thousand gallons.

The view just taken disposes of the eighteenth exception, based upon the sufficiency of the supply of water power to meet the maximum requirements of the contract.

The nineteenth exception does not present very clearly the ground of obligation to the judgment intended to be taken, but, assuming that its object is to reverse the judgment on the ground that the evidence showed that the work was unskillfully performed, we find no ground for disturbing the judgment.

No issue was made in the pleadings as to the character of the work supplied by the plaintiffs as it regards skill of workmanship, and the evidence does not afford any such clear and decisive proof that would justify the interference of this Court with the con-

clusions of the Circuit Judge on a question of fact.

The twentieth and twenty-first exceptions are fully disposed of by what has already been said.

The exceptions are all insufficient, and the appeal must be dismissed.

WRIGHT, A. J., concurred.

*262

*MOSES, C. J. I entertain doubts as to the assignable character of the contract. I will not, however, allow them to prevent my concurrence in the judgment of the Court.

5 S. C. 262

WHALEY v. BANK OF CHARLESTON.

(Columbia. April Term, 1874.)

[*Equity* ⇐454.]

Petition for leave to file a bill of review, or bill in the nature of a bill of review, refused.

[Ed. Note.—Cited in Ex parte Knox, 17 S. C. 214; State v. Turner, 39 S. C. 426, 17 S. E. 885.

For other cases, see Equity, Cent. Dig. § 1110; Dec. Dig. ⇐454.]

[*Appeal and Error* ⇐1217.]

After remittitur the Supreme Court has no jurisdiction, and cannot re-hear the case.

[Ed. Note.—Cited in Ex parte Dunovant, 16 S. C. 300; Ex parte Knox, 17 S. C. 213.

For other cases, see Appeal and Error, Cent. Dig. § 4717; Dec. Dig. ⇐1217.]

This was a petition by the Bank of Charleston to this Court for leave to file a bill of review, or bill in the nature of a bill of review, in the case of Whaley against the Bank of Charleston, reported ante p. 189, to the end that the cause may be re-heard.

The grounds chiefly relied upon were that the Court, in its decision, treated the cause as an action at law, holding the judgment of the Circuit Court upon the facts to be final, whereas the case was treated in the Court below as a proceeding in equity; that a trial by jury had not been waived; that, having been treated as a case in equity, the decree upon the facts could be reviewed on appeal; and that there was error in the finding upon the facts.

Porter & Conner, for petitioner.

Campbell, contra.

The opinion of the Court was delivered by

MOSES, C. J. A consideration of the petition filed in this case for a re-hearing leads us to no conclusion favorable to its prayer. Even assuming our right to control the judgments of the Court, so as to subject them to our review and reversal, we see nothing in the matter before us to require our interference.

We take occasion here to refer to what was said In Re Knox & Gill v. So. Ca. R. R. Co., ante, p. 22.

If we have power to suspend a judgment duly filed, on the application of the party against whom it was rendered, to discover by another hearing that it is without error,

*263

we do not see how we *could exercise it here, when the case, by the formal process of remittitur, is beyond our jurisdiction.—Pringle v. Sizer, 3 S. C., 337.

The motion is dismissed.

WRIGHT, A. J., concurred.

5 S. C. 263

STATE v. WALKER.

(Columbia. Nov. Term, 1873.)

[*Mandamus* ⇐78.]

Mandamus is the proper remedy to compel a Sheriff to keep his office at the County seat.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 136; Dec. Dig. ⇐78.]

[*Costs* ⇐35.]

After the decision in State v. Chairman County Canvassers, 4 S. C., 485, the papers relating to the election were transmitted to the State Board of Canvassers, but that Board declined to act upon them: *Held*, That the effect was to leave the declaration of the Board of County Canvassers final and conclusive; and that Barnwell was the County seat.

[Ed. Note.—Cited in Ex parte Mackey, 15 S. C. 335.

For other cases, see Costs, Cent. Dig. § 99; Dec. Dig. ⇐35.]

This was a petition by the Attorney General to the Supreme Court for a writ of mandamus to compel N. G. W. Walker, Sheriff of Barnwell County, to remove his office from Blackville to Barnwell.

The petition, after referring to the Act to refer to the qualified voters of Barnwell County the location of the County seat, and setting forth that the election was held, and that the County Board of Canvassers had certified that a majority of the votes were given for Barnwell as the County seat, proceeded to state, in effect, that after the decision of this Court in the case of the State v. The Chairman County Canvassers, 4 S. C., 485, the poll lists and other papers relating to the election were transmitted to the State Board of Canvassers, who declined to act upon them on the ground that it was not their duty to do so under the Act, wherefore Barnwell became, and was and is, the County seat.

The Sheriff, by his answer, admitted the facts, and submitted the question to the Court.

Aldrich, for relator.

Hunter, contra.

*264

*April 30, 1874. The opinion of the Court was delivered by

WILLARD, A. J. If the town of Barnwell is by law the County seat of Barnwell County, it is the duty of the respondent, who is the Sheriff of that County, to keep his office at that place, and a writ of mandamus is the appropriate remedy for its enforcement.

This Court decided, in the case of The State Ex Rel. Lartigue v. Nerland, 4 S. C., 485, that it was the duty of the County Canvassers of Barnwell County, under the Act of February 12th, 1873, 15 Stat., 333, to transmit to the Board of State Canvassers all protests and other papers relating to the election held under that Act. It appears that such papers were so transmitted, but that the Board of State Canvassers have declined to pass upon the matters thus brought before them.

The grounds upon which their refusal to consider the matters thus submitted to them are not of importance to the present case. It is enough to know that they have had an opportunity to reverse the conclusions arrived at by the Board of County Canvassers, and that they have not exercised their power to reverse or modify such conclusions and determination. It is claimed by the relator that the effect of this want of action, on the part of the State Board of Canvassers, is to leave the determinations and declarations made by the Board of County Canvassers final and conclusive. If this view is correct, Barnwell is the County seat, and the writ of mandamus should be allowed as prayed. On the other hand, it is contended that the election has no finality or validity until its result is ascertained and declared by the Board of State Canvassers, and that such ascertainment and declaration not having been made, the election is inoperative and void, and Blackville remains the legal County seat.

The position thus assumed by the respondent involves the proposition that any election, the results of which are proper to be ascertained by the State Board of Canvassers, can be defeated by the mere refusal of that Board to perform its legal functions. Such a conclusion is not to be hastily arrived at, as it tends to place in the hands of an official Board power to neutralize the elective power, and consequently to prevent succession to public office in accordance with the will of the majority of the electors.

The respondent places his proposition upon the language of the last clause of Section 2 of the Act already cited, which is as fol-

*265

*lows: "Provided, That in all respects the said election shall be held, conducted and determined as is now provided by law for the holding of elections for State and County officers." He concludes that inasmuch as this Court has held that the election must, in due course, be considered and passed upon by the State Board of Canvassers, therefore it cannot be regarded as effectually determined for any purpose until so determined by the last named Board.

The fact that the election is not finally and conclusively determined until the Board of State Canvassers has had due opportunity to act upon it, is perfectly consistent with the idea that the determination by the County Board is to stand as final and conclusive, unless its force is impaired by the action of the State Board. Construing the law by its subject-matter, it must be borne in mind that the fact of an election, as an act of the electors expressing choice as to a matter submitted to them by the Constitution or laws, is the foundation of all rights springing out of such an election. The action of canvassers, whether local or general, is merely a mode of ascertaining the existence of such fact. Under our laws there are two bodies entrusted with power to ascertain and fix the fact of an election for State or County purposes, the one acting as a primary tribunal and the other as a revisory body. The Board of County Canvassers is the primary body, and the Board of State Canvassers is the revisory body. To say that the election fails unless a proper declaration is made by the Board of State Canvassers is to destroy entirely the function of the County Board. On the other hand, to allow the Board of County Canvassers power to make a determination and declaration, valid and conclusive, unless reversed or modified by the revisory body, is to give to each body a distinct, important and entirely consistent function in harmony with the methods by which we are accustomed to fix the existence of facts on which legal rights depend.

The certificates of the result of the election issued by the Board of County Canvassers were not issued in conflict with any provision of the law, and, being consistent with the legal state of facts, are sufficient to fulfill the intention of the Statute and to put in operation the rights placed by the Statute upon the results of the choice of the electors.

The order herein has already been filed.

WRIGHT, A. J., concurred.

*266

*MOSES, C. J. I am compelled to dissent from the judgment of the Court in these cases, and shall briefly state my reasons.

In the State Ex Relatione C. E. Lartigue and M. F. Malony v. W. A. Nerland, (April Term, 1873,) it was held that the election, under the Act of February 12, 1873, was not determined according to law, because the protest of the contestants had not been transmitted to and heard by the Board of State Canvassers. I did not concur in that conclusion, but as it was the judgment of the Court I regard myself bound by it. In my view, the judgment in the case now before us is in direct contradiction, not only of the grounds on which the result in that case rest-

ed, but of the judgment itself. There it was held that the election was not complete, because it had not been passed upon by the Board of State Canvassers in accordance with the general election law: here it is held that, notwithstanding its refusal to act upon the return of the Board of County Canvassers, the action of the last named Board is final and conclusive.

Looking to the views of the majority of the Court, as expressed in the opinion in Lartigue & Malony v. Nerland, it cannot be disputed that the order for the mandamus was granted because the election was considered without finality or validity until its result was declared by the Board of State Canvassers. It is of no consequence on what ground, whether of supposed want of jurisdiction or otherwise, the said Board declined to render its judgment, for if, according to the opinion of the Court in the case referred to, the action of the Board was necessary to a final determination of the election, until obtained the election was not determined.

It is (as I regard it) no sufficient answer, that an election is not to be defeated because of the refusal of the Board of State Canvassers to execute the duties enjoined upon it by the Legislature. If the action of that Board (as was certainly held in Lartigue & Malony v. Nerland) was necessary to the determination of the election, it could have been enforced by the very writ now claimed here, and it would have been the appropriate remedy, to compel, on the part of the Board, the performance of a duty which the opinion in the same case says was required of it by law.

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5 S. C. *267

*BROWN v. KIRKPATRICK.

(Columbia. Nov. Term, 1873.)

[*Trial* ⇐=25.]

Where the answer admits the allegations of the complaint and pleads a counter claim, and the reply alleges special circumstances negativing the allegations of the counter claim, defendant is entitled, at the trial, to open and close the case.

[Ed. Note.—Cited in Addison v. Duncan, 35 S. C. 169, 14 S. E. 305.

For other cases, see Trial, Cent. Dig. § 58; Dec. Dig. ⇐=25.]

[*Trial* ⇐=25.]

The question, as to who is entitled to the opening and closing of the case, under Rule 69 of the Circuit Court, must be determined wholly on the pleadings as they stand at the commencement of the trial.

[Ed. Note.—Cited in Bennett v. Sandifer, 15 S. C. 420; Burckhalter v. Coward, 16 S. C. 443; McConnell v. Kitchens, 20 S. C. 433, 47 Am. Rep. 845; Mitchell v. Fowler, 21 S. C. 300.

For other cases, see Trial, Cent. Dig. §§ 44–75; Dec. Dig. ⇐=25.]

[*New Trial* ⇐=36.]

Error in allowing the plaintiff to open and close is ground for new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 50; Dec. Dig. ⇐=36.]

Before Graham, J., at Charleston, December Term, 1873.

Action upon a money demand. When the case came on for trial, defendants moved that they be allowed to open and reply. The motion was denied and defendants excepted.

The verdict was for the plaintiff, and defendants appealed.

Memminger, for appellants.

Harllee, contra.

April 20, 1874. The opinion of the Court was delivered by

WILLARD, A. J. Rule 69 of the Circuit Court Rules allows the defendant to have the opening and closing of the case "when he admits the plaintiff's case and takes upon himself the burthen of proof." In the present case the defendants admitted the matters stated in the complaint, and relied wholly on matters set forth by way of counter claim. This would appear to be the very case contemplated by the rule. It is contended, however, that inasmuch as the facts stated, by way of counter claim, were such as to demand proof from the plaintiff, in order to controvert the same, that the defendant is not entitled to the benefit of the rule.

The question as to who was entitled to the opening and closing of the case must be determined wholly on the pleadings as they stood at the commencement of the trial. Then it was that the error was committed, if committed at all, and the ruling of the Circuit Judge must be tested by them alone. The facts subsequently developed cannot be permitted to influence the question.

It is clear that the rule as to opening and closing should be plain and simple in its application. It ought not to be encumbered with nice considerations growing out of the

*268

character of the evidence *necessary to be adduced, nor on speculative views of the course of proof likely to be pursued by the respective parties. In other words, it is to be determined by the nature of the issues, rather than by the character of the evidence called for in their support by the respective parties.

What, then, was the nature of the issues involved in the present case? The complaint is upon a money demand for the proceeds of the sale of certain goods, sold by the defendants for the account of the plaintiffs upon commission. Every fact and circumstance alleged by the complaint is admitted. The defendants, by way of counter claim, allege that at the time when the proceeds of such sales were received by them the plaintiff was

indebted to them in an amount in excess of the proceds of sale, and they set forth the grounds of such previous indebtedness, which appear by the pleadings to have no connection with the transaction relating to the consignment and sale of the goods mentioned in the complaint. The basis of the indebtedness set forth by the counter claim consists of certain sums of money advanced at various times by defendants to plaintiff, which, as is claimed by the defendants, were properly chargeable as such by them against the plaintiff. On the other hand, the plaintiff, in his reply to the counter claim, contends that these sums were paid to him by the defendants for the account of a copartnership, of which one of the defendants had formerly been a member, on account of a debt due to the plaintiff from such copartnership.

Had it appeared by the pleadings that the advances made by the defendants were in fact payments made subsequent to the receipt of the proceeds of sale on account of such proceeds received, it might be that the construction would have to be regarded as merely equivalent to denial of so much of the complaint as alleges that the proceeds of sale had been received by the defendants and not accounted for, and therefore not strictly and properly matter suitable for a counter claim, but such a state of facts does not appear. On the contrary, the indebtedness alleged by the defendants as existing at the time of the receipt of the proceeds of sale appears to be a matter entirely foreign to the transactions set forth by the complaint, and proper to put forth by way of counter claim.

As it regards the pleadings, then, the issue to be tried is raised upon a demand for money paid to and for the use of the plaintiff, by the defendants, controverted by special

*269

circumstances that *amount merely to a negative of the matters alleged by the defendants. The fact that the moneys in question were paid on account of a third party is only of importance as negativing defendants' allegation that they were paid on plaintiff's account, and is in the nature of a general issue.

The issue tried being raised by the plaintiff's denial of matters stated by way of counter claim, it is clearly a case where, under the rule, the defendants have the opening and closing of the case.

Under this view the Circuit Judge was in error in allowing the plaintiff to open and close, and, under the decisions of the Courts of this State, holding that such ruling is ground for alleging error, we are bound to order a new trial.

A new trial should be granted.

MOSES, C. J., and WRIGHT, A. J., concurred.

5 S. C. 269

POPE v. FRAZEE.

(Columbia. Nov. Term, 1873.)

[*Mortgages* ⊂⊃526.]

An order confirming a Sheriff's report of sale under a decree for foreclosure is a bar to an action against the Sheriff and purchaser to set aside the sale, on the ground that it was null and void, under Section 43, Chapter XX, General Statutes, because the Sheriff was interested in the purchase.

[Ed. Note.—Cited in Orr v. Orr, 7 S. C. 383; Le Conte v. Irwin, 23 S. C. 111.

For other cases, see Mortgages, Cent. Dig. § 1534; Dec. Dig. ⊂⊃526.]

Before Carpenter, J., at Columbia, May Term, 1873.

This was an action by Thomas W. Pope, against Phineas F. Frazee and Wm. D. Frazee, to set aside a sale made by the first named defendant, as Sheriff of Richland County, under a decree for foreclosure. The case and exceptions are so fully stated in the opinion of the Court as to render any statement here unnecessary.

His Honor the Circuit Judge made a decree setting aside the sale, and the defendants appealed.

Melton & Clark, Pope & Haskell, for appellants.

Monteith & Bauskett, contra.

*270

*June 9, 1874. The opinion of the Court was delivered by

WRIGHT, A. J. The following are the facts in the case before us, as we collect them from the brief: In January, 1873, a proceeding to foreclose a mortgage of certain lots, given to secure a bond, was commenced in the Circuit Court for Richland County, by Emma Jackson, the mortgagee, against Thomas W. Pope, the mortgagor. The preliminary requisitions having been complied with, in pursuance of the practice of the Court, an order of foreclosure was made on the 24th day of February, 1872, by His Honor S. W. Melton, then Judge of the 5th Circuit, and the premises ordered to be sold by P. F. Frazee, Sheriff of Richland. The sale was made on the 1st Monday of May, 1872. A report of it, containing the name of the purchaser, the price and the application of the proceeds, was duly filed 21st May, 1872, and confirmed by the Court on the following day. On the 15th May, 1872, T. W. Pope commenced an action against P. F. Frazee, the Sheriff, and W. D. Frazee, the purchaser, reciting the suit of Emma Jackson, and the proceedings under it, to set aside the sale of the said lots, on the ground that there had been no legal sale, inasmuch as the purchase, though in the name of the said W. D. Frazee, was for the benefit of the said P. F. Frazee, Sheriff. Judgment was prayed that the sale be declared null and void, and that the said

W. D. Frazee be required to surrender to the Court the deeds which had been executed on the sale, that they might be cancelled. Both the defendants deny all fraud and combination, and that P. F. Frazee was in any manner interested in the purchase. The issues came on for trial before Judge Carpenter at the Circuit Court for Richland, at May Term, 1873, he having succeeded Judge Melton as Judge of the 5th Circuit. The plaintiff, among other things, introduced the whole record in the case of Emma Jackson v. T. W. Pope. The ground on which it was sought to set aside the sale was, that it was obnoxious to the 43d Section of Chapter XX of the General Statutes, which is as follows:

"No Sheriff or Deputy Sheriff shall be concerned or interested, directly or indirectly, in the purchase of any property sold by either of them officially; and if any such Sheriff or Deputy Sheriff shall be concerned or interested in any such purchase, at any such sale, made by either of them, he shall, on conviction thereof, be deprived of his office, and shall be liable to be fined and imprisoned

*271

at the *discretion of the Court; and such purchase shall be null and void."

The Judge charged the jury as follows: "If you believe from the evidence that the defendant, P. F. Frazee, was either directly or indirectly interested in the purchase of the said property, you should find for the plaintiff." To this charge the appellants excepted, and, with other requests, asked him to charge "that the order of the 22d May, 1872, in the case of Emma Jackson against T. W. Pope, confirming the sale thereunder made, was conclusive upon the rights of the plaintiff in the suit then before the Court." This was refused. The jury found for the plaintiff in the case below, on which the Judge pronounced a decree, setting aside and decreeing the sale null and void, setting aside also the order of Judge Melton, confirming the sale, and ordered the premises to be resold. Whether Emma Jackson was a party to this case did not exactly appear from the brief, but in the decree of the Court, which declared the sale null and void, a petition of Emma Jackson is referred to, from which, with the verdict of the jury and the records of the Court, the Judge concludes that the decree of Judge Melton had not been carried into effect by a legal sale of the property. We think the order confirming the sale was binding and conclusive between the parties to the suit—that the issue made under it was res adjudicata, and precluded them from seeking to set the sale aside. It is not necessary to cite authorities to sustain the proposition that a final judgment of a Court having jurisdiction of the subject-matter is final and conclusive between the same parties, and cannot be re-examined in a subsequent original action by the same or any other Court. The order made on the 22d May, 1872, must be held to have passed upon the facts brought to the view of the Judge, from which his conclusions of law was drawn and applied. It is beyond dispute that both Emma Jackson and T. W. Pope were parties to the proceeding for foreclosure, and W. D. Frazee was subject to the order of the Court, for he was the party reported to it as the purchaser, and, without a confirmation of the sale, no title could have vested in him. He became subject to the control of the Court in the particular case, when he became the purchaser of property sold by its order, and compliance with his bid could have been enforced through the process of attachment by the Court.—Exors. of Brasher v. Cortlandt, 2 John. Ch., 505; Haig et al. v. Commissioners, 1 DeS., 112.

*272

*The confirmation passed upon every thing which the report contained, and precluded all exceptions but that which was made, even if cause for good exception existed.—McCaw v. Blewitt, Bail. Eq., 98. That Pope is bound by the order is conclusive, from the fact that on the motion to confirm the report he could have brought before the Court the very objection he now makes. He could have raised it then, and his failure to do so debars him from urging it by another suit, presenting the very issue he could have raised on the hearing of the report. He now contends, by his action, that the sale was void, and when the opportunity was open to him to make the objection he neglected to avail himself of it, stood by, and, without speaking, allowed the Court to confirm the sale. The judgment of His Honor Judge Melton was not the subject of review or examination by His Honor Judge Carpenter. Even if erroneous, it bound all who were parties or privies to it. If there was fraud or illegality it should have been shown when the motion to confirm the report was made. The confirmation stopped the mouths of all who were interested in the matter, and who had the privilege of then speaking. No after discovered facts are averred, as presenting a ground for interference. The complaint shows that the circumstances on which Pope now relies to set aside the sale, came to his knowledge at least as early as the 15th May, 1872, while the order was not confirmed until the 22d of the same month. This was final, and, unless appealed from, left nothing further to be done.—See Britton v. Johnston, Dud. Eq., 24.

There is no allegation in the complaint of any fraud or imposition on the Court which induced its order. Nay, so far as the complaint is disclosed to us by the brief, the order of 22d May, 1872, is not even referred to, much less is it asked that it should be set aside; and that it was an obstacle in the way of any relief to the plaintiff, Pope, is manifest from the decree of the Circuit

Judge, which found it necessary to set it aside before he could declare the sale null and void. It was an impediment in the way of the relief prayed, and could not be surmounted on the asking of Pope, who was a party in the cause in which it was made. If Emma Jackson was before the Court, on a petition to set aside the sale, as appears to be the case from what is said in the decree, we cannot discover any interest which she has in the matter. Not only was her mortgage satisfied, by the receipt, of her attorneys, of the whole principal and interest due upon it, but the order of the confirma-

*273

tion of *the sale was made on their motion. For her to retain the money and yet ask to set aside the sale, would place her in a position too inconsistent to be reconciled. Our conclusion on the first exception renders unnecessary any consideration of the other exceptions made by the appeal.

It is ordered that the motion be granted, the decree set aside, and the complaint dismissed.

MOSES, C. J., concurred.

WILLARD, A. J., dissenting. The complaint sets forth that the plaintiff was the owner of the property sold by the defendant, P. F. Frazee, as Sheriff of Richland County, under a judgment of foreclosure, recovered by E. Jackson, upon a bond and mortgage secured upon such premises; that the property had been purchased at such sale by W. D. Frazee, for the benefit of P. F. Frazee. P. F. Frazee and W. D. Frazee are made parties defendant, and the complaint prays that the deeds executed and delivered upon such sale be given up to be cancelled, upon the ground that the sale was void, under Section 43 of Chapter XX of the General Statutes, which provides as follows: "No Sheriff or Deputy Sheriff shall be concerned or interested, directly or indirectly, in the purchase of any property sold by either of them officially; and if any such Sheriff or Deputy Sheriff shall be concerned or interested in any such purchase at any such sale, made by either of them, he shall be liable to be fined and imprisoned, at the discretion of the Court, and such purchase shall be null and void."

The case was tried by a jury, and a verdict rendered for the plaintiff.

The only questions presented for our consideration arise upon exceptions taken to the charge of the Circuit Judge. The first exception is to a charge which is substantially in the language of the Statute, to the effect that if the Sheriff was, either directly or indirectly, interested in the purchase of the property, the plaintiff was entitled to a verdict. Applying the language of the Statute to the issues presented by the pleadings, it is obvious that the charge was correct. The sale was rendered null and void by such interest, and the plaintiff was clearly entitled to relief of some character, and, in order to obtain such relief, to the verdict of a jury upon the matters of fact involved.

*274

*The proposition contained in the second exception is, that the plaintiff's right of action was barred by the operation of an order made in the original foreclosure suit confirming the sale.

The terms of the order of confirmation are not given. The mere fact that such an order was made is all that is stated. The motion for the order of confirmation and the order based upon such motion were made after the commencement of the present action. It does not appear that any such defense was interposed in the pleadings. The answer is not set forth in full, but in the description of its contents no mention is made of an order of confirmation having passed. It does not appear that the order of confirmation was made upon notice to parties affected by it. In the absence of the order itself, and of a statement that it was made upon notice, there is nothing to exclude the idea that it was made ex parte.

Orders, with a view to proper binding effect, should state upon their face that the parties intended to be bound either appeared or were served with notice.

It also appears that the judgment appealed from was based, not only upon the pleadings and verdict in this action, but upon a petition of E. Jackson, asking that the order of confirmation might be set aside and a new sale ordered, and upon this prayer the judgment was entered accordingly.

If the order of confirmation was a bar, it ought to have been pleaded as such, although it may be that the plaintiff has failed to raise this objection in a form suitable to be considered by us. It is not necessary to consider whether an action, brought upon a cause of action existing, and in full force at the time the action is brought, can be barred by collateral proceedings taken after the commencement of such action in another cause, for there is, in fact, no order of confirmation standing in the way of the plaintiff's right of recovery. The order of the Circuit Court, setting aside the order of confirmation previously made in that Court, is valid until set aside upon appeal. It is made by a Court of general jurisdiction, and cannot be disregarded or collaterally impeached. There is nothing indicating that the present appeal embraces a review of so much of the judgment as relates exclusively to the matter of the petition of E. Jackson. The proceedings before us are entitled exclusively in the action of Pope v. Frazee, and the matter of the petition of E. Jackson does not appear in the title or body of the notice

*275

of appeal. It must, therefore, be *concluded that so much of the judgment as orders the

confirmation of sale to be set aside and a new sale is not before this Court on the present appeal. It has nothing to do with the issues joined in the present action, and must be referred to an entirely collateral proceeding. The practice of entering a single judgment intended to cover two or more cases having different objects in view is inconvenient and embarrassing. It is especially objectionable where the parties to the different proceedings are not identical. The proceedings in this action, and those upon the petition, ran side by side, and the conclusion of the charge, that no such bar existed, is supported by the order subsequently entered in form setting them aside.

The third exception is not well taken. The statute renders the sale absolutely void, and it is not for the Court to consider, under an objection to its validity, whether it is, or is not, the interest of the parties that it should be upheld. It might be otherwise where the invalidity of the sale resulted from want of conformity to some practical rule of proceeding imposed by the authority of the Court. But where the statute declares an instrument void, no authority exists in the Courts to give efficacy to it.

The appeal should be dismissed.

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5 S. C. 275

PICKETT v. LYLES.

(Columbia. Nov. Term, 1873.)

[*Evidence* ⇐165.]

A demandant in dower may, it seems, give in evidence the contents of a deed by which the land was conveyed to her husband without such full proof of loss as is required in actions to try the title.

[Ed. Note.—Cited in Stark v. Hopson, 22 S. C. 45.

For other cases, see Evidence, Cent. Dig. § 551; Dec. Dig. ⇐165.]

[*Dower* ⇐38.]

Neglect of husband to record his deed does not deprive his widow of her right of dower as against a subsequent purchaser at Sheriff's sale without notice.

[Ed. Note.—Cited in Horde v. Landrum, 5 S. C. 215; Sondley v. Caldwell, 28 S. C. 582, 6 S. E. 818.

For other cases, see Dower, Cent. Dig. § 94; Dec. Dig. ⇐38.]

Before Cook, J., at Camden, September Term, 1873.

This was a petition for dower by Mary A. Lyles, widow of James V. Lyles, deceased, against Susan R. Pickett, executrix of John R. Pickett, deceased, and others, brought before the Circuit Court by appeal from the Court of Probate.

The issue was as to the seizin of the petitioner's husband, and it was submitted to a jury.

The petitioner gave evidence tending to

*276

show that, during the *coverture, James V. Lyles purchased the land in which dower was claimed from John J. Nelson; that he entered into possession and held it for two years; that he then bargained the land to W. L. Pickett, who finding that Nelson's deed to Lyles was not recorded, induced the former, with Lyles' consent, to execute a deed of conveyance of the land to him; and that the land was sold by the Sheriff under execution against W. L. Pickett and purchased by John R. Pickett, to whom the Sheriff conveyed the same, and whose conveyance was duly recorded.

The plaintiff then called John R. Lyles, her son, who testified that the deed of conveyance from John J. Nelson to James V. Lyles was in his mother's possession after his father's death; that his mother was administratrix of his father; that he and his mother had made repeated searches for the deed since the war, but were unable to find it; and that he believed it was destroyed, with all his father's papers, during Sherman's raid. Upon this evidence John J. Nelson was allowed to testify against defendant's objection, that he conveyed the land by deed to James V. Lyles during the coverture, and that the deed was properly executed.

His Honor declined, at the request of defendant's counsel, to charge the jury "that the unrecorded deed of Nelson to Lyles was not sufficient to entitle the petitioner to recover against the purchaser at Sheriff's sale, unaffected with notice, and whose deed was properly recorded in due time," and charged that if the jury believed the testimony of Nelson, that he had conveyed the land to Lyles, and, if they further believed that W. L. Pickett had notice of the deed when he purchased, they should find for the petitioner.

The jury found for the petitioner, and the defendants appealed.

Kershaw, for appellants.

DePass, contra.

June 9, 1874. The opinion of the Court was delivered by

WRIGHT, A. J. There are two questions raised by the appeal. The first alleged error on the part of the Circuit Judge in receiving parol evidence of the execution and contents of the deed from J. J. Nelson to James V. Lyles. The second, in holding that the said deed, although unrecorded, was sufficient to enable the petitioner to recover against the purchaser of the land at Sheriff's sale, whose deed had been duly recorded. In the applica-

*277

tion of the principles *of law the character of the action is not to be lost sight of. The demand here was for dower, and the rules which govern and regulate a claim of that nature are not of the exacting kind which pertain to an action of trespass to try title.

There the plaintiff must recover by the force of his own title, while the defendant

may protect himself by showing an outstanding title in another; here the right of the widow will prevail, though the husband, during the coverture, had only a seizin in law, though he may have none in deed.—Coke on Lit., 31.

Where a party seeks to recover land he must show a regular title, beginning with a grant, (or its equivalent,) followed by conveyances which vest the right in him. If a deed constituting a link in his chain of title cannot be produced, he must first prove its loss, and then show its contents by such testimony as the rules of evidence allow. The loss in this case was not sufficiently established without the testimony of the respondent, in whose charge the deed was alleged to have been, and it was necessary that it should have been, before evidence of its execution and contents could be offered. In this action, however, the right of the plaintiff did not rest on the production of the paper. It was not indispensable to her recovery, and by law she was not the custodian of it. A current of decisions in this State has held that, as the "demandant in dower claims by act of law, her right may be established without the deeds on which the title of her husband may have depended, as she had not the property in them." The authorities are so full, to the effect "that a demandant in dower need not make out a regular chain of title in her husband that it is sufficient for her to show he had been in possession during the coverture, and it is then incumbent on the defendant to show a paramount title in himself," that all that is required is a mere reference to them.—Smith v. Paysenger, 2 Mill., 59; Forrest v. Trammell, 1 Bail., 77; Reid v. Stevenson, 3 Rich., 67; Gayle v. Price, 5 Rich., 526.

Here it was proved "that Lyles entered into possession of the land during the coverture and cultivated it about two years." Another principle, well settled and recognized in some of the cases just referred to, may well be applied in bar of the defense submitted. Although W. L. Pickett, through whom the appellants claim, did not hold by direct conveyance from Lyles, he accepted from Norton, on his purchase from Lyles, with the consent of the latter, a deed for the land, to which

*278

he knew Lyles held the title. *The appellants never can make out their title, should it be drawn in question, without connecting themselves with Lyles' right, and, claiming through it, they cannot be allowed to show that it was defective.

Neither can the other ground of appeal, to wit, that the unrecorded deed of Nelson to Lyles, if proved, was not sufficient to entitle the petitioner to recover against the purchaser of the land at Sheriff's sale, unaffected with notice, and whose deed was properly recorded in due time, be sustained. The dower of the wife is conferred by law, and is not dependent on the husband. Where he is seized of the legal title, for an instant, to his own use, the right of dower attaches, and can only be renounced in the mode provided by law. The failure by the husband to record his deed does not affect the right of the wife, if she survive him, to a claim which attaches by virtue of his seizin during the coverture. The recording of the deed under which the husband held is not an incident necessary to her right of dower. Mr. Justice Story, in his Equity Jurisprudence, Section 630, says: "It is admitted that dower is a mere legal right, and that a Court of Equity, in assuming concurrent jurisdiction with Courts of law upon the subject, professedly acts upon the legal right, for dower does not attach upon an equitable estate. In so acting the Court should proceed in analogy to the law, where such a plea of purchaser for a valuable consideration without notice would not be looked at, and therefore, as an equitable plea, it should also be inadmissible."

The motion is dismissed.

MOSES, C. J., concurred.

WILLARD, A. J. The Circuit Judge was clearly wrong in admitting parol proof of the contents of the lost deed as the testimony relative to loss stood. The deed supposed to be lost was clearly traced to the possession of the defendant. The rule requiring the testimony of the person to whose possession the instrument alleged to be lost was last traced, is essential to due proof of loss, and is well established, and unless the defendant can bring himself within some of the recognized exceptions to it, her proof of loss must be regarded as insufficient to authorize a resort to parol proof of the contents of the deed.

Perkins v. Cobbett, (1 Car. & Pay., 282.) recognizes and applies the rule in question. It is true that the rule as there applied did

*279

*not extend to the testimony of parties, for they were not at that time competent as witnesses, but it enforced it to the extent of rendering it necessary to produce the person last coming to the possession of the instrument, if that person is competent and capable of being produced as a witness. Now that parties are competent as witnesses, both in their own behalf and that of the opposite party, the reason of the rule embraces them. It is true, as contended, that Cathcart v. Gibson, (2 Sp., 661,) turned on a question of hearing evidence, but that decision distinctly recognizes the authority of Perkins v. Cobbett. Cathcart v. Gibson, is identical, in principle, with Rese v. Castleton, (6 T. R., 236.)

The object of the rule is, in part, to prevent a secret act of concealment on the part of the person last in possession of it, as far as that can be done by subjecting such person to judicial scrutiny. The fact that a third person may have searched with the person last in possession without finding the instru-

ment, although sufficiently proved, does not tend to show that it is not concealed by the act of such custodian. The reason of the rule applies with peculiar force where the person last possessed of the instrument is a party, for in that case a direct motive to conceal the instrument may exist.

It is contended that a demandant of dower is, through peculiar favor of the law, exempt from the operation of the rule.

It is clear that, when a demandant of dower is under the necessity of proving the existence and contents of a deed, she must conform to the rules of evidence relating to the making of such proofs. There is not a particle of authority for dispensing with them in her case. The object of these rules is to elicit the truth by the best and most available means, and this is as important in ascertaining the existence of a right to dower as of any other right.

Smith v. Paysenger (2 Mill., 59,) has been referred to as authorizing a peculiar mode of proving title on the part of the demandant of dower, dispensing with the ordinary rules applicable to that subject. All that is decided in Smith v. Paysenger, and by Forrest v. Trammell, (1 Bail., 77,) and Reid v. Stevenson, (3 Rich., 66,) following it, is that, in making her case, she is entitled to rest on proof of mere possessory title in her husband during coverture. That puts the defendant to proof of title, paramount as against the husband. If the defendant proves a paper title, and the demandant, in replying to it, is compelled to prove the existence

*280

*and contents of a deed, there is nothing, in either of those cases, exempting her from making such proofs, in accordance with the ordinary rules of evidence.

It has been contended that, according to Smith v. Paysenger, the widow, not being the legal custodian of her husband's title deeds, is not bound to produce them. The rule requiring the person last possessed of a lost instrument to testify as to such fact does not depend upon the fact that the person thus possessed is the legal custodian of the instrument. That person may be the mere agent or servant of another in holding the instrument, as in Perkins v. Cobbett, and yet the rule applies with full force.

As it regards the question of the effect upon the right of dower of the failure of her husband to record the deed by which it is alleged he derived seizin of the lands in which dower is claimed, although the charge of the Circuit Judge appears to have been placed on the fact of notice, yet the conclusion to which he arrived is sustained by a different view that may be taken of the question. It is not and cannot be disputed, assuming the existence of the deed claimed not to have been recorded, that the husband obtained seizin of the land at some time previous to the expiration of the time allowed by law for the recording of the deed. To this seizin the inchoate right of dower at once attached, and the act of the husband could not defeat such right. So neither could his default work such an effect. The estate of dower is created by operation of law, and once there being an adequate seizin in the husband during coverture, it attaches, and, having attached, cannot be destroyed by the act or neglect of the husband.

There should be a new trial.

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5 S. C. 280

GREEN v. JACOBS.

(Columbia. April Term, 1874.)

[*Chattel Mortgages* ⇐5.]

A lien under the "Act to secure advances made for agricultural purposes," &c., contained, at the bottom, the words: "I consider the above instrument of writing a mortgage of all my personal property, such as wagons, horses, cattle," &c.: *Held*, Not to be a legal mortgage, vesting the title and giving the right to seize and sell.

[Ed. Note.—Cited in Moore v. Byrum, 10 S. C. 461, 30 Am. Rep. 58; Sternberger v. McSween, 14 S. C. 40; Kennedy v. Reames, 15 S. C. 553; Whilden & Co. v. Pearce, 27 S. C. 48, 2 S. E. 709; Davis v. Childers, 45 S. C. 145, 22 S. E. 784, 55 Am. St. Rep. 757; Bingham v. Harby & Co., 91 S. C. 123, 74 S. E. 369.

For other cases, see Chattel Mortgages, Cent. Dig. § 4; Dec. Dig. ⇐5.]

Before Green, J., at Manning, May Term, 1873.

This was an action by William Green, against Mitchell Jacobs, to recover the possession of a horse.

*281

*The case was this: On the 20th March, 1872, one Frank James gave to E. B. Mathews an instrument of writing, purporting to be a lien on his crop of cotton, corn, &c., to be made that year, to secure advances that day made, to the amount of $165, which sum James agreed to pay to Mathews on the first of October then next, out of his first cotton. The instrument contained at the bottom the following words: "I, Frank James, consider the above instrument of writing a mortgage of all my personal property, such as wagons, horses, cattle," &c. It was recorded in the office of the Register of Mesne Conveyances for Clarendon County, on the same day it bore date.

Mathews assigned the instrument to the defendant, and James having failed to pay the debt, the defendant seized the horse in the possession of the plaintiff, to whom James had sold him after the lien was given.

The defendant asked that the jury be instructed to find for the defendant, because the instrument constituted a mortgage of the horse, and the defendant had a right to seize the same.

His Honor declined so to charge, and in-

structed the jury that the written instrument gave no authority to the defendant to take the horse out of the possession of the plaintiff. To which ruling defendant excepted.

The jury found a verdict for the plaintiff, and the defendant appealed on the ground that the instrument referred to was a sufficient and valid mortgage of all the personal property of Frank James, and that defendant on the non-payment of the debt, had the right, as mortgagee, to seize the property referred to in said mortgage.

Fraser, for appellant.

The Court, in giving construction to the contract, should have taken it most strongly against the contractor.

No form of words is necessary to constitute a mortgage of personal property. The only essentials are that it be apparent that the property is to be a security for some indebtedness or for the performance of some contract.

The words: "All my personal property, such as wagons, horses, cattle," etc., is a sufficient description of any such personal property in a mortgage.—Chit. on Con., 95; 1 Shep. Touch., 87; Calhoun v. Reynolds, Mell, 305; 7 Cranch R., 237; 1 Green. Ev., 334 to 342 and 338, 339 note; 2 Kent, 3d ed., 556,

*282

557; Menude v. Polony, *2 DeS., 564; Ralfe v. Lord, 2 Dun. & W., 480; Con. & L., 519; Brown v. Wood, 6 Rich. Eq., 169; Johnson v. Vernon, 1 Bail., 527; 2 Hilliard on Mortgages, 316, 320; 2 Kent, 554, 555, 615, *468; Read v. Gaillard, 2 DeS., 552.

Galluchat, contra.

June 11, 1874. The opinion of the Court was delivered by

MOSES, C. J. The action was for the recovery of a horse. The plaintiff below purchased it from one Frank James, who had executed a lien on his crop, for advances, to E. B. Mathews, which he (Mathews) assigned to the appellant, Jacobs. The instrument creating the lien was dated 20th March, 1872. It recited that Mathews had on that day made advances to the amount of $165, which James agreed to pay out of his first cotton on the first of October then next, and to secure the payment he thereby gave a special lien on his crop of cotton, corn &c., to be made during the coming season, in accordance with the Act of the General Assembly, "to secure advances made for agricultural purposes," &c. The paper contained, also, the following words: "I, Frank James, consider the above instrument of writing a mortgage of all my personal property, such as wagons, horses, cotton, hogs," &c. It was recorded in the office of Register of Mesne Conveyance of Clarendon on 20th March, 1872.

The Judge on the trial on Circuit was requested to charge "that the instrument offered is a sufficient mortgage upon the property claimed by the plaintiff, and if it is not so with regard to a third person without notice, it should so be held in this instance, the plaintiff having had notice." His refusal to do so is assigned as error. The only question before us is whether the instrument creates a mortgage on the horse, which justified its seizure by Jacobs, after the debt secured by the lien became due.

The words, "all my personal property, such as wagons, horses, &c.," are sufficiently descriptive to pass any of such property as James held at the time of the execution of the instrument. Id certum est quod certum reddi potest. A deed specifying the character of the property conveyed will transfer all that the grantor may be proved to have held of that description.—Brown v. Wood, 6 Rich. Eq., 169. So if the instrument amounts to a mortgage, it will not fail because of the general description of the property it was intended to affect.

*283

*It cannot be doubted that the appellant has an equitable right to claim, through the instrument, a specific lien on the horses, wagons, &c., owned by James at its date, so as to subject them to the payment of his debt for the agricultural advances, but the point we are to consider is, whether it so operates as to transfer the legal title from James and vest it in Mathews. In other words, can the mere acknowledgment of a party, that the paper which he executes primarily for another purpose and to another end, have effect as a formal legal mortgage, so as to attach to it all the elements and incidents which belong to and follow such an instrument, though wanting all of its essential requisitions?

The title to property, save where it is conferred by statutory enactment, through the force of mere possession, rests on muniments which define its character. The limitations and qualifications which restrict the general grant must be expressed in words, which have a technical significance, fit and proper, in the particular case, to define the purpose and intention of the parties. A mere declaration in writing that one considers an instrument executed for a different purpose, also, a deed of a certain piece of land, though signed, sealed and delivered in the presence of two witnesses, would be wanting in the evidence of a grant and release which are necessary to a deed of real estate. A mortgage is a conveyance of land or personal chattels as a security for the performance of some act, generally the payment of money, to be void on a compliance with a specified condition. Words denoting conveyance or transfer are also essential to it, and though a power of sale is not indispensable it is usually included. Depending on the language of a mortgage, nice and intricate questions often arise as to trusts, growing out of the relation of mortgagor and

mortgagee, and they must be executed according to the construction which is to be given to the language of the instrument.

It is not wise or politic to dispense with the forms which affect the transfer of property, whether absolute or conditional. It is better and safer to adhere to those to which the community has been accustomed than to substitute a mere declaration of what the instrument is to be considered, in the place of the instrument itself. It may be a more ready mode, both of disposing of property or affecting it with liens or conditions, but at the same time it could not fail to be more fruitful of litigation and the consequences which follow it.

*284

*Unless some clear advantage is to be gained, it is safer to adhere to well recognized and established forms of conveyance, sanctioned by long adoption and use, than to legalize departures which do not seem to promise any public benefit.

The motion is dismissed.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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5 S. C. 284

BULL v. LAMBSON.

(Columbia, Nov. Term, 1873.)

[*Witnesses* ⟸255.]

A plaintiff examined as a witness on his own behalf may, like other witnesses, refer to book entries and other memoranda to refresh his memory.

[Ed. Note.—Cited in Pope Mfg. Co. v. Charleston Cycle Co., 55 S. C. 529, 536, 33 S. E. 787; Pierce v. Varn, Byrd & Co., 76 S. C. 361, 57 S. E. 184; Cousar v. Heath, Witherspoon & Co., 80 S. C. 470, 61 S. E. 973; Citizens' Savings Bank v. Efird, 96 S. C. 22, 79 S. E. 637.

For other cases, see Witnesses, Cent. Dig. § 881; Dec. Dig. ⟸255.]

[*New Trial* ⟸104.]

Cumulative evidence received in reply, *held*, under the circumstances, to be no ground for new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 218–220, 228; Dec. Dig. ⟸104.]

Before Graham, J., at Charleston, March Term, 1873.

This was an action by E. Bull against J. R. Lambson for the price and value of a turpentine still made for defendant and delivered to him. The weight of the still, as stated in the bill of particulars, was 2,871 pounds, and the price charged 55 cents per pound.

The answer contained only a general denial of the allegations of the complaint.

The plaintiff was examined as a witness on his own behalf. He testified that the price charged was reasonable, and proposed to give the dimensions and weight of the material used in making the still from entries in his books. This was objected to, and the objection being overruled the defendant excepted. Witness then proceeded to give from the entries the dimensions and weight of the material, and from these he estimated the weight of the still at 2,781 pounds.

For the defense the defendant was examined. He stated that the price as agreed upon was 53 cents per pound; that he weighed the still after delivery, and that the actual weight was much less than that charged.

In reply, the plaintiff offered to show by his foreman the dimensions of the material used, and by an expert that the weight of the

*285

*still, as estimated from those dimensions, was greater than the weight charged. This evidence was objected to as cumulative, but the objection was overruled, and the plaintiff excepted.

The evidence was given, and the jury found for the plaintiff the amount of his claim.

The defendant appealed.

Maurice, for appellant.

Rutledge & Young, contra.

June 17, 1874. The opinion of the Court was delivered by

WILLARD, A. J. The first exception arises on an objection made by defendant to the effect that the plaintiff, in testifying on his own behalf, was not entitled to look at entries contained in his books of account. It must be assumed, as the case stands, that the plaintiff's object in desiring to look at the entries in his books of account was to refresh his memory. The defendant's objection amounts to a denial of the right to a party examined as a witness to aid his memory by reference to books and memoranda of any kind. This proposition cannot be maintained. It is allowed to all witnesses to refresh their memories by reference to suitable memoranda, and the practice rests on sound principles. A party, when examined in his own behalf, is entitled to the same means of refreshing his memory that are allowed to other witnesses.

The second exception is placed on the ground that the Court improperly allowed the plaintiff, after the defendant's case was closed, to offer cumulative testimony. It is certainly a general rule that the plaintiff cannot offer cumulative testimony after the close of defendant's case. Whether a disregard of this rule, working a clear injury to the substantial rights of the party, might not form ground of appeal, is a question that need not be considered here, for the record does not present such a case.

The defendant's evidence disputed the weight of materials sold and delivered to the defendant, and after its close the plaintiff offered further evidence on the disputed point. In one sense the evidence may be considered cumulative, for evidence of the weights had already been introduced, but it is not a case of the improper admission of cumulative evi-

dence. It does not appear that the answer raised any question as to the weight of the

*286

goods delivered. *The plaintiff, therefore, had a right to assume that this would not be a point in dispute, and to confine himself to ordinary proof on this point without going into exhaustive proof, as upon a controverted point. Inasmuch as the question appears first to have been specially made by the introduction of the testimony by defendant it was entirely proper to allow the plaintiff to reply to such evidence by additional proofs, although such as would have been properly introduced before closing his case.

The appeal should be dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

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5 S. C. 286

SHUMATE v. POWELL.

(Columbia. April Term, 1874.)

[*Appeal and Error* ⊂⊃813.]

Case stricken from the docket—the brief containing no case upon which the appeal could be heard.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3195; Dec. Dig. ⊂⊃813.]

Action by W. T. Shumate against Edward Powell, tried in Greenville County.

The brief, after stating the names of the parties, and that the action was on bond, contained a notice, addressed to plaintiff's attorney, that defendant appeals, in this action, from the ruling of the Circuit Judge, on the ground that an action can only be maintained in the name of the real party in interest, and that the plaintiff herein is not the party in interest, and does not come within any of the exceptions of the Code—signed by defendant's attorney—and then proceeded as follows:

"We tender the following statements of facts as containing so much of the testimony as necessary to present the legal question involved:

"The suit is brought in the name of 'W. T. Shumate,' individually.

"The cause of action is payable to W. T. Shumate, Treasurer of the Board of Public Buildings.

"W. T. Shumate has no interest, as he swore, in this suit, and had not authorized its

*287

institution. The note was taken for dis*tiller's license, under the Act of the General Assembly of 1865, and, though he was Treasurer, he was not a member of the Board."

Earle & Blythe, for appellant.
Perry & Perry, contra.

June 20, 1874. The opinion of the Court was delivered by

MOSES, C. J. As the case was not heard on its call, but submitted by the counsel for the appellant for our judgment, we had no opportunity of noticing the manner in which it was brought before us until it was taken up for consideration and decision.

The printed paper which is submitted as the brief is so wanting in compliance with all the requisitions of our rules, in regard to the "case" which shall be made in "all appeal cases," that we cannot accept it, without violating the mode of procedure which we have prescribed for the hearing of appeals, both from judgments and such orders as the Code allows us to review.

Where the departure from the settled and established course does not involve any substantial infraction of it, if there is enough before the Court to show the character of the proceeding below, and the right of the appellant to review here any supposed error of the Circuit Court in adjudications at the hearing, we might not insist on a formal adherence to the rules, particularly where no objection is made by the opposing counsel. Here we have nothing but the notice of appeal from the ruling of the presiding Judge that the action could be maintained in the name of the party in which it was brought, a statement by the counsel of the appellant as to the nature of the cause of action, and the recital of the fact "that the plaintiff swore he had no interest in the suit and had not authorized its institution."

We know nothing of the character of the action, of the mode in which it was tried, nor do we know whether, as error is alleged on the part of the Judge, there was a request to charge the charge, and the exceptions. In fact, the "case," in the form in which it is presented, is wanting in all the essential elements necessary for a proper understanding of the points to be considered.

We can readily conceive how the learned counsel supposed there was enough in the paper to present the single point on which he desired the judgment of the Court. He was

*288

familiar with the case *and the proceeding below, forgetting that we had no opportunity of knowing them but through the brief.

The case must be struck from the docket without prejudice.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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5 S. C. 288

BULL v. LAMBSON.

(Columbia. Nov. Term, 1873.)

[*Parties* ⊂⊃95.]

In an action against two as copartners, the Court may, at the close of plaintiff's case, and after motion for non-suit, on the ground that neither a copartnership nor other joint liability

had been shown, allow the plaintiff, under Section 296 of the Code, to amend by striking out the name of one defendant and proceeding against the other individually.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 160–166; Dec. Dig. ⟸95; Partnership, Cent. Dig. § 374.]

Before Graham, J., at Orangeburg, March Term, 1873.

This was an action by Edmund Bull against J. R. Lambson and D. G. Hough, as copartners, under the name of J. R. Lambson & Co., for goods sold and delivered. Service of the summons and complaint was acknowledged by Lambson for himself and Hough.

At the close of plaintiff's case defendant moved for a non-suit on the ground that no copartnership but only the individual liability of Lambson had been proved. His Honor denied the motion, and allowed the plaintiff to amend by striking out the name of Hough and all allegations of copartnership. The defendant excepted, and the jury having found for the plaintiff he appealed.

Maurice, for appellant.

Rutledge & Young, contra.

June 22, 1874. The opinion of the Court was delivered by

WILLARD, A. J. The complaint, before amendment, was against Lambson & Hough for the sale and delivery of goods. The evidence introduced by plaintiff tended to prove that the contract was joint with both Lambson & Hough. Plaintiff's witnesses were cross examined with a view to establish the fact that the contract was the several contract of Lambson. The defendant, on the close of plaintiff's case, moved for a non-suit,

*289

on the ground that the allegation of *a joint contract was not sustained by the proofs, which showed an individual contract on the part of Lambson. The plaintiff then moved to amend his complaint by striking out the name of Hough as a defendant. The Court allowed this amendment against defendant's objection, and, on this ground, defendant appeals. No further testimony was offered, and, under the charge of the Court, the jury rendered a verdict for defendant.

The only question to be considered is, whether the Court had authority to allow the amendment.

Section 196 of the Code provides that "the Court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party," &c. The obvious intention of this clause was to enable the party to correct any defect in the statement of his case as it regards the parties affected, as well as to get rid of unnecessary and superfluous parties, and to call in others collaterally interested or affected. Such a construction is conformable not only to the general spirit of the Code of Procedure but to the special and very liberal provisions relating to the amendment of pleadings and proceedings. The Circuit Judge had, clearly, authority to allow the amendment in question.

The appeal should be dismissed.

WRIGHT, A. J., concurred.

MOSES, C. J. If Hough had been a party before the Court I am not satisfied that the failure of the plaintiff to prove the allegations of the complaint could have been remedied by an amendment.—Code of Procedure, Section 194.

The amendment proposed a substantial change in the character of the claim, and was objectionable on that ground.—Code, Section 196.

Hough, however, was no party to the cause. Even if a partnership had been proved between him and Lambson, the latter could not have authorized an acceptance and appearance for him.—Keckly & Keen v. Perry, MS. Charleston, May T., 1822; Haslet et al. v. Street et al. 2 McC. 310 [13 Am. Dec. 724].

Lambson was the only party before the Court and therefore, I think the amendment was allowable.

I concur in the order dismissing the motion.

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5 S. C. *290

*CHALK v. PATTERSON.

(Columbia. Nov. Term, 1873.)

[*Equity* ⟸396.]

A late Commissioner in Equity *held* not liable for moneys collected in Confederate States Treasury notes and invested, in March, 1864, in four per cent. certificates of the Confederate States.

[Ed. Note.—Cited in Koon v. Munro, 11 S. C. 154; Hyatt v. McBurney, 18 S. C. 220.

For other cases, see Equity, Cent. Dig. § 860; Dec. Dig. ⟸396.]

Willard, A. J., holding, That he was compelled to make the investment by irresistible force.

Wright, A. J., That he acted prudently under the circumstances.

Moses, C. J., That the plaintiff was concluded by certain issues, which, with his consent, were submitted to a jury and found against him.

[Ed. Note.—Cited in Hyatt v. McBurney, 18 S. C. 217; Griffith v. Charlotte, C. & A. R. Co., 23 S. C. 36, 55 Am. Rep. 1.]

Before Thomas, J., at Chester, February Term, 1872.

This was an action by Thomas T. J. Chalk against Giles G. Patterson, for money had and received.

The case was as follows: The defendant was Commissioner in Equity for Chester District from the year 1858 to the year 1868, inclusive. In the years 1862 and 1863 he, as Commissioner in Equity, received moneys in

Confederate Treasury notes, for the distributees of George W. D. Chalk, deceased, and in March, 1864, he funded the amount he had received in four per cent. certificates of the Confederate States. The funding was under the Act of the Confederate States Congress, approved 17th February, 1864. The plaintiff was one of the distributees, and the action was brought to recover his share of the moneys received.

The defendant, by his answer, alleged, inter alia, the particulars relative to the funding in four per cent. certificates, and he also pleaded the Statute of Limitations.

When the case came on for trial the following order was made:

"This action having been brought on to be heard on the pleadings herein, and Mr. Hamilton for the plaintiff, and Messrs. McAliley & Brawley for defendant, having been heard, and by consent of said counsel, it is ordered that the following issues between the parties be tried by a jury, on the 14th February:

"First. Was the disposition of the moneys admitted to have been received by the defendant to the use of the plaintiff, as set forth in his answer, proper and legal, and such as to bar the plaintiff's right to recover?

"Second. Did the plaintiff's cause of action accrue within four years next preceding the commencement of the action?"

The issues under the order were submitted

*291

to a jury, and, after *evidence given on both sides, His Honor charged the jury "that the receipt of the money in Confederate currency was not in issue in the case." To this charge the plaintiff excepted. The plaintiff then submitted various propositions of law, which he requested the Court to charge, which was refused. One of the requests was "that Confederate bonds were not such securities as, under any circumstances, were proper for the investment of trust funds."

The jury found for the defendant and the plaintiff appealed.

Hamilton, for appellant.

McAliley & Brawley, C. D. Melton, contra.

June 27, 1874. The following opinions were filed:

WILLARD, A. J. I concur in the conclusion that the appeal should be dismissed, but upon the grounds that the conversion of Confederate currency into Confederate States bonds, under the operation of the Act of the Confederate Congress, approved Feb. 17, 1864, by which all persons holding notes of the Confederate States were required to fund the same in 4 per cent. Confederate States bonds, on or before April 1st, 1864, or submit to a tax thereon of 33⅓ per cent., with an additional monthly tax of 10 per cent. on all bills of the denomination of $100, must be regarded as compelled by irresistible force. The Act in question, considered with reference to the facts of the actual supremacy of the Confederate Congress within this State, and of the compulsion proceeding from the statutes and Courts of this State, in conformity with the policy and requirements of the Confederate Congress, and the situation of the defendant, as a public officer, dependent, as to the line of his duty, upon the orders of the Courts, must be regarded as sufficiently evidencing a force to which the defendant, as a public officer, was not bound to offer resistance.

Not being chargeable with wrong, he cannot be made liable, as the plaintiff seeks to charge him. It is not necessary to examine the question whether the present suit could have been maintained without previous proceedings of a suitable character in the case in which the moneys were received, inasmuch as the parties have assumed, by mutual consent, to shape the issues in such manner as to effectually waive such objection on the part of defendant.

*292

*WRIGHT, A. J. I agree that the respondent in this case should not be held liable, and that the motion should be dismissed. By the provisions of an Act of the Congress of the Confederate States of America, approved February 17th, 1864, all holders of Confederate treasury notes above the denomination of five dollars not bearing interest were allowed to fund the same in registered four per cent. bonds; and, in the event that such holders did not fund all non-bearing interest notes of the denomination of one hundred dollars, such notes were depreciated by a tax of thirty-three and one-third cents levied "for every dollar promised on the face of said notes," and also an additional monthly tax of ten per cent.

It is evident that while it was the design of those who passed the Act above referred to to cause all persons holding such treasury notes to fund them, yet all holders had the right of choice, and therefore might fund such notes or submit to the tax which was imposed upon them.

If such notes were not funded by the time specified in the Act, (April 1st, 1864,) it is clear that, had the rebellion continued, in a brief period of time such notes would have been consumed by taxation.

The respondent being permitted to exercise discretionary power as Commissioner in Equity, like every prudent man would have done under the same or like circumstances, funded the notes held by him, and should not be held liable for their loss.

MOSES, C. J. While the whole Court concurs in dismissing the motion, the conclusion of its several members is not reached by a like regard of the points arising under the appeal. My view of the case precludes our right to consider either the propriety of the

receipt of the Confederate money or its investment.

The action was for money had and received by the respondent, as Commissioner in Equity for Chester, the proceeds of the sale of real estate, which came to his hand as such officer.

After the pleadings had been brought to the notice of the Court, and the counsel for both sides heard thereon, by their consent, it was ordered that the following issues between the parties be tried by a jury:

"First. Was the disposition of the moneys, admitted to have been received by the defendant to the use of the plaintiff, as set

*293

*forth in his answer, proper and legal, and such as to bar the plaintiff's right to recover?

"Second. Did the plaintiff's cause of action accrue within four years next preceding the commencement of this action?"

After the evidence, argument and charge, the jury returned a verdict "for the defendant."

The proceeding is of a very singular and anomalous character. The mode in which the issues were to be determined is one certainly not to be encouraged by the Court. It is in violation, not only of all regularity, but entirely inconsistent with the form in which cases at law are to be tried, where questions of fact are to be decided by the jury, unless it is waived, while those of law are exclusively for the determination of the Judge. Even in cases arising at law, while, by consent, questions of fact may be left to the judgment of the Court, those of law can never be referred to the decision of the jury. Here the first issue, admitting the receipt of the money, raises the question, whether its disposition, as set forth in the answer, was "proper and legal, and such as to bar the plaintiff's right to recover?"

The manner of the disposition, therefore, is admitted, and the only matter the jury was to pass upon was its legal effect in bar of the recovery. A mere naked proposition of law was raised, and this, by consent of the appellant, was left to the jury. Can he complain of error in their judgment when he accorded them rights which in no way pertained to them? His consent that they should be invested with the power of fully determining the issues submitted, though they involved pure questions of law, should leave him without remedy in the way of appeal. It is true he now excepts to the issue, because "it settled a question of law"—but this was on his own motion, for in an order by consent both parties must be considered actors, and he should not be permitted to show error in an order of the Judge granted on his own application.

It is apparent from the pleadings and the testimony that the "disposition" of the money under the first issue referred to the funding of it in Confederate States bonds.

The only error in the charge of the Judge excepted to is "that the receipt of the money in Confederate currency was not in issue in the case."

We concur in his conclusion. It was not involved in the issue, which only affected its "disposition." The other errors complained

*294

*of consist in his refusal to charge as requested on behalf of the appellant. An examination of the points so made will show that they could have no bearing on the real question raised by the said issue, which, we have said, looking to its language submitted to the jury, whether the investment in Confederate securities of the money received was a proper and legal disposition of it.

Even if there had been error on the part of the Judge, as alleged, in regard to the first issue, it is not contended there was any as to the second. That involved the Statute of Limitations. The general verdict of the jury extended to both issues—and they have said, by their finding, that the "plaintiff's cause of action did not accrue within four years next preceding the commencement of the action." Neither in the exceptions or the argument here is any error charged in their finding on this issue, and it is conclusive against the appellant.

The motion is dismissed.

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5 S. C. 294

WILSON v. HARPER.

(Columbia. April Term, 1874.)

[*Bills and Notes* ⇐537.]

Where an instrument is sued upon as a single bill and the issue is as to defendant's sealing, the question is one of fact for the jury, and it is error to take that question from them, leaving them nothing to do but to calculate the amount due by the terms of the instrument.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1895–1898, 1900–1910; Dec. Dig. ⇐537.]

[*Evidence* ⇐226, 366.]

A copy of a bankrupt's schedule is, by itself, incompetent evidence; so, also, is it incompetent against one not a party to the record.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 815, 1527; Dec. Dig. ⇐226, 366.]

Before Cooke, J., at Anderson, February Term, 1874.

This was an action by Amanda C. Wilson, against John Harper, upon an instrument alleged in the complaint to be the single bill of the defendant.

The instrument is in words and figures as follows:

"$856.

"Twelve months after date we, or either of us, promise to pay Joseph C. Eaton, or bearer, the sum of eight hundred and fifty dollars, for value received, with interest from date.

*295

*"Witness our hands and seals, this the 27th day of December, 1858.

"(Signed) A. W. Richardson, [L. S.]
"J. M. Carpenter, [L. S.]

"Signed in presence of us, in the 2d instant:
"John Harper.
"A. W. Guyton,
"W. L. Smith.
"Test: W. J. Robins."

The answer admitted defendant's signature, but denied the sealing, and alleged that the instrument was defendant's promissory note, and, as such, was barred by the Statute of Limitations.

The plaintiff offered in evidence a certified copy of schedule A of W. A. Richardson's bankrupt record, filed March 10th, 1868, in which the note sued on is described, and set down as a debt due by him. The copy was received in evidence against defendant's objection.

For the defense, W. T. Robins testified that the defendant, A. W. Guyton and W. L. Smith were not parties to the instrument when it was executed by A. W. Richardson and J. M. Carpenter; that they signed it in the fall of 1860, when Carpenter was about to remove from the State.

His Honor instructed the jury "that the note sued on is a sealed instrument, according to the laws of South Carolina, and all you have to do is to count the interest and ascertain the amount due."

The defendant excepted to the instruction and requested the Court to charge:

1. That the paper sued on cannot be held to be a sealed instrument, without evidence of defendant's intention to seal, no seal being annexed to his signature.

2. That it is a question of fact for the jury to decide from the evidence whether the defendant adopted, or intended to adopt, the seal of the parties, or either of them who signed before him, or otherwise to bind himself by a seal; that the intention to seal or not to seal is a question for the jury.

His Honor declined so to charge and defendant excepted.

The verdict was for the plaintiff, and defendant appealed.

Reed & Brown, for appellant.
Whitner, contra.

*296

*June 29, 1874. The opinion of the Court was delivered by

WRIGHT, A. J., [who, after stating the case, proceeded as follows]: Whether an instrument is to be regarded as a specialty, and entitled to the priority and privilege which attaches to instruments of that rank, depends on the intention of the maker, and this is to be inferred from the circumstances attending its execution, both as regards the manner of the signing and the purposes the parties designed to effect by it. Even where the mode of execution can scarcely leave a doubt that the creation of a specialty was intended, and was, in fact, fulfilled by the use of expressions, coupled with a seal, or a sign, or a symbol, adopted and substituted in the place of one it is not a question of law for the Court, but of fact for the jury. The intention is to be collected from all the evidence offered in the case and the conclusion is to be drawn from it whether the party who signed did anything to show that his design was to execute a paper which was to operate as a specialty. If it were a matter to be decided by the mere inspection of the Court, the absence of a single formal requisite to the constitution of the instrument, as a specialty, might defeat the purpose of the parties that it should so take effect, while the deficiency might be supplied by testimony, to be passed on by the jury, showing that the seal of one of the signers opposite to his name was adopted by all of the others as their seals, though there might be nothing affixed to their names denoting such purpose. If a conclusion is to be derived from the mere inspection of the paper, it is not perceived how it could be considered a specialty as to the said Harper, the party sued. There is nothing which could affect him with the liabilities which follow an obligation of that character, except that it contains the words, "witness our hands and seals." The effect of these, as to each signer, must be tested and measured by the testimony. The question of intention, always the one of material significance, where a party is alone charged, by reason of his adopting the act of another, is indispensable in the case before us, where it is in evidence that Harper was not one of the original drawers of the note, but that he, with Guyton and Smith, nearly two years after the execution of the single bill by Richardson and Carpenter, signed it as surety for Carpenter, and that Robins was the subscribing witness to their signatures. The conclusion of the presiding Judge, leaving nothing to the jury on the case as presented but the calculation of the amount

*297

due, *was error, and at variance with the course and practice of our Courts.—Relph & Co. v. Gist, 4 McC., 267; McKain v. Miller, 1 McM., 313; Gramling v. Woodward, 2 Rich. 621; O'Cain v. O'Cain, 1 Strob., 402.

The objection made by the appellant, in regard to the admission of the copy of the schedule in the bankrupt proceeding of Richardson, in which the note is set down as a debt due by him, must be sustained. The paper was in no way admissible. Besides, being but a part of the whole record, to which Harper was in no way a party, it was but the declaration of Richardson, and until a joint interest was prima facie shown to exist

between Harper and himself it could not charge or prejudice the latter.—1 Greenleaf, 177.

The motion for a new trial is granted.

MOSES, C. J., and WILLARD, A. J., concurred.

5 S. C. 297

STATE v. CARDOZO, Treasurer.

(Columbia, April Term, 1874.)

[*Mandamus* ⇐154.]

A petition for a mandamus to compel a public officer to pay a claim held by the relator must describe the claim in such terms as to identify it and distinguish it from all other claims of a similar kind.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 296–316; Dec. Dig. ⇐154.]

[*States* ⇐145.]

"Certificates of indebtedness," issued by the State Treasurer, under the directions of an Act of the Legislature, in payment of certain claims against the State, and redeemable by the Treasurer out of the taxes of a certain year," or receivable in the payment of all taxes or other dues to the State," are not "bills of credit," within the sense of that term, as used in Article I, Section 10, of the Constitution of the United States.

[Ed. Note.—For other cases, see States, Cent. Dig. § 141; Dec. Dig. ⇐145.]

[*Officers* ⇐121.]

A public officer is not liable to punishment for obeying an Act of the Legislature which violates no provision of the Constitution.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 207, 208; Dec. Dig. ⇐121.]

[*States* ⇐145.]

It is no violation of Section 10, Article IX, of the Constitution of the State, to issue "certificates of indebtedness" as evidence of debt due for the public printing and other claims against the State.

[Ed. Note.—For other cases, see States, Cent. Dig. § 141; Dec. Dig. ⇐145.]

[*Constitutional Law* ⇐70.]

A claim against the State, ordered to be paid by the Legislature, cannot be questioned before the Courts upon grounds imputing wrong or improper motive to the Legislature.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129–132, 137; Dec. Dig. ⇐70.]

[*Mandamus* ⇐154.]

[A petition for a mandamus to compel a public officer to pay a claim held by the relator must describe the claim in such terms as to identify it and distinguish it from all other claims of a similar kind.]

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 297; Dec. Dig. ⇐154.]

These were ten petitions to the Supreme Court by as many different relators, praying for writs of mandamus against F. L. Cardozo, State Treasurer.

The relators were A. G. Brenizer, as Cashier and agent of the Central National Bank of Columbia, and as agent of the Trustees of the Citizens' Savings Bank, a bankrupt

*298

corporation, F. Cardarelli, *J. M. Smith, T. C. Andrews, J. A. Bowley, Howie & Allen, A. Palmer, W. E. Rose, P. F. Frazee, and Josephus Woodruff and A. O. Jones, members of a firm called the Republican Printing Company.

The petition of Brenizer set forth an Act of the General Assembly of the State, approved March 9, 1874, whereby it was enacted: "That the sum of sixty-five thousand dollars be, and the same is hereby, appropriated for the payment of pay certificates issued by the authority of the General Assembly, bills payable or Treasury notes of the late State Treasurer, Niles G. Parker, interest on loans, and other evidences of indebtedness held as claims by the Citizens' Savings Bank of South Carolina and the Central National Bank of Columbia against the State of South Carolina.

"Sec. 2. That the State Treasurer be, and he is hereby, directed and required, upon the presentation at his counter by A. G. Brenizer, Esq., Cashier, or his authorized agent, of the said claims of the said Citizens' Savings Bank of South Carolina, and Central National Bank of Columbia, to pay the same, with all lawful interest that may have accrued upon said claims: Provided, That the amount of said claims and interest shall not exceed the appropriation herein made.

"Sec. 3. That in case there is not sufficient money in the Treasury to pay said claims, or any part thereof, at the time of presentation, the State Treasurer is herein authorized and required to issue to A. G. Brenizer, Cashier, or his authorized agent, upon demand, certificates of indebtedness to the amount of said claim, which certificates shall be redeemed by the said Treasurer out of moneys collected from the taxes for the fiscal year commencing November, 1874, or receivable in payment for all taxes or other dues to the State for the said fiscal year, except taxes for school purposes, and interest on the public debt."

That the banks above named were the holders of the claims mentioned in said Act, and that the petitioner was the agent for the collection of the same.

The petitions of Cardarelli, Rose and Frazee set forth a Joint Resolution, approved March 9, 1874, whereby it was provided as follows: "That the sum of nineteen thousand dollars be, and the same is hereby, appropriated for the payment of pay certificates issued by the authority of the General Assembly, and bills payable or Treasury notes of the late State Treasurer, Niles G. Parker,

*299

*together with the interest on the said certificates and bills payable, at the rate of seven per cent. per annum, held as the claims of Phineas F. Frazee against the State of South Carolina, which have already been passed

upon, but no appropriation made for the payment of by the General Assembly.

"That the sum of six thousand seven hundred and seventy-two dollars and eighty-six cents be, and the same is hereby, appropriated for the payment of a pay certificate, issued December 1, 1873, in favor of W. E. Rose, for claims passed by the General Assembly, held by him against the State of South Carolina, for which no appropriation was made to pay.

"That the sum of eleven hundred dollars be, and the same is hereby, appropriated to pay the pay certificates authorized by the General Assembly, and held by Felix Cardarelli as claims against the State of South Carolina, together with the interest on the said certificates at the rate of seven per cent. per annum.

"And the State Treasurer is hereby directed and required, upon the presentation, at his counter, by the said Phineas F. Frazee, W. E. Rose, Felix Cardarelli, or their authorized agents, of the said claims, to pay the same.

"And the State Treasurer shall, and he is hereby required, on the presentation of the aforesaid claims, to issue to the said Phineas F. Frazee, W. E. Rose, Felix Cardarelli, or their authorized agents, upon their demand, certificates of indebtedness to the amount of their several claims, which certificates shall be redeemed by the said Treasurer out of moneys collected from the taxes collected for the fiscal year commencing November 1, 1874, or receivable in payment of all taxes or other dues to the State for the said fiscal year, except for the payment of the interest on the public debt, or the tax levied for the support of schools."

In the petition of Frazee the Act approved January 9, 1874, referred to in the opinion of the Court, in which some of his claims were specifically mentioned, was not referred to.

The petition of Smith set forth:

"That your relator is the bona fide owner and holder of various different legislative pay certificates, issued in pursuance of law, amounting, in the aggregate, to the sum of nineteen hundred dollars, and for the payment of which provision has been made by the General Assembly, by Act approved March 17, 1874, as follows, to wit:

*300

*"An Act to Amend an Act entitled 'An Act to make Appropriation to Meet the Ordinary Expenses of the State Government for the Fiscal Year commencing November 1, 1873,' approved March, 9, 1874.

"Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That sub-division six of Section three (3) of an Act entitled 'An Act to make appropriations to meet the ordinary expenses of the State government for the fiscal year commencing November 1, 1873,' approved March 9, 1874, be, and the same is hereby, amended so as to read as follows: 'If the proceeds of the tax levied for the payment of the expenses of the General Assembly shall be insufficient to pay in full the appropriations herein made, the State Treasurer is directed, after paying the salaries and mileage of the members, to pay the salaries and per diem of the officers, Engrossing Clerks, Solicitors, and then the employees of the General Assembly, prior to any claim for contingent or incidental expenses whatsoever, and to divide the remainder between the House and Senate orders; and then, in case there is a deficiency in the appropriations made for legislative expenses and printing in said Act, the State Treasurer is hereby authorized and directed to issue certificates of indebtedness to the amount of said deficiencies for the payment thereof, to be redeemed out of the taxes collected for the fiscal year commencing November 1, 1874, as provided for in an Act entitled 'An Act to raise supplies for the fiscal year commencing November 1, 1873, and to alter and amend the law in relation to the collection of taxes,' approved December 22, 1873."

The petition of Bowley was the same, in every respect, as that of Smith, except as to the amount of the claim.

The petitions of Andrews, Howie & Allen and Palmer, set forth a Joint Resolution, approved March 16, 1874, whereby it was provided "that the sum of eleven thousand nine hundred and six dollars and fifty-six cents, ($11,906.56,) or so much thereof as may be necessary, be, and the same is hereby, appropriated for the payment of the claims owned and held by M. H. Berry and others, as follows: Legislative pay certificates for the years 1871, 1872 and 1873, amounting to the sum of $11,906.56; the sum of three thousand and eleven dollars and fifty cents is also ap-

*301

propriated *for the payment of the claim of the Aiken Tribune, passed by the two Houses of the General Assembly at the present session; also the sum of twelve thousand dollars, for the payment of the claims of George Symmers; also the sum of six thousand two hundred and eighty dollars, for the payment of the claims of A. Palmer; also the sum of twenty-nine hundred and twenty-three dollars, for the payment of the claim of the Beaufort Southern Standard; also the sum of two thousand three hundred dollars, for the payment of the claim of the Columbia Union-Herald; also the sum of five thousand four hundred dollars, for the payment of the claims of the Charleston Chronicle; also the sum of six thousand two hundred and ten dollars and thirty-three cents, for the payment of the claims of Howie & Allen; also the sum of seven thousand seven hundred and forty-seven dollars, for the payment of the claim of J. Evans Britton.

"Sec. 2. That the State Treasurer be, and he is hereby, authorized and required, upon

presentation of the aforesaid legislative pay certificates, as provided for in Section 1 of this Joint Resolution, to issue to the said M. H. Berry, and others, certificates of indebtedness to the amount of the above appropriations, in such sums as he, or they, the said M. H. Berry and others, may desire; said certificates to be redeemed out of any incoming taxes paid into the State Treasury for the fiscal year commencing November 1, 1874; and the State Treasurer is further authorized and directed to issue to Henry Sparnick certificates of indebtedness in the sum of three thousand and eleven dollars and fifty cents, in payment of the claim of the Aiken Tribune, passed by the General Assembly at the present session, said certificates to be redeemed out of any incoming taxes paid into the State Treasury for the fiscal year commencing November 1, 1874."

The petition of Andrews alleged that he was the owner of the claim for $2,300 mentioned in the resolution as the claim of the Columbia Union-Herald.

The petition of Woodruff and Jones, members of the Republican Printing Company, set forth "An Act to make appropriations to meet the ordinary expenses of the State Government for the fiscal year commencing November 1, 1873," approved March 9, 1874, which contained the following amongst other appropriations:

"Sec. 3. Sub. 5. For the payment of expens-

*302

es of current print*ing, twenty-five thousand dollars is hereby appropriated, to be paid on the order of the Clerks of the two Houses."

"Sec. 51. For the payment of the balance due the Republican Printing Company, on contract for current and permanent printing of the present session of the General Assembly, fifty-four thousand dollars, to be paid in accordance with the provisions of the Act under which said contract was awarded to said company."

This petition also set forth an Act approved March 17, 1874, which is as follows:

"An Act to Amend an Act Entitled 'An Act to Make Appropriation to Meet the Ordinary Expenses of the State Government for the Fiscal Year Commencing November 1, 1873,' Approved March 9, 1874.

"Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That sub-division six of Section three (3) of an Act entitled 'An Act to make appropriation to meet the ordinary expenses of the State Government for the fiscal year commencing November 1, 1873,' approved March 9, 1874, be, and the same is hereby, amended so as to read as follows: 'If the proceeds of the tax levied for the payment of the expenses of the General Assembly shall be insufficient to pay in full the appropriations herein made, the State Treasurer is directed, after paying the salaries and mileage of the members, to pay the salaries and per diem of the officers, Engrossing Clerks, Solicitors, and then the employees of the General Assembly, prior to any claim for contingent or incidental expenses whatsoever, and to divide the remainder between the House and Senate orders, and then, in case there is a deficiency in the appropriations made for legislative expenses and printing in said Act, the State Treasurer is hereby authorized and directed to issue certificates of indebtedness to the amount of said deficiencies for the payment thereof, to be redeemed out of the taxes collected for the fiscal year commencing November 1, 1874, as provided for in an Act entitled 'An Act to raise supplies for the fiscal year commencing November 1, 1873, and to alter and amend the law in relation to the collection of taxes,' approved December 22, 1873."

The petition also set forth "An Act to make appropriation for the payment of the expens-

*303

es of printing," approved November 19, *1873, which, after various appropriations for printing, amounting to $125,000, contained the following:

"Sec. 4. That the State Treasurer be, and he is hereby, authorized and directed to issue to the Republican Printing Company certificates of indebtedness to the amount of the above appropriations, and also for the balance due said company, one hundred thousand five hundred and eighty-nine dollars sixty-three cents, with interest, appropriated by the General Assembly for printing at the session of 1872–73.

"Sec. 5. That the sums hereby appropriated be paid on the certificates of the Clerks of the two Houses, said certificates of indebtedness to be receivable in payment of all dues to the State, and redeemable at the State Treasury out of the incoming taxes, except taxes levied for school purposes and interest on the public debt."

It also contained "An Act to raise supplies for the fiscal year commencing November 1, 1873, and to alter and amend the law in relation to the collection of taxes," approved December 22, 1873, which contained the following:

"Sec. 5. That a tax of one mill upon every dollar of the value of all taxable property in this State be, and the same is hereby, levied to meet appropriations for public printing for the fiscal year commencing November 1, 1873.

"Sec. 11. That all taxes assessed and payable under this Act shall be paid in the following kind of funds: United States currency, gold and silver coin, National Bank notes, and certificates of indebtedness authorized by this General Assembly and issued to the Republican Printing Company, pursuant to the Act approved November 19, 1873; and on receiving any of said certificates for taxes, the County Treasurers shall cancel the same,

by writing the word 'Cancelled' on the back of each certificate so received, and attaching his official signature thereto; and the State Treasurer shall report to the General Assembly, at the next regular session, the total amount of such certificates returned to him by the County Treasurers respectively."

All the petitions set forth the 7th Section of "An Act to raise supplies for the fiscal year commencing November 1, 1874," approved March 14, 1874, which is as follows:

"Sec. 7. That a tax of one and four-fifths of a mill upon every dollar of the value of all taxable property in this State be, and

*304

*the same is hereby, levied to pay the deficiency or the unpaid appropriations and claims of the Central National Bank, P. F. Frazee, F. Cardarelli and others, made by the General Assembly, for the fiscal year which commences November 1, 1873."

The relator in each case alleged that he presented his claim at the counter of the Treasurer and requested him to pay the same, or to issue to the relator the certificates of indebtedness authorized and required to be issued, &c., but that the State Treasurer refused to pay the claim in money, or to issue the certificates of indebtedness, and prayed that the said F. L. Cardozo, State Treasurer, may be required and commanded to pay to the relator his said claim or to issue to him the said certificates of indebtedness.

A rule to show cause why a peremptory mandamus should not be granted was issued in each case, and a return thereto duly filed.

To the petition of Brenizer the return showed, for cause, as follows:

I. That the said mandamus should not be granted to require this respondent to pay the claims of the said relator, as agent, because this respondent now shows and informs this Honorable Court that there is no fund or moneys which this respondent is by law authorized or required to pay to the said relator in payment or satisfaction of said claims, as set forth in the petition herein.

II. That the said mandamus should not be granted to require this respondent to issue certificates of indebtedness in payment or satisfaction of said claims of said relator:

(1) Because said certificates of indebtedness, when issued, would be and become "bills of credit" of the State of South Carolina, and would be within the prohibition of the tenth Section of Article I of the Constitution of the United States; and,

(2) Because the sole fund or moneys out of which the said claims of the said relator are or will be payable, if said claims are or will be lawfully payable in any manner, will arise under the provisions of the Act of the General Assembly entitled "An Act to raise supplies for the fiscal year commencing November 1, 1874," and by the provisions of the Act of the General Assembly set forth in the petition herein, and entitled "An Act to make appropriation to pay the claims of the Citizens' Savings Bank of South Carolina, and the Central National Bank of Columbia, S. C., against the State of South Carolina," approved March 9, 1874, this respondent, as State Treasurer, is authorized and required,

*305

by Section 3 thereof, *to issue to the relator the said certificates of indebtedness only in case there is not sufficient money in the Treasury to pay said claims of said relator, or any part thereof; that it is not the right or duty of this respondent to issue said certificates until the tax levied to pay said claims of said relator shall have been collected into the Treasury, and there shall be an insufficient amount of money arising from said tax to pay the said claims of said relator.

III. That the said mandamus should not be granted to require this respondent to pay the said claims of the said relator, because if said mandamus should now be granted, and this respondent should presently pay said claims, then this respondent would be compelled to divert the funds arising under the provisions of the Act of the General Assembly entitled "An Act to raise supplies for the fiscal year commencing November 1, 1873, and to alter and amend the law in relation to the collection of taxes," approved December 22, 1873, from the specific purposes and objects therein named, contrary to the provisions and requirements of the fourth Section of Article IX of the Constitution of the State.

IV. That the said mandamus should not be granted to require this respondent to issue certificates of indebtedness for said claims of said relator, because, as is hereinbefore set forth, this respondent is by law authorized to issue said certificates of indebtedness only in case there is not sufficient money in the Treasury to pay said claims, or any part thereof; and if there is not now, nor has been at any time, any money whatever in the Treasury which is by law applicable to the payment of said claims of said relator, then the contingency upon the happening of which this respondent is authorized by law to issue certificates of indebtedness for said claims of said relator has not arisen.

V. For further cause why said mandamus should not be granted to require this respondent to pay said claims of said relator, or to issue certificates of indebtedness therefor, this respondent shows that the pay certificates and bills payable or Treasury notes set forth in the said Act entitled "An Act to make an appropriation to pay the claims of the Citizens' Savings Bank of South Carolina, and the Central National Bank of Columbia, S. C., against the State of South Carolina," approved March 9th, 1874, were issued without warrant of law, in excess of the lawful appropriation made for such purpose by the General Assembly, and were at

all times, and now are, illegal, fraudulent and void, and wholly without consideration

*306

*in law, and this respondent cannot, in law or justice, be made the instrument by which to cause the payment of said claims out of the funds of the State, or by the issue of any obligations of the State; and for the proof of the facts stated in this paragraph, this respondent proffers to this Court the books and records of the office of this respondent, as State Treasurer.

VI. That said mandamus should not be granted to require this respondent to issue certificates of indebtedness for said claims of said relator, because if said certificates of indebtedness shall be issued they will become payable out of any of the taxes levied for the fiscal year commencing November 1, 1874, and will be receivable in payment of all dues to the State for the said fiscal year, except taxes for school purposes and interest on the public debt; and the said certificates of indebtedness will thereby be and become claims which will be paid in preference to all other claims or appropriations made by law payable out of the proceeds of the tax levied for said fiscal year, except the taxes levied for school purposes, and interest on the public debt.

The return in each of the other cases was substantially the same—that in the case of Woodruff and Jones, containing some further objections, which will be sufficiently understood from the opinions of the Judges.

Rion, Dunbar, Melton & Clark, Whipper, for relators.

Melton, Attorney General, Elliott, Chamberlain, for respondent.

The opinion of the Court was delivered by

MOSES, C. J., [who, after stating the names of the cases, proceeded as follows:]

The cases named were all heard together. Their general object was to compel the State Treasurer to issue to the several relators certificates of indebtedness for certain claims alleged in their respective suggestions to be held against the State, and for which, as they aver, provision for payment was made by the appropriation Acts specifically referred to; and on failure of means through the Bills to raise supplies to meet the said claims, certificates of indebtedness for their several amounts were to be issued to the various parties by the said Treasurer. They set out a demand for payment, and in the event of there being no money in the Treasury properly applicable to them, then for the said certificates, which was refused.

*307

*The relators are to be distinguished into various classes—those who aver a right to the remedy sought by reason of appropriation to meet "pay certificates issued by authority of the General Assembly, bills payable or Treasury notes of the late State Treasurer, Niles G. Parker, interest on loans and other evidences of indebtedness," and those who merely assert a claim passed by the General Assembly without any express reference as to its character, but leaving, from the language of the appropriation for its payment, the necessary implication that it was founded on "legislative certificates."

The claim of the Republican Printing Company is of another character, and is alleged to be founded on an appropriation for public printing, in a fixed amount, as follows: By the fifth sub-division of Section 3 of appropriation Act to meet the ordinary expenses of the State Government for the fiscal year commencing November 1, 1873, (15 Stat., 614): "For the payment of expenses of current printing, twenty-five thousand dollars is hereby appropriated, to be paid on the order of the Clerks of the two Houses." By first sub-division of 5th Section of the same Act (same page): "For the payment of balance due the Republican Printing Company, on contract for current and permanent printing of the present session of the General Assembly, fifty-four thousand dollars, to be paid in accordance with the provisions of the Act under which said contract was awarded to the said company."

It also sets forth the "Act to raise supplies for the fiscal year commencing November 1, 1873," &c., by the 5th Section of which (15 Stat., 515,) "a tax of one mill upon every dollar of the value of all taxable property in this State be, and the same is hereby, levied to meet appropriations for public printing for the year commencing November 1, 1873."

It further sets forth the Act of March 17, 1874, "to amend an Act entitled an 'Act to make appropriations to meet the ordinary expenses of the Government for the fiscal year commencing November 1, 1873' (15 Stat., 709,) which provides that in case there is a deficiency in the appropriations made for legislative expenses and printing in said Act, the State Treasurer is hereby authorized and directed to issue certificates of indebtedness to the amount of said deficiency, for the payment thereof, to be redeemed out of the taxes collected for the fiscal year commencing November 1, 1873," &c. It alleges that their claim against the State arises out of a de-

*308

ficiency *in the appropriations made for legislative expenses and printing in the Act approved March 9, 1874; that they presented their claims at the counter of the Treasurer and requested him to pay them, or issue to them the certificates of indebtedness authorized and required to be paid by the provision of the Act already referred to, which was refused.

The writ of mandamus cannot issue to enforce the performance of what is claimed as a right against a public officer, unless the nature and character of the right be first

shown, so that the Court may determine whether it raises a corresponding duty on the part of the officer. Where a claim is directed by the Legislature to be paid, and is so set forth that the Treasurer may identify it by the enactment, through the force of which it is demanded, he may not be at liberty to exercise any discretion in the obligation which is imposed upon him, either to pay it or place it in such form as the Legislature has directed, provided it involves nothing inconsistent with the Constitution of the State or the United States. The mere allegation by a relator that an appropriation has been made for the payment of pay certificates issued by the authority of the General Assembly, and held by him, will not necessarily entitle him to the aid of the Court, through the writ of mandamus, to enforce the payment, unless in his suggestion such a description is given as will be sufficient to identify them, that the Court, if it responds favorably, may frame its order in such language as to make it available and effective for the purpose it designed. Nor can the Court properly act unless the instruments on which the claim is alleged to rest are so set forth that they may be distinguished and set apart from all others of the like kind. There is wanting in the suggestions such a specific statement of the claims as is necessary to guide and regulate the judgment of the Court in its order to the Treasurer. In fact, without it the order might be fruitless, from the general character of its terms. The mandatory clause of the writ should be expressed with certainty, that the party to whom it is addressed should not have the chance of disobeying it for any want of distinctness or precision. The only cases where the claims depend upon pay certificates, or bills payable, or Treasury notes of the late State Treasurer not subject to this objection, are those of Frazee and Rose, except in the case of the former as to the pay certificates referred to in his suggestion. The Act of February 6, 1874, (15 Stat., 532,) audits the other demands presented by him

*309

to *the General Assembly, setting them forth fully. That of Rose is expressed in the Act to be for claims passed by the Legislature, and the amount included in one pay certificate, of which the date and sum are both given. They are thus identified, and can be the subject of a direct and specific order.

The case of the Republican Printing Company stands on a different footing. Their claim is for labor and services performed for the State, through the direction and employment of the Legislature, and appropriations, definite and fixed, are made for the payment. The amount does not depend on the certificates of the Clerks of the two Houses, as was said, but are named in and determined by the Acts which have been already referred to. There is nothing in the return of respondent which contests the validity of the claim, so far as it is averred to be in consideration of services performed, for which the State is responsible. All the objections rest upon the want of power in the General Assembly to make the said appropriations the subject-matter for the issuing of a certificate of indebtedness, either for the repugnancy to the Constitution of the State or the United States, or as being repugnant to or inconsistent with existing laws. The first objection is, that the certificates of indebtedness now demanded are "'bills of credit,' within the meaning of the Constitution of the United States." The subject has been so lately and fully considered by the Court, in Shiver v. Hoge [4 S. C. 185], May Term, 1873, that it is not our purpose now to enlarge upon it. As was there said, the fact that the debt or obligation of a State might be readily received in the community in the payment of debts or purchase of commodities might not so impress the paper with the qualities which would render it obnoxious to the Constitution, for it is the intention to create a currency—a circulating medium—which invalidates the emission, and this must be apparent from the whole scope of the Act. That some of the said certificates of indebtedness were to be receivable in taxes due the State affords no evidence of an intention on the part of the Legislature to create a currency or circulating medium. It was but a ready and legitimate mode of their payment or redemption, and exhibits no purpose of creating a medium by which the volume of circulation might be so increased as to produce all the evils of a redundant and excessive currency. There is no intent to do more than to provide for the creditors, to whom the indebtedness of the State was admitted, the means of making their debts available

*310

in the payment of taxes, *or even other dues to the State, provided there should be a deficiency in the supplies to meet the various appropriations they were expected to pay. The certificates in no way increased the obligation of the State, and, in fact, only constituted another admission by the General Assembly of the particular debt not paid by the certificate, but remaining due until its satisfaction was unconditionally acknowledged.

It is, secondly, shown, for cause, why the writ prayed by said company should not issue, that the taxes authorized to be levied under "the Act to raise supplies for the fiscal year commencing November 1, 1874," are, when collected, appropriated and devoted to certain named and specified objects—are to be kept separate and apart from each other, and to be applied to the purposes for which they are levied, and none other, and any failure to comply with its requisitions would subject the respondent to punishment by fine and imprisonment. It is enough, in reply to

this objection, to say that the very Act levies a tax to meet the appropriations for the public printing for the fiscal year, November 1, 1874, and it is to be presumed that the Legislature knew the amount that would be required to pay the sum which they had set apart for this purpose. Besides, a right conferred by statute is not to be postponed in its enjoyment because some future exigency might arise which would render its exercise inconvenient or impracticable. But even if subsequent developments should show that by some contingency the appropriated amount might not be raised, and by possibility the Treasurer should discover that he could not conform to the very letter of the Act of March 9, 1874, the objection could not be urged against the issuing of the certificates, but against their redemption.

In any event, if the act of the officer is compelled by a subsequent statute, he would scarcely be liable to punishment, because, perchance, it may violate some previous one, and he would even be protected if his act was induced by some Section of the same statute. A public officer cannot be amenable to punishment by following the directions of the Legislature—certainly when they involve no constitutional breach.

The only remaining objection in the return of the respondent to the suggestion of the said company is the third, that the issue of the certificates to the relators will be a violation of Section 10, Article IX, of the Constitution, which is in the following words: "No scrip, certificates, or other evi-

*311

dence of State indebtedness, *shall be issued except for the redemption of stock, bonds or other evidences of indebtedness previously issued, or for such debts as are expressly authorized in this Constitution." It is enough to say that the public printing, being one among the necessary expenses of the State, is a debt "authorized by the Constitution." The 3d Section of the 9th Article of that instrument requires that "the General Assembly shall provide for an annual tax sufficient to defray the estimated expenses of the State for each year." Besides, an appropriation is an evidence of indebtedness by the State, and for this the certificates are claimed. No allegation is made that the debt for printing was not a bona fide claim against the Legislature, even if such question could have been raised here. And if the fact had been, as was intimated, that the amount due to the company was ascertained by the Clerks of the two Houses and certified by them, they being the representatives of the company, it is not clear that this or any other Court would be authorized to inquire into the policy, wisdom, justice or prudence of the enactment, and test its validity by either of the said standards. It is a mistake, however, to say that the amount due to the company, under the Acts through which they here claim, were to be regarded and adjusted by the certificates of the two Clerks, who were members of the Republican Printing Company. The two Clerks were not referred to in either of the Acts before us, except that in sub-division 5 of Section 3 of Act of March 9, 1874, the amount there appropriated was "to be paid on the order of the Clerks of the two Houses."

It was a mere authority to receipt and thus discharge. We fail to discern any application of 4th Section of 9th Article of the Constitution of the State, which is interposed as a bar by the respondent.

The Acts and Joint Resolutions are laws, and they provide for the levy of the tax, and its object is distinctly stated. There does appear to be a full compliance with all that is demanded by this constitutional requirement.

We have thus considered all the objections urged by the return to the rule to shew cause in the case of the Printing Company. Some of them apply to the cases made by the other relators; and as to these last, there are further exceptions not made to the claim of the said company, which we will now briefly consider.

*312

*The objection of the respondent that the certificates cannot be issued until the taxes for 1874 are collected cannot avail. By the Act and Joint Resolution they are redeemable out of money collected from the taxes of said year, and some of them receivable in payment of such taxes. This clearly shows that they are to be previously issued.

For further cause why the said mandamus should not be granted, as prayed by the said Rose and Frazee, severally, it is objected that the legislative pay certificates, treasury notes, for and in consideration of which the appropriations were made in favor of the said Rose and Frazee, respectively, were issued without warrant of law, in excess of the lawful appropriation made, and were, and now are, illegal, fraudulent and void. So far as this position involves constitutional prohibitions, they have been considered and disposed of. So far as it implies any wrong or improper motive on the part of the Legislature in the particular enactment, it is beyond the control of the judicial department. It cannot examine into the inducements to any act. Public and proper motives are alone to be attributed to the Legislature. Can we direct an issue to test the motive which impelled its action, or to ascertain the consideration for claims which they have decided to be valid and ordered to be paid? While they act within their constitutional limits they are beyond the control or supervision of the Judiciary.—Cooley on Constitutional Lim., pp. 186, 187, and authorities there cited.

Not only has an appropriation been made for their payment, but the means of meeting

it, through a tax, have been provided. If, when payment is demanded, there are no funds to apply to it, the Treasurer is ordered to issue certificates of indebtedness, which are to be redeemable out of the taxes for the fiscal year commencing on 1st November, 1874, or receivable for taxes for the said year, or other dues. "No executive duty is imposed on him—there is no reason for the exercise of discretion, official or otherwise—all that is shut out by the direct and positive command of the law, and the act required is, in every sense, a mere ministerial act." —Kendall v. The United States, 12 Peters, 524 [9 L. Ed. 1181].

It is ordered that the petitioners in the several cases—Brenizer, Cardarelli, Smith, Andrews, Bowley, Howie & Allen, and Palmer—be dismissed without prejudice.

*313

*The State Ex Relatione W. E. Rose v. F. L. Cardozo, State Treasurer:

It is ordered, in this case, that a writ of mandamus do issue to the said F. L. Cardozo, State Treasurer, commanding and enjoining him, upon the receipt thereof, on the presentment at his counter by the said W. E. Rose, or his authorized agent, of the pay certificate issued December 1, 1873, in his favor, for the sum of six thousand seven hundred and seventy-two dollars and eighty-six cents, referred to in his petition, to issue to the said W. E. Rose, or such agent, certificates of indebtedness to the said amount, being the same amount appropriated by the Joint Resolution of the General Assembly, approved March 9, 1874, entitled "A Joint Resolution to make appropriations to pay certain claims, and for other purposes."

The State Ex Relatione P. F. Frazee v. F. L. Cardozo, State Treasurer:

It is ordered, in this case, that a writ of mandamus do issue to the said F. L. Cardozo, State Treasurer, commanding and enjoining him, upon receipt thereof, on the presentment at his counter by the said P. F. Frazee, or his authorized agent, of the following claims, to wit: One bill payable or certificate of the late State Treasurer, No. 1, bearing date March 13, 1872, for twenty-five hundred dollars; one bill payable or certificate of the late State Treasurer, No. 9, bearing date March 14, 1872, for twenty-five hundred and seventy-three dollars and four cents; one bill payable or certificate of the late State Treasurer, No. 27, bearing date March 18, 1872, for five thousand and forty-one dollars and sixty cents; one bill payable or certificate of the late State Treasurer, No. 27¾, bearing date March 18, 1872, for six thousand dollars, issued on the above dates, for the sum, in whole, of sixteen thousand one hundred and fourteen dollars and sixty-four cents, and held by the said P. F. Frazee, as set out in the Act approved January 9, 1874, entitled "An Act to provide for the payment of the claims herein named," (15 Stat., 532,) to issue to the said relator, or his authorized agent, certificates of indebtedness to the amount of said specified bills payable or certificates of the late State Treasurer, and all lawful interest that may have accrued upon the same, as provided by Joint Resolution of March 9, 1874, (15 Stat., 808). This order not to prejudice hereafter any claim of the said relator for the payment

*314

of the legis*lative pay certificates referred to in the said Act and Joint Resolution.

The State Ex Relatione The Republican Printing Company v. F. L. Cardozo, State Treasurer:

In this case it is ordered that a writ of mandamus do issue to the said F. L. Cardozo, State Treasurer, commanding and enjoining him, upon the receipt thereof, on the presentation at his counter of the order of the Clerks of the two Houses of the General Assembly, by the said relators, to issue to them, or their authorized agents, certificates of indebtedness for the sum of twenty-five thousand dollars, appropriated by the fourth Section of the Act of March 9, 1874, entitled "An Act to make appropriations to meet the ordinary expenses of the State Government for the fiscal year commencing November 1, 1873." And it is further ordered that, on demand of the said relators, or their authorized agent, at the counter of the said State Treasurer, he do issue to them certificates of indebtedness to the amount of fifty-four thousand dollars, the amount appropriated to the relators under the fifth Section of the Act above referred to.

WRIGHT, A. J., concurred.

WILLARD, A. J., [who, after naming the cases of Brenizer, Cardarelli, Smith, Andrews, Bowley, Howie & Allen, Palmer, and Woodruff & Jones, proceeded as follows:]

The relators in the above entitled cases have presented petitions alleging that they are the holders and owners of certain claims against the State, authenticated by certificates duly issued by certain officers of the State authorized to issue such certificates, and asking that a writ of mandamus may issue in each case to compel the performance of certain official acts by the State Treasurer, required to be performed by the provisions of certain Acts of the Legislature, spread out in the various petitions, looking to the payment of such claims directly, or for placing in the hands of the claimants certificates of indebtedness for the amount of such claims, which the relators claim will be of value to them, and, therefore, that they have an interest in and right to require performance of such act.

In each of the cases above entitled the

relators claim to hold several certificates or other claims of the various classes described

*315

*in the several Acts, but they do not set forth the particulars of their claim in any manner by which the certificates or other claims held by them can be identified.

The only claims described in these various Acts, so as to be capable of identification, are those to which the petitions of W. E. Rose and P. F. Frazee relate. In those cases the Act refers to certificates by date or number, so as to fix their identity sufficiently. In all the other cases the individual claims and certificates are not described by the Acts, nor any means of specific identification afforded.

It would, therefore, be necessary for the State Treasurer, upon the presentation of the various claims and certificates, to ascertain whether they were signed by the proper parties having authority to issue them, and whether they were issued conformably to law.

The relators ask of us compulsory process against the Treasurer. It is necessary, therefore, that the specific claims and certificates should be set forth in the suggestion, to enable the respondent to traverse any matter that may be of importance as it regards the right of the relators to the remedy demanded.

It has been contended that it is sufficient for the relators to demand a general direction, leaving it to the Treasurer to examine the vouchers on presentation after a general direction has been given to him as to the nature of his duty.

It is not the duty of the Court, nor the particular office of the writ of mandamus, to give general instruction, or to decide abstract questions touching the performance of official duties. This proposition was very clearly advanced in the State Ex Rel. Morton v. Hoge [4 S. C. 430], decided in September, 1873.

If the relators are entitled to any remedy, the nature and validity of their claims must be passed upon by this Court after an opportunity to contest their validity has been afforded to the respondent.

The duty that may be compelled by mandamus is specific; a general duty cannot be compelled in a case where private rights and interests are alone concerned. The suggestions do not contain matter sufficient to raise all the issues that the respondent is entitled to raise.

The propriety of requiring a specification of the details of the several claims, in respect of which the relators demand the aid of this Court, is peculiarly illustrated by the matters set forth in the petition of J. Woodruff and A. O. Jones and others. The peti-

*316

*tion in that case sets forth various legislative proceedings, relating to the employment of the Republican Printing Company, and providing for the payment of the amounts due to that company. The authority to ascertain and certify the amounts due to that company is conferred upon the Clerks of the two Houses of the General Assembly. The relators, J. Woodruff and A. O. Jones, were the Clerks of the respective Houses, upon whom the authority in question was conferred. These relators describe themselves, in their petition, as "trading under the firm name of the Republican Printing Company." They are, therefore, before us as parties preferring claims to a large amount, authenticated by their own signatures, as Clerks of the respective Houses of the General Assembly.

What may be the effect of the attempt to exercise public authority of this character, for their personal benefit, is a matter not presented for consideration at the present time; but it is clear that the circumstances of this case illustrate most forcibly the propriety and necessity of their setting forth the prices and specific character of their claims, so that their legality may be tested, and the correct bearing of the Acts of the Legislature in question upon them may be ascertained.

For aught that the record discloses, these last named parties may hold a class of claims, the payment of which, by the Legislature, was not intended, and also claims that were intended to be provided for. The respondent has a right to know the precise nature of their claims, in order to direct payment according to the expressed intent of the Legislature; and the Court, before it can assume to direct the action of the Treasurer, must possess the same knowledge.

The petitioners in each of the above entitled cases should be dismissed without prejudice.

[Then stating the title of the case of Rose, he continued:]

The respondent has traversed the validity of the claim set forth by the relator, as the ground of asking relief by mandamus. The averment of the return is that the evidences of debt relied upon by the relator "were issued without warrant of law, in excess of the lawful appropriations made for such purposes by the General Assembly, and were at all times, and now are, illegal, fraudulent and void, and wholly without consideration in law, and this respondent cannot, in law or justice, be made the instrument by which to cause the payment of said claims out of the funds of the State, or by the issue of any obligations of the State."

*317

*If, then, the legal validity of the claim presented by the relator can be inquired into in these proceedings, the traverse of the return puts such legal validity at issue. No objection is made by the relator to the return upon the ground that the issue thus tendered lacks formality. His objection is one of substance, not of form. He contends that the legislative proceedings set forth by the peti-

tion have finally determined, as between the parties, that the claim in question is valid, and that its validity cannot be averred against. This view presents the main question arising for consideration under the present state of the pleadings.

The issue joined is in part an issue of fact, and, if held to be a material issue, must be tried in the mode pointed out by the statute for the trial of issues of fact joined in original proceedings in this Court, (15 Stat., 314).

Before examining the character of the issues made, as it regards their materiality, it will be of importance to fix the construction of Section 10, Article IX, of the Constitution of this State. The language of this Section is as follows: "No scrip, certificate or other evidences of State indebtedness shall be issued except for the redemption of stocks, bonds or other evidences of indebtedness previously issued, or for such debts as are expressly authorized in the Constitution."

It is conceded that mandamus cannot issue in the present case to compel direct payment of the relators' demands, for want of funds in the Treasury applicable to each payment. The provision of law to which the remedy sought relates is the following: "And the State Treasurer shall, and he is hereby, required, on the presentation of the aforesaid claims, to issue to the said Phineas F. Frazee, W. E. Rose, Felix Cardarelli, or their authorized agents, upon their demand, certificates of indebtedness to the amount of their several claims, which certificates shall be redeemed by the State Treasurer out of moneys collected from the taxes for the fiscal year commencing November 1, 1874, and receivable in payment for all taxes or other dues to the State for the said fiscal year, except for the payment of the interest on the public debt or the tax levied for the support of public schools."

The first inquiry is as to whether the official acts authorized by the law quoted above are embraced within the provisions of Section 10, Article IX, of the Constitution. If such is the case, it is evident that the Consti-

*318

tution has imposed a limitation of some *nature upon the power of the Legislature by enumerating the cases in which that power may be rightfully exercised, and forbidding its exercise in any case other than those enumerated.

Are the certificates of indebtedness provided to be issued to the relator embraced in the terms "certificates or other evidences of State indebtedness" within the meaning of Section 10 of the Constitution? The character of the certificates of indebtedness, as intended by the statute, is very clearly fixed by its terms. They are to serve, not only as vouchers for money at the State Treasury, but as a medium of paying debts and demands due to the State, including claims for taxes. They are necessarily evidences of State indebtedness, in the ordinary acceptation of the term, being based upon an actual or supposed indebtedness of the State, and of such a character that the instrument thus issued is in itself, and without reference to any other or further proof or voucher, evidence of indebtedness, which all officers charged with the collection and receipt of taxes and other public dues are bound to accept and act upon.

Unless, then, the words "certificates or other evidences of State indebtedness," as they stand in Section 10, Article IX, of the Constitution, are to be taken in some peculiar or limited sense, the certificates of indebtedness in question must be regarded as belonging to the class to which the provision of the Constitution in question relates. The statute calls the instruments "certificates of indebtedness," and it would require very clear expressions in the statute to show that the certificates of indebtedness intended by it differed substantially from those contemplated by the Constitution. No such expressions are found in the statute, but, on the contrary, the terms fixing the character of such certificates show a clear intent to issue certificates of the character contemplated by the Constitution.

The clause of the Constitution in question must be construed, not only with regard to the particular subject and object set forth in Section 10, Article IX, but by reference to the more general subject and object to which the whole of Article IX has reference.

This Article imposes checks and limitations on the powers of the Legislature, and enforces the performance of certain Acts tending to limit the employment of the credit of the State as a means of providing revenue or postponing obligations, as it regards the ordinary expenses of the government.

*319

*Ordinary annual expenses must be met by annual taxation, and deficiencies arising in any year must be met by taxation imposed for that purpose in the next succeeding year. Money can only be borrowed for the purpose of defraying the extraordinary expenditures and upon bonds of a certain character.

Independently of the provisions of Section 10, Article IX makes it clear that the great object that controlled its enactment was the avoidance of an unnecessary creation of obligations current in the community or elsewhere, based upon the faith and credit of the State, whether forming part of a funded or floating debt. The provisions requiring that money borrowed should only be borrowed upon bonds of a character to form a funded debt shows an intention to avoid the creation of a floating debt consisting of obligations of the class referred to. They also show a clear intent that debts due for ordinary expenditures shall not be allowed to assume the form of obligations based on the faith and credit of the State, whether of the class of funded or floating debt, the

requirement being positive that they shall be paid from the proceeds of taxation laid for the specified purpose of meeting deficiencies of a previous year.

These general objects give the key to the construction of Section 10. The mischief of an undue and improper issue of obligations might arise not only from the issue of that class of obligations that are connected with the permanent funded debt of the State, but from another class enumerated in Section 10, which might create a still more inconvenient floating debt. Hence it was that Section 10 was enacted, limiting the power to issue, and defining the cases in which issues might be made of scrip certificates or other evidences of debt.

Section 10 is in form a denial to the Legislature of the power of issuing evidences of debt of any class or description except in the cases provided for by that Section. No exercise of that power has validity unless its warrant lies in the permissive terms of the Section.

It is not necessary to consider at the present time whether the certificate of an officer authorized by law to audit and allow claims for services rendered, or for other like demands, falls within the description of certificates embraced within Section 10. To this class belong certificates of credit or warrants issued by the Comptroller General, and certificates and orders issued by Clerks of the

*320

respec*tive Houses of the General Assembly for the payment of legislative expenses, and many others of a similar character. There would, however, be no difficulty in distinguishing certificates of the class just named from these, the issue of which is regulated by Section 10.

A certificate of indebtedness issued by the Treasurer cannot be regarded as belonging to the class just mentioned, but must be considered as embraced within the class to which Section 10 applies. When an account or demand payable out of the State Treasury is audited or allowed by any officer other than the Treasurer, the certificate of such officer is given as a voucher to furnish evidence to the Treasurer that the account or demand is in a condition to be paid. The duty of the Treasurer is payment. His certificates of indebtedness cannot be regarded as a step or stage to the course of the payment of demands against the State, but as a means of postponing payment of an obligation already due. When, as in the present case, the provisions of law under which such certificate is authorized are such as to impart to such certificate value enabling the holder to use it or part with it for value as a merchantable article, it must be concluded that the object of such communication of authority was to create an obligation based on the faith and credit of the State capable of having current value in the community. If the nature of the certificate is such that, in the event of currency being given to it, it could perform the functions of money, or become a common medium of trade, then the clause of the Constitution of the United States forbidding the issue by a State of bills of credit would be directly applicable to it. (State Ex Rel. Morton v. Hoge, 4 S. C. [430].) If such evidence of debt would, according to its nature, circulate with negotiable securities, bonds, stock of corporate companies and other merchandise, they would undoubtedly be within the class to which Section 10 relates, and be subject, as it regards their validity, to its provisions. It is clear that such an issue is a case of the employment of the credit of the State by means of obligations intended to circulate either as property in trade or money, and, as such, within the mischief that Section 10 was intended to remedy.

It must, therefore, be concluded that the right and duty of the respondent to issue the certificates of indebtedness attempted to be authorized by the law under which the relator claims, is dependent on the question whether a proper case for the issue exists under the provisions of Section 10.

*321

*The relator does not ask that the certificate should be issued for the redemption of either stock or bonds of the State; nor does he ask for such issue under the clause of Section 10 allowing such issues to take place on account of debts expressly authorized in the Constitution. The only grant of express authority to create debts conferred upon the Legislature is that of borrowing money for extraordinary expenditures upon bonds.—Article IX, Sections 7 and 14.

It is only under that clause of Section 10 that authorizes the issuing of certificates or other evidences of indebtedness for the redemption of other evidences of indebtedness previously issued, that the relator can look as conferring the authority essential to maintain his present demand.

Section 10 was very clearly intended to provide the means of converting obligations already duly created and issued into other obligations of a different form or class, such as a negotiable bond into a non-negotiable stock, or either of the last named obligations into some form of scrip or evidence of debt capable of moulding the obligation to suit the wants of the holder or the convenience of the treasury, or into obligations of the same class or general form, in order to modify some one or more of the terms or features of the original obligation, or to replace such original obligation, as in case of loss, destruction or mutilation, by one of a similar nature and tenor.

The foregoing proposition is so clearly apparent on the face of Section 10, and when comparing its contents with the Article of which it forms a part, that an extended ex-

amination of it is unnecessary. That the Section in question was intended to apply to a case of the conversion of an existing obligation into a new form is its expressly declared object. That this Section was not intended to have any secondary operation, such as authorizing original issues of obligations, or to apply to any other case than that of the conversion of a valid existing obligation into some other form of obligation, is apparent from the strong negative terms employed by it, having the effect not only to limit its own construction and operation in the manner, but to deprive the Legislature of authority to put in circulation obligations as evidences of debt, unless for the purpose directly intended by the Section, namely, the conversion of a previously existing obligation, or for the purpose of borrowing money on the issue of bonds.

*322

*It follows that no obligations can form the ground for the issue of a certificate of indebtedness under Section 10, unless it had a valid legal existence prior to, and at the time of, the adoption of the Constitution, or, if since created, it was so created under and in conformity with the provisions of the Constitution.

As Section 10 forbids the issuing of certificates or other evidences of debt, except in the redemption of previously issued certificates, it is evident that if the relators' claims are founded upon certificates of the class to which Section 10 relates, and if they were issued since the adoption of the Constitution, no authority for their issue existed under the Constitution, and they cannot be recognized as ground for the exercise of the powers authorized by Section 10. In that case it would be necessary to show that Section 10 authorized the issue of original evidences of debt upon the creation of new debt, a construction that cannot be put upon it, as we have seen.

If, on the other hand, relators' claims are based upon evidences of debt of a class different from that to which the authority conferred by Section 10 relates, then a question arises whether the authority conferred by that Section applies to them at all.

The certificates or other evidences of indebtedness for which new certificates or evidences of indebtedness may issue under this Section must be such as the Legislature could have authorized under Section 10. The terms used in this Section to describe the evidences of debt that may be issued under the authority of the Legislature are identical with the terms employed when describing the class of evidences of debt that may be converted into new issues under this Section. The primary sense of the Section is that no evidence of debt can be the subject of re-issue, unless of the same nature and character as the evidence of debt issued to replace it; nor is there ground in Section 10, or in the residue of Article IX, for modifying this result of construction. In order to meet the case made by the relator, it would be necessary to read Section 10 as if it allowed certificates or other evidences of indebtedness to be issued only whenever an indebtedness shall have previously existed. Such reading would render senseless the word "redemption," as employed in the Section, for in no sense can the issuing of an original certificate to verify the existence of a previous unevidenced debt be said to be an act of redemption. It is only for purposes of redemption that such evidences may issue, and, therefore, the construction for

*323

*which the relator is compelled to contract is inadmissible. Nor is there anything in the nature of the subject-matter to which Section 10 relates rendering such an enlarged construction proper. Viewing Section 10 as aimed at a class of evidences of debt of such a nature as to take a place in commercial dealings, and regarding it as not interfering with the ordinary course of verifying and evidencing accounts by an auditing officer for the purpose of payment at the Treasury, it is evident that the mode of verification last named is all that is required for the convenient and orderly transaction of that class of business, and, on the other hand, that the use of a class of evidences for that purpose fitted to become the subject of commercial dealings is not only unusual and unnecessary, but of questionable propriety, as making the credit of the State and its relations to its agents and creditors a subject of constant financial speculation tending to lower the estimation of the citizen for his government to the level of that which he has for the banking house with which he deals. The construction essential to maintain the relator's claims cannot be properly placed upon the provisions of Section 10.

If the precise character and consideration of the evidence of debt held by the relator, and in respect of which he asks the issue of certificates of indebtedness, had been set forth by the pleadings, it would become a question of law whether the nature of the claims was such as to authorize the issue of a certificate of indebtedness under Section 10.

The immediate ground of his claim is a pay certificate issued by the authority of the Legislature, dated December 1, 1873. The return declares that this certificate was issued without authority of law. Under the view already taken, the test of the validity of this pay certificate of December 1, 1873, is the nature of the claim in respect to which it was issued, and the date when those claims arose, whether before or after the adoption of the Constitution. These particulars are not set forth either by the petition or by the law under which relator claims,

and can only be developed upon the trial of an issue of fact.

An order directing an issue to be framed, and sent for trial to the Circuit Court, should be made.

[Then, after stating the title of the case of Frazee, he proceeded as follows:]

The conclusions at which I have arrived, as set forth in the case of the State Ex Rel. Rose, dispose of all the questions arising in

*324

the *present case. The relator claims certificates of indebtedness covering the amount of four bills payable or certificates issued by the State Treasurer in March, 1872, under a Joint Resolution of the General Assembly entitled "Joint Resolution to provide for the payment of certificates issued by the General Assembly," approved March 12, 1872; also the amount of certain certificates for the payment of "legislative pay certificates issued to and drawn in favor of members and attachees of the General Assembly for the year 1871-72."

Are demands of this nature sufficient to authorize the issue of certificates of indebtedness, under Section 10, Article IX, of the Constitution of this State? It may be a serious question whether the authority attempted to be conferred on the Treasurer by the Joint Resolution of March 12, 1872, which was that of borrowing money on the faith and credit of the State to an amount sufficient to cancel certain certificates made by the Clerks of the respective Houses of the General Assembly, was constitutional and valid, in view of the limitations of the Constitution allowing money to be borrowed only for extraordinary expenditures, and the fact that the object of borrowing in the case under consideration was to pay the current and ordinary expenses of the General Assembly. It may also be a serious question whether, if the authority communicated to the Treasurer was constitutional and valid, it could be exercised in the way of issuing bills payable and certificates, in view of the fact that the Constitution declares that where money is borrowed it shall be upon bonds of a certain description and subject to certain rules as to registration. But it will be unnecessary to consider these questions, since, under the conclusions at which I have arrived, as stated in the State Ex Rel. Rose, the case is disposed of under the view that, assuming the Treasurer to have, in all respects, conformed his action to the Joint Resolution under which he acted, still he had no authority, nor could any be conferred upon him by the Legislature, to issue certificates or other evidences of indebtedness for the borrowing of money or in exchange for accounts certified by the Clerks of the General Assembly, such issues being forbidden by Section 10, Article IX, of the Constitution.

As it regards his claim to the issue of certificates of indebtedness covering the amount of certificates for the payment of legislative expenses, the objection is that certified accounts of that character are not such certificates or evidences of indebtedness as Section

*325

10, *Article IX, intended should authorize the issuing of scrip, certificates or other evidences of State indebtedness.

The relator's petition should be dismissed.

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5 S. C. 325

WISE v. HARDIN.

(Columbia, April Term, 1873.)

[*Executors and Administrators* ⇐433.]

An administrator cannot question the validity of a judgment confessed by his intestate, upon any ground for which the intestate himself could not have questioned it; as, for instance, mere inadequacy of consideration, or that it was intended as a fraud upon creditors; nor, it seems, can his creditors question it if the estate is sufficient for the payment of debts.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1692–1697; Dec. Dig. ⇐433.]

[*Attorney and Client* ⇐123; *Executors and Administrators* ⇐281.]

A, being indebted, as endorser of a draft, to an insolvent bank, requested B, who was his attorney and legal adviser, to purchase bills of the bank, then selling at about 25 cents on the dollar, and pay the draft for him. B did so, the bank taking the bills at their face value, and A gave B a confession of judgment for the amount of the draft. A died, and his administrator, with knowledge of the circumstances, paid the judgment: *Held*, That the administrator was entitled to credit on his account for the amount of the payment.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 245; Dec. Dig. ⇐123; Executors and Administrators, Cent. Dig. § 1102; Dec. Dig. ⇐281.]

[*Attorney and Client* ⇐123.]

A confession of judgment by a client to his attorney, if made with entire fairness and full knowledge of all circumstances, is not void merely because the value of the consideration is not equal to the amount of the confession.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 245; Dec. Dig. ⇐123.]

Before Thomas, J., at Chester, January Term, 1872.

This was a bill in equity, filed March 27th, 1869, by John Hardin, administrator of Jesse Cornwell, deceased, against Jesse H. Hardin and others, heirs and creditors of the intestate, for a sale of the real estate, in aid of the personalty, and for settlement of the estate. John Hardin afterwards died, and in June, 1871, Cynthia Wilkes, as administrator de bonis non of the estate, was substituted as plaintiff in his stead. She then died, and finally Alexander Wise, as administrator de bonis non of the intestate, was substituted as plaintiff in the bill. The bill was further amended by making the executor of John Hardin a party defendant.

The case came before the Court on exceptions, by the heirs and distributees of the intestate, to the report of a Referee, to whom the accounts of John Hardin, as administrator of the intestate, had been referred. The exceptions related to certain payments made by the administrator, in 1867 and 1868, on a judgment for $5,547.38, which, on the 27th March, 1866, the intestate had confessed to Giles J. Patterson.

*326

*The facts were as follows:

At the close of the war the intestate was indebted to the Bank of Chester in the sum of $12,000 and over, on a draft which he had endorsed for one Dunovant, who had removed to Texas. He was much disturbed in his mind about this debt, and frequently consulted Giles J. Patterson, who was his attorney and legal adviser, in reference thereto. By Mr. Patterson's advice, he purchased bills of the Bank of Chester to the amount of $7,000, and paid them on the draft, leaving a balance due thereon, which, on the 6th March, 1866, amounted to $5,547.38. The bills of the Bank of Chester were then selling at from 24 to 29 cents on the dollar, but he was unable, either with his own means or by borrowing, to raise the money with which to buy the bills to pay this balance. Patterson then, at his urgent request, agreed to take up the draft. He accordingly purchased bills of the bank to a sufficient amount, and with them paid the draft for Cornwell, as endorser. He then delivered the draft to Cornwell, who desired to get possession in order to send it to Texas for collection from Dunovant. It was sent to Texas, and after Cornwell's death his administrator effected a settlement with Dunovant by which he secured $3,200 for the estate.

It further appeared that Cornwell had two mulatto children—daughters—by one of his former slaves, about whose education, social position, and prospects in life, he was much concerned; that he desired to do something for them; and that one of his inducements for giving the confession was, that Mr. Patterson told him, that after reimbursing himself for the amount he had paid for the bills of the bank, he would hold the balance of the confession for the benefit of those children, stating, however, that he was not to be considered as bound in law, but only in conscience, to perform the promise.

It further appeared that Hardin, the administrator, was fully informed by Patterson of all the circumstances connected with the giving of the confession, the consideration thereof, and the inducements for giving it; that eminent counsel was consulted on behalf of Hardin, who gave a written opinion to the effect that the judgment could not be impeached for fraud or want of consideration; that the administrator might safely pay it, especially as no creditor had given him notice not to do so; and that Patterson had the legal right to use the money as he

*327

pleased. He might appropriate the *whole to his own use, or he might use a part for the benefit of the illegitimate daughters of Cornwell.

The payment of the judgment by the administrator was sustained by the Referee, but His Honor held that the administrator was entitled to credit for only so much as Patterson paid for the bills with which he purchased the draft and interest thereon, and a decree was entered accordingly.

The executor of the administrator appealed.

Patterson & Gaston, for appellant.

Hamilton, Hemphill, Brawley, contra.

Aug. 12, 1874. The opinion of the Court was delivered by

MOSES, C. J. The case in the Court below, and on the argument here, appears to have been treated as if the only question raised by the exceptions, and to be determined under them, involved the validity of the judgment confessed by Jesse Cornwell to Patterson. It would not necessarily follow that if the objections to the judgment, on the part of the respondent, prevailed, the payment referred to in the pleadings made by John Hardin, as administrator of Jesse Cornwell, would amount to a devastavit, for which his estate would be liable by the proceedings now before the Court. Alexander Wise, the respondent, is bound by the judgment against his intestate, and is estopped from averring that it was without consideration, or assuming any position in regard to it that his intestate would not be permitted to hold. He would not even be allowed to show that it was intended by the intestate to be in frand of his creditors, for he can no more make an averment against his act than could the intestate himself.—Chappell v. Brown, 1 Bail., 532; Anderson v. Belcher, 1 Hill, 246 [26 Am. Dec. 174]; Tomlinson v. Tomlinson, 10 Rich., 404; Vose v. Hannahan, 10 Rich., 472.

Assuming even that a devastavit is charged by the creditors of Cornwell, by reason of the payments made by the administrator to Patterson, (and it is difficult to say whether they are before the Court on that exception,) they are not in a position to allege a devastavit, because it does not appear that the estate may not be ample to meet all of its liabilities. On the account, as it now stands, there is a balance in the hands of the administrator. The pleadings show that there are other assets to be collected, and the real estate liable for debts still remains unsold.

*328

*For aught that is shown by the brief, there may be sufficient means to pay all the creditors, and they have no right to charge any wrongful administration on the part of

John Hardin, unless it in some way prejudices the collection of their debts.

Not so, however, with the heirs and distributees. They have a direct interest in the estate of the intestate, Jesse Cornwell, and may question any act of his administrator which tends to their injury by diminishing the amount to which they may be entitled, after the payment of all outstanding debts.

It is not disputed that all the facts and incidents connected with the transfer of the draft by the Bank of Chester, and the confession by Cornwell, were known to Hardin. They were fully, and without reservation of any kind, communicated to him by Patterson, who cannot be charged with any purpose to mislead, by withholding from him any of the transactions between himself and the intestate in regard to the debt, or from failing to inform him of the exact relation in which he stood to it. The payments, which are now the subject of complaint, were made with complete knowledge of all the circumstances which surrounded the debt.

It will be borne in mind that the proceedings here are not to compel Patterson to allow his judgment to stand for only the value of the bank bills, which were the consideration of the transfer of the draft, or to require him to restore to Hardin, the administrator, the difference between such value and the full amount which he received as payment, for Patterson is not even a party to the suit. Hardin alone is pursued on the charge of a devastavit, and if convicted, his representative (he being dead) must be left to his remedy against Patterson, if he has any, in such manner as he may be advised.

Although the judgment of the Court cannot, in this case, affect the validity of the judgment, still, so far as the heirs and distributees of Cornwell are concerned, we must necessarily inquire whether it was of a character to be recognized by the administrator as a legitimate debt, the payment of which, in the due course of his administration, he was bound to make, to the full amount appearing due.

In all matters, either of contract or gift, between attorney and client, from the confidential relation which must necessarily exist between them, the law requires not only proof of fairness on the part of the former, but the influence which their relative posi-

*329

tion *allows him to exercise demands that severe and rigorous fairness which can leave nothing of doubt or uncertainty behind.

While it is not the exact relation which exists between trustee and cestui que trust, where the contract between them can be avoided at the mere will of the latter, a very refined equity has exacted that the rules and requirements which apply to this fiduciary connection shall, to a great extent, regulate and control all contracts and gifts between attorney and client. They must, therefore, be shown not only to be clear of actual but of constructive fraud.

The principle is well summed up by Story in his Equity Jurisprudence, Vol. 1, Sec. 311: "On the one hand, it is not necessary to establish that there has been fraud or imposition on the client, and, on the other hand, it is not necessarily void throughout, ipso facto. But the burden of establishing its perfect fairness, adequacy and equity, is thrown upon the attorney, upon the general rule that he who bargains in a matter of advantage with a person, placing a confidence in him, is bound to show that a reasonable use has been made of that confidence—a rule applying equally to all persons standing in confidential relations with each other." The proposition thus announced is but the result of the comparison of all the authorities, and the facts and circumstances of each particular case are to direct the conclusion which is to follow from them. Thus, in Edwards v. Myrick, (2 Hare, 24 E. C. R., 68,) Vice Chancellor Wigram said: "It was not insisted in argument that a solicitor is under an actual incapability to purchase from his client. The rule the Court imposes is that, inasmuch as the parties stand in a relation which gives, or may give, the solicitor an advantage over the client, the onus lies on the solicitor to prove that the transaction was fair."

In Howell v. Ransom & Johnson, 11 Paige, 538, it was required of the attorney "to show that he communicated to his client everything necessary to enable him to form a correct judgment as to the real value of the subject of the purchase, and as to the propriety of selling for the price offered. And the neglect of the attorney to inform himself of the true state of the facts will not enable him to sustain a purchase from his client for an inadequate consideration." Judge Johnson, in delivering the opinion of the Court of Appeals in Miles v. Ervin, 1 McC. Eq., 549 [16 Am. Dec. 623], says: "I conclude, therefore, that all contracts between attorney and client in relation to property in litigation are not neces-

*330

sarily void on the ground of that *relationship; but that, to render it so, it must appear that it was used to the prejudice of the client. As a matter of proof, it is impossible to lay down any rule as to what will or will not constitute sufficient evidence of it." When adequacy of price is spoken of, it is not to be understood as referring to the intrinsic value of the article, but "the full amount," as was said in Harris v. Tremenheere, 15 Ves., 42, "that he could have obtained from any other person."

Applying these rules, we see nothing in the conduct of Patterson that subjects him even to any animadversion for his whole course, in regard to his business relations with Cornwell, as they have been developed in this case. No information was withheld, no deceit or falsehood practiced, no retention of

information which might possibly have dissuaded Cornwell from his course in relation to the draft and the confession. So far from eagerly availing himself of the opportunity of a speculation, through the offer of Cornwell, at his request, he proposed to Simpson to enter into the arrangement, and Cornwell had, himself, applied to several, who declined.

Patterson had actually subjected himself to the chance of loss by the purchase at the request of Cornwell, of bills of the Bank of Chester, to the amount of $10,000, for $7,000 of which could he (Cornwell) only pay, leaving the remainder in the hands of Patterson, at the risk of his loss by depreciation.

Cornwell, when he made the confession, knew that the draft had been transferred to Patterson, in consideration of bills of the Bank of Chester, which had greatly fallen in value. With this knowledge he confessed judgment for the whole amount due on the face of the draft. It was done on full deliberation, and with a purpose to provide, through a friend on whom he could rely, something for his children, about whose condition he was much disturbed and disquieted. If any portion of the sum confessed had even been intended as a gift to Patterson, and not as a benefit for the children, in the absence of any fraud or imposition on his part, the transaction could not be avoided by the heirs and distributees of the intestate. How far the performance of the trust accepted by Patterson may be compelled by the Courts, or how far it may rest alone on his honor and conscience, can not change the aspect in which we are bound to regard the case as made.

There are other circumstances which would go far to sustain the payment by the administrator, John Hardin, so as to prevent its operating as a devastavit against him. Even

*331

with a knowledge of *all the facts relating to the confession, he did not act until the opinion of able counsel assured him he could do so with impunity. Now, although it may be true, as was said in Doyle v. Blake, 2 Sch. and Lef., 243, that "the Court must proceed, not upon the improper advice under which an executor may have acted, but upon the acts he has done," the fact that one entrusted with the performance of legal duty seeks advice from those whose ability in their profession renders them safe and proper guides, is a circumstance from which honest intention and good faith are to be inferred. It cannot be doubted that the incidents connected with the transfer of the draft and the confession of judgment were notorious in the community where these parties reside. The confession was a matter of record, and carried with it the consideration on which it was founded, and yet not a word of notice was given to the administrator, by any interested in the estate, to question its validity.

To make him liable, under the circumstances, would be, as was said by the Master of the Rolls in Vez v. Emery, 5 Ves., 144, "to permit a testator to lay a trap for his executor."

It is ordered that so much of the judgment of the Circuit Court as sustains the exception to the report of the Referee, as to the payments made by John Hardin, as administrator of Jesse Cornwell, to G. J. Patterson, on his confession of judgment, be reversed, and the case remanded for such further proceedings as may be necessary.

WRIGHT, A. J., concurred.

WILLARD, A. J. I am of opinion that the judgment confessed by Cornwell to Patterson was intended as collateral security, between the parties, to cover such advances as Patterson should make, for the purpose of extinguishing the draft, by the purchase and payment to the bank holding such draft of its bills, then at a large discount, and also such sum as would be reasonable compensation to Patterson for his personal services in the matter, the advances made by him, and his expenses; that the administrator had a clear equity to reduce the amount of the judgment to a sum that would express the true equitable relations between the parties; that, as he possessed full knowledge of the facts, the payment in full was improper; that he had a right to take the judgment of a Court of Equity upon the validity and extent of Patterson's claim, but, having preferred to rely upon the opinion of counsel, he is respon-

*332

*sible for the correctness of the course of action pursued by him under such advice.

I conclude that the judgment of the Circuit Court should be set aside and the cause remanded for conformity to the foregoing principles.

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5 S. C. 332

DAVIS v. WINSMITH.

(Columbia. April Term, 1874.)

[*Auctions and Auctioneers* ⇨7.]

A offered, at public outcry, to rent a tract of land in separate parcels, and B bid off two fields which the crier represented as containing seventy acres, but which probably contained much less. After the biddings were over, A and B made a contract for the rent of the whole tract, and B gave to A his note for the sum agreed on: *Held*, That this was a new and independent contract, unaffected by the representations of the crier.

[Ed. Note.—For other cases, see Auctions and Auctioneers, Cent. Dig. § 24; Dec. Dig. ⇨7.]

[*Evidence* ⇨379.]

Where a surveyor is appointed for both parties, his plat, filed with the Clerk, cannot be

given in evidence without calling the surveyor as a witness to verify it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1656; Dec. Dig. ⟸379.]

[*Pleading* ⟸173.]

A defendant, to entitle himself to the reply, must follow the mode prescribed by the rule of Court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 339, 340, 385; Dec. Dig. ⟸173.]

Before Moses, J., at Spartanburg, October Term, 1873.

This was an action by John Davis against J. Winsmith, to recover the amount of a sealed note, given by the defendant to the plaintiff, for $250 "in gold or its equivalent in currency, for the rent of the place formerly owned by George D. Smith," dated January 5th, 1867, and payable twelve months after date.

The answer stated that the note was given for the rent of tillable land; that defendant had not received full consideration; and that the land fell short of the number of acres represented.

The plaintiff, at the trial, read the note in evidence and closed. The defendant then gave evidence tending to show that the place mentioned in the note was offered for rent in January, 1867, at public outcry, by George D. Smith, as agent of the plaintiff; that two fields represented by the crier, one as containing 40 acres, and the other 30 acres of new and fresh land, were bid off by defendant at $90; that there were only about 35 acres in both fields, and that the lands were poor and thin. He then produced a rule of survey made in this case, on behalf of both parties, directed to W. C. Camp, surveyor, and a plat which the surveyor had filed with the Clerk, and offered the plat in evidence. This

*333

was objected to by *plaintiff, the surveyor not being present as a witness. His Honor sustained the objection, and defendant excepted.

The plaintiff called George D. Smith as a witness, who testified that the offer to rent at public outcry was advertised; that many persons were present; that four fields were bid off at $350; that one bidder asked to be released because he did not get as much land as he wanted; that the witness then proposed to defendant that he should take the place, which he declared his willingness to do, and after some bargaining they agreed upon $250 as the rent of the whole place, and the bargain was closed by defendant's giving the note in suit. The plaintiff also gave other evidence tending to show that no representations as to the quality or quantity of the lands was made by the crier, and that defendant knew the place when he rented it.

The defendant then offered evidence in reply, but, on objection made, His Honor ruled that it could not be received, and defendant excepted.

His Honor charged the jury that the note "was a new contract, and not subject to abatement on account of any representations made in reference to a part of the land at the time the renting took place," to which charge defendant excepted.

The jury found for the plaintiff the full amount of the note, and the defendant appealed.

Sullivan & Winsmith, for appellant.

Bobo & Carlisle, contra.

Sept. 5, 1874. The opinion of the Court was delivered by

WRIGHT, A. J. This was an action brought upon a single bill given for the rental of land. The appellant avers that he did not receive full consideration for said note, as he claims the land rented fell short of the number of acres represented. A part of the land in question was rented at public outcry, there being two fields. The crier represented, as is shown by the testimony, that there were about forty acres in the first field put up for rent, and thirty acres in the second. The two fields rented for the sum of ninety dollars.

After the public bidding was closed, the owner of the land applied to the appellant to rent the whole. A trade was closed for all, and the note sued upon given for the rent.

*334

*We do not regard the exception to the charge of the Judge well taken. The whole testimony, on the part of the appellant, applied to the quantity of the land supposed to be bid off by him at the public outcry. That contract was entirely superseded by the new one, which included the whole place. It was rented as a whole, and, so far as the testimony shows, referred to the boundaries which were known to the appellant. He had the opportunity of disclosing all that was said and done which led to the execution of the note, and although having it in his power to show any misrepresentation or fraudulent statements in regard to the contract which resulted in his giving the note, not a single expression was offered in evidence from which any wilful misstatement could be inferred.

The note was not given for the rent of a part of the land, as concluded by the bid at the public outcry of it, but on a new contract for the rent of the whole of it, and in regard to it the evidence did not show any misrepresentation as to the quantity in consideration of which the price stated in the note was agreed upon.

The return of the joint surveyor was clearly incompetent, and the Judge properly refused to allow it. Unless verified on the trial by his examination, subject to cross-examination, the mere introduction of the paper in evidence would have been of no avail, for, unless the boundaries were shown

by the surveyor, under oath, to be correct, how could the jury ascertain the number of acres, and without this knowledge they could not conclude whether any deficiency of quantity existed. The practice, founded in reason, has too long prevailed to be lightly set aside. If the appellant desired the presence of the surveyor, it was his duty to have subpœnaed him, and have ascertained, before he announced himself ready for trial, that he could avail himself of his examination, if he desired to introduce the plat. If there was any surprise on the part of the appellant, it was caused by his own neglect in not compelling the presence of the surveyor through the means which the law affords him.

Nor was there any error on the part of the Judge in refusing to allow the appellant the reply in the evidence. The testimony offered by the plaintiff below, in answer to that of the defendant, cannot be considered as that kind of new testimony to which a reply is permitted by the party who is not entitled to the general reply. It was but a circumstance to resist the effect of the evidence which the appellant had offered to sustain

*335

his defense. If it was not, *however, even strictly in reply, the appellant has lost the benefit of availing himself of that objection, because he did not, at the time it was offered, submit his exception. He did not admit the plaintiff's cause of action in the mode provided by the rule, and, therefore, was not entitled to the reply as there allowed.

We see no ground on which the motion can prevail, and it is therefore dismissed.

MOSES, C. J., and WILLARD, A. J., concurred.

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5 S. C. 335

KIBLER v. BRIDGES.

(Columbia. April Term, 1874.)

[*Appeal and Error* ⇐1195.]

A judgment of the Supreme Court settling the principle of law involved in the case is conclusive on the parties, and the question is not open for further consideration in the same case.

[Ed. Note.—Cited in Jones v. Charleston & W. C. Ry. Co., 65 S. C. 420, 43 S. E. 884.

For other cases, see Appeal and Error Cent. Dig. § 4661; Dec. Dig. ⇐1195.]

[This case is also cited in Kibler v. McIlwain, 16 S. C. 552, as to facts.]

Before Mackey, J., at Lancaster, October Term, 1873.

This was a second hearing of the case reported 3 S. C., 44.

His Honor allowed the defendant to introduce evidence aliunde, both parol and written, to show that the twenty acres of land claimed as McIlwain's homestead was reserved from sale by the Commissioner in Equity, when he offered the land for sale under the decree for foreclosure, although the Commissioner's deed of conveyance to the plaintiff contained no exception of the same.

His Honor charged the jury that defendant, claiming under McIlwain, was not estopped, by the decree for foreclosure and the order confirming the sale, from denying that a sale of the entire tract embraced in the deed was made, and that Section 7 of Order No. 10 operated as law at the date of the sale, and raised the presumption that the homestead of twenty acres was not sold.

The verdict was for the defendant.

The plaintiff appealed.

Moore, for appellant.

DePass & Clyburn, contra.

*336

*Sept. 5, 1874. The opinion of the Court was delivered by

WRIGHT, A. J. The views of the Court in regard to the legal principle by which this case must be determined have been so plainly and fully expressed in the opinion on the appeal from the first verdict, (3 S. C., 45,) that it is difficult to perceive how they could be misunderstood. The question of law involved, and on which alone the defense rested, was adjudged against the respondent, and this necessarily concludes him. Where the judgment of this Court has been so distinctly pronounced on a point on which alone the case must turn, we are not disposed, where it has not been followed, to enlarge upon the reasons which induced it.

The motion is granted.

MOSES, C. J., and WILLARD, A. J., concurred.

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5 S. C. 336

EARLE v. STOKES.

(Columbia. April Term, 1874.)

[*Motions* ⇐62.]

An order irregularly made by the Court of Common Pleas in Term cannot be treated as a nullity and disregarded. If made ex parte the party aggrieved should move to set it aside, and, failing, to appeal.

[Ed. Note.—Cited in Ex parte Williams, 7 S. C. 77; Golson v. Holman, 28 S. C. 56, 57, 4 S. E. 811.

For other cases, see Motions, Cent. Dig. § 85; Dec. Dig. ⇐62.]

[*Execution* ⇐417.]

An order requiring a defendant in execution to appear before the Court to answer touching his property may be enforced by attachment and imprisonment for contempt.

[Ed. Note.—Cited in McDaniel v. Stokes, 19 S. C. 62; Kennesaw Mills Co. v. Walker, Id., 113; Golson v. Holman, 28 S. C. 57, 4 S. E. 811.

For other cases, see Execution, Cent. Dig. § 1200; Dec. Dig. ⇐417.]

Before Cooke, J., at Greenville, September Term, 1873.

R. H. Earle held a judgment, and execution thereon, for $150.73, against E. F. Stokes, in reference to which the following proceedings took place:

On the 22d July, 1872, J. L. Southern, Sheriff of Greenville County, made an affidavit, by which, after stating the case, he said that there is an unsatisfied execution in his office against the defendant in the above stated case, for the sum of one hundred and fifty 73–100 dollars, besides interest and cost.

On the 27th July, 1872, His Honor Judge Orr made the following order:

*337

*On hearing the affidavit of J. L. Southern, Sheriff of Greenville County, on motion of Earle & Blythe, attorneys for R. H. Earle, it is ordered that the said defendant do appear before the Circuit Court for Greenville County, on the first day of the next term thereof, and from day to day, until discharged by the Court, for the purpose of answering such questions as may be propounded to him touching his property.

On the 20th September, 1872, the same Judge made another order, as follows:

It appearing from the return of J. L. Southern that the defendant, E. F. Stokes, was personally served with a copy of an order to personally appear before the Court at the present term, to answer such questions as might be propounded to him touching his property, and the defendant having failed to appear, it is ordered that a rule do issue against the defendant, E. F. Stokes, requiring him to show cause, at the next term of the Court, why he should not be attached for contempt.

On the 12th September, 1873, the defendant filed an answer to the above rule, as follows:

The defendant, Edw. F. Stokes, answering the rule to show cause why he should not be attached for contempt, respectfully answers as follows: That in September, 1872, the defendant was necessarily absent from the State, in the State of Kentucky, on important business; that he could not return in time for the Court which was held at this place in September, 1872; that he was not absent with an intention to be in contempt of the Court; that in January, 1873, the next Court following, there was no Court held at this place, and at the May Term of the Court the Court was exclusively occupied in the transaction of the criminal business; that the matter was not called up by the plaintiff at the May Term, and the defendant was under the impression and belief that the whole matter was dropped; and the defendant would hence pray to be dismissed.

And on the same day, September 12th, 1873, His Honor Judge Cooke made two orders, as follows:

On hearing the testimony of Thomas M. Cox, it is ordered that the defendant do forthwith turn over to J. L. Southern, Sheriff of Greenville, one of the notes which the said defendant holds against John Westfield, Thos. M. Cox, and T. C. Gower; that the said

*338

*Sheriff shall forthwith put said note in suit, and out of the proceeds thereof pay off the judgment of the plaintiff herein and the costs of this proceeding.

A notice having been made by the Court, on the 25th day of July, A. D. 1872, that the defendant herein should appear before the Court and answer such questions as may be propounded to him touching his property, and the said defendant refusing to be sworn and answer, it is ordered that he be held by the Sheriff in close confinement, until such time as he shall make such answers.

The defendant then gave notice that he appealed from the last of the above orders, on the following grounds:

1. Because the plaintiff called on Thomas M. Cox and swore him, and from him ascertained, under oath, all the information which plaintiff required touching defendant's property.

2. Because the Court was satisfied with such information, and thereupon the notice by the Court, bearing date the 25th day of July, A. D. 1872, requiring the defendant to answer, was accordingly marked continued, and the defendant, at the same time, was ordered to deliver to the Sheriff a note which T. M. Cox testified he and John Westfield and T. C. Gower had given to this defendant many years since, to be put in suit by the Sheriff.

3. Because the information derived, as aforesaid, from T. M. Cox, was not only sufficient for plaintiff's purpose, as aforesaid, but, also, because the defendant had appealed from the order requiring him to surrender up said note, before the aforesaid order was made, requiring the Sheriff to arrest and confine him.

4. Because the Court is required by law to impose a fine for an alleged contempt of the Court in the first instance, and it cannot imprison a person until he fails to pay the fine. In this case no fine was imposed by the Court before or even after the order was made to arrest and imprison him in the four walls of the jail, where he is now confined under said order.

5. Because said order is otherwise contrary to law and the facts of the case.

Stokes, for appellant.

Earle, contra.

The opinion of the Court was delivered by

WILLARD, A. J. The appeal is from an

*339

order committing ap*pellant to close confinement until he should submit to be sworn and answer touching his property, in accordance with an order made July 27, 1872, to that effect. It is not disputed that appellant refus-

ed to submit to such order, but it is contended that he was not bound to obey the order in question, on various grounds set forth in the grounds of appeal.

The original order appears to have been irregular. It was made on the affidavit of J. L. Southern, Sheriff of Greenville County, to the effect that there was an unsatisfied execution in his office against the defendant in the case above entitled, for the sum of $150.75, with interest and costs. It did not appear by affidavit—as required by Section 318 of the Code of Procedure—that such execution was issued to the Sheriff of the County where the defendant resided or had his place of business, nor that such execution was returned unsatisfied, either in whole or in part. Without these averments the Court or Judge to whom the application was made could not properly make the order for the examination of the judgment debtor touching his property. The order of July 27, 1872, made upon the affidavit, was ex parte, and, if irregularly or improperly granted, the defendant, in order to take advantage of such irregularity, was bound to move the Court by which it had been made to set it aside on the ground of irregularity. This course does not appear to have been pursued by the defendant. Had he pursued that course the refusal of the Court to set aside the order would have been ground for an appeal to this Court.

The defendant could not treat the order as a nullity, and disregard it. It was made by the Court of Common Pleas in term, and even if the authority of the Court, as it regards orders of that class, is to be regarded as founded on a stated power that must be strictly pursued, still that order, being made by a Court of general original jurisdiction, the presumption that it was rightfully done, arising out of the nature of the powers of the Court, could only be removed on a proper application to vacate the rule.

The defendant is not, therefore, in a position to assert the invalidity of the original order, nor does his notice of appeal or grounds of appeal question the propriety of such original order.

It follows that the defendant was in contempt, unless some of the matters set forth in his grounds of appeal afford justification or excuse of his refusal to obey the command of the Court.

The fact that a witness was called and

*340

sworn and gave testimony *as to defendant's property, is no ground justifying refusal. The plaintiff had a right to determine whether there was a necessity for the testimony of defendant. Nor did the fact that, during the pendency of the proceedings under the order, a collateral order was made, requiring the defendant to turn over a certain promissory note, not alleged to be in his possession as holder and owner, arrest the proceedings under the order of July 27, 1872. The actual delivery of the note by defendant, if it had been made—a fact that does not appear—would not, in itself, have amounted to satisfaction of the plaintiff's judgment, nor can it be assumed that it would have produced satisfaction of such judgment. The plaintiff had a right to inquire as to the existence of other property which might either be now readily available, or might satisfy any insufficiency of the note in question to pay the judgment.

Nor could an appeal taken from the order requiring the delivery of the note arrest the general proceedings under the order, for the right to further examination of the defendant was entirely independent of any question that might be made as to the propriety of such order of delivery.

The objection taken to the imposition of imprisonment until the defendant should submit to obey the command of the Court is not well taken. The Court of Common Pleas has always had power to enforce obedience to its lawful mandates by imprisonment until compliance. Although the clause of the Constitution forbidding imprisonment for debt interferes with this right where the order is intended to enforce the payment of a debt, still in all other cases it remains unchanged. Without such power the authority of the Court would be incomplete, and it cannot be taken away without strong and direct evidence of the intention of the Legislature to take it away. There is no enactment that can have any such effect.

The appeal should be dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

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5 S. C. *341

*SMITH v. LAKE.

(Columbia. April Term, 1874.)

[*Clerks of Courts* ⟸9.]

Rule to show cause is not the proper remedy of a Clerk of the Court to compel his predecessor in office to turn over to him the moneys belonging to the office.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. § 31; Dec. Dig. ⟸9.]

Before Moses, J., at Chambers, Newberry, February, 1873.

This was a rule to show cause, issued in the name and on behalf of Jesse C. Smith, Clerk of the Court of Common Pleas and General Sessions for Newberry County, against Thomas M. Lake, late Clerk of the same Courts, to compel the latter to turn over to the former the bonds and other securities and moneys belonging to the office.

The respondent, by his answer, objected, inter alia, that a rule to show cause was not the legal remedy of a Clerk in such case.

His Honor dismissed the rule as to the moneys, but granted it as to the bonds and other securities.

Smith appealed on the ground of error in dismissing the rule as to the moneys.

Jaeger, with whom were Melton & Chamberlain, Suber & Caldwell, for appellant.

Baxter & Johnstone, Jones & Jones, contra.

The opinion of the Court was delivered by

WILLARD, A. J. The appellant obtained a rule to show cause, against the respondent, for the purpose of compelling the late Clerk of the Court of Common Pleas and General Sessions for Newberry County to turn over to him, as the present incumbent of such office, the property appertaining to such office, including money and securities held by him. The appeal is from so much of the order made on such rule as refuses an order to turn over the money.

There is a difficulty in the way of granting appellant's motion, arising from the nature of the proceeding instituted by him before the Circuit Court. The rule was not issued in any cause depending in that Court. It was moved by the appellant, in his own name and right, and is entitled as a proceeding affecting merely such rights as exist between the appellant and respondent in regard to the particular subject-matter.

*342

*The only rights that are put in controversy are such as the appellant may have as Clerk, to be invested with whatever appertains to his office. This is to be regarded as a proceeding by petition, although a petition in form does not appear to have been filed, and the question is, whether it is the appropriate remedy in a case like the present.

As it regards the question of the proper remedy in a case where the Clerk of the Court seeks possession of property or funds appertaining to his office, in the hands of his predecessor, no reason exists for authorizing a form of proceeding unusual in case of applications for similar relief by other public officers. A summary application by rule to show cause is not allowed in that class of cases, and it cannot be resorted to by the Clerk. Should the parties to any suit in which money or securities have been placed in the hands of the late Clerk desire to change the custody of such funds, they have a right to move the Court by a rule taken out in such suit, and under such rule may take orders such as the nature of the case may demand; but that is not the nature of the present application.

It is only necessary to hold that where the Clerk seeks a remedy based upon his right to the possession of property appertaining to his office, it must be of a more formal character than the present rule, such as would admit of a formal mode of trying any issue of fact that might arise in such proceeding.

The appeal should be dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

5 S. C. 342

MULLER v. WADLINGTON.

(Columbia, April Term, 1874.)

[*Mortgages* ⇐249.]

B as principal, and W as surety, gave to F & M seven money bonds, and B. at the same time, gave to the obligees his mortgage of real estate to secure the payment of the bonds. A became the assignee and holder of one of the seven bonds, the other six and the mortgage remaining in the possession of F, and after the assignment F & M, without the knowledge or consent of A, by writing, endorsed on the mortgage a release of its "lien and legal effect:" *Held*, That the release did not discharge W from his liability on the bond held by A.

[Ed. Note.—Cited in Jackson v. Patrick, 10 S. C. 201, 205, 206; Williams & Co. v. Paysinger, 15 S. C. 173; McCaughrin & Co. v. Williams, Id., 509.

For other cases, see Mortgages, Cent. Dig. §§ 667–677; Dec. Dig. ⇐249.]

[*Mortgages* ⇐236.]

Where a mortgage is given to secure the payment of several bonds, the assignment of one bond only does not carry the legal title to the mortgage, but only an equity.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 622; Dec. Dig. ⇐236.]

[*Principal and Surety* ⇐169.]

A surety in a bond, as well as an assignee thereof, is entitled to the protection of a mortgage given to secure the payment of the debt and to enforce the same.

[Ed. Note.—Cited in Walker & Trenholm v. Kee, 16 S. C. 90.

For other cases, see Principal and Surety, Cent. Dig. § 475; Dec. Dig. ⇐169.]

[This case is also cited in Lynch v. Hancock, 14 S. C. 84, as to facts.]

*343

*Before Carpenter, J., at Columbia, May Term, 1873.

Action by G. Muller against T. B. Wadlington, on a bond for $2,102, dated the 2d January, 1854, and payable, with interest from date, on the 1st January, 1855.

The case was this: On the 2d January, 1854, S. Fair and J. F. Marshall sold and conveyed to John Bauskett a tract of land, said to contain 1,839 acres, for $28,007, and to secure the payment of the purchase money, Bauskett, on the same day, gave to Fair and Marshall seven bonds, executed by himself, and Wadlington as his surety, and also a mortgage of the tract of land. The mortgage was duly recorded. By an arrangement between Fair and Marshall, Fair became the owner and holder of the bonds and mortgage, and before the 1st January, 1855, he assigned to the plaintiff, for valuable consideration, one of the seven bonds—the bond

in suit. The other six bonds and the mortgage remained in the possession of Fair.

Bauskett, from time to time, made payments on the bond held by the plaintiff, but leaving a balance due thereon, amounting, on the 1st January, 1866, to $2,000.

After the execution of the bonds and mortgage Bauskett sold the mortgaged tract of land to one L. J. Hancock, who afterwards negotiated with one James M. Rhett to sell it to him. Pending this negotiation Fair delivered the mortgage to Bauskett, having first made upon it the following endorsement:

"Columbia, S. C.

"The lien and legal effect of the within mortgage is hereby released and discharged forever, this April 14th, 1863.

"Samuel Fair,

"For Fair & Marshall.

"In presence of Jos. A. Black."

This endorsement was recorded in the office of the Register of Mesne Conveyance for Richland County. It was made without the knowledge or consent of the plaintiff.

Bauskett is dead and his estate insolvent.

The defendant contended that the release discharged him from all liability on the bond.

His Honor, to whom the issues were sub-

*344

mitted, to be decided *without a jury, held that the defendant was not discharged, and judgment was entered for the plaintiff.

The defendant appealed.

Garlington, Suber & Caldwell and Carroll, for appellant:

The assignee of a bond or other unnegotiable chose in action takes, subject to all the equities existing between the obligor and the obligee at the time or before notice of the assignment.—1 Bac. Ab., 384; Smith v. Tunno, 2 McC. Ch., 443; Maybin v. Kirby, 4 Rich. Eq., 105; Code of Procedure, §§ 134, 135.

The surety on a note or bond is entitled to the benefit of all the securities given by the principal debtor to the creditor, whether the security be given at the request of the surety or not, and whether given at the time of the execution of the bond or afterwards; and if the security be lost by the fault of the creditor the surety is released.—Story Eq. Jur., § 326; Law v. East India Co., 4 Ves., 833; Lead. Cas. in Eq., Vol. 2, Pt. 2, ps. (top) 374, 376, 377; R. R. Co. v. Claghorne, Sp. Eq., 545; Van Lew v. Parr, 2 Rich. Eq., 321; Wulff v. Jay, 3 Moak's Eng. Rep., 298.

The assignment of a bond carries with it, by operation of law, the assignment of the mortgage given to secure it; therefore the assignee of a bond secured by a mortgage, having all the rights of the original obligee of the bond, is subject to all the duties and penalties attaching to such original obligee in connection with such mortgage.—Story Eq. Jur., § 1047; Lead. Cas. in Eq., Vol. 2, Pt. 2, p. (top) 236; Wright v. Eaves, 10 Rich. Eq., 582.

In this case the recording of the mortgage within the period required by law perfected the right of the surety, and was notice, from the first, to the assignee, of the security given to secure the bond, whether he had actual notice or not.—Thayer v. Davidson, Bail. Eq., 412; Godbold v. Lambert, 8 Rich. Eq., 155.

The assignee, (Muller,) by leaving the mortgage (in which, by the assignment of the bond, he had an interest pro tanto,) in the hands of the original mortgagee (Fair,) constituted Fair his trustee; and, therefore, innocent purchasers of the mortgaged property on the faith of a release of the mortgage by Fair must be protected against the claims of any one in connection with the mortgage, i. e. against the claims both of the assignee and of the surety on the bond; for Fair remained the legal owner of the mortgage, and his release was sufficient to protect purchasers without notice. This

*345

*position is sustained by the principles announced in Williams v. Sorrell, 4 Ves., 389, and in Holbrook v. Colburn, 6 Rich. Eq., 289, in which latter case it is said that where the assignee of a bond gives no notice of the assignment to the obligor, but allows the bond to remain in the hands of the obligee, and to be sued by him in his own name, he is subject to all the equities existing against the obligee, and is concluded by a judgment against the obligee.—Vanderhemp v. Shelton, 11 Paige Ch. Rep., 28.

If the last position is not correct it behooves the respondent to show it, for, prima facie, Wadlington has lost his security.

Assuming that the security of the mortgage is lost, the respondent must take one or the other horn of the dilemma—either he bought a bond of which the law did not permit him to make himself the complete master, or else he was guilty of laches in not asserting his rights in the mortgage in such a way as would have prevented its release.

The surety's equity is superior to that of the assignee, because: 1st. His rights attached before those of the assignee. 2d. The assignee bought necessarily subject to his rights. 3d. The assignee was a volunteer, a speculator, one taking at every risk.

If Wadlington can have no protection here, it is equivalent to declaring that any creditor in such case can, by selling the bond, deprive the surety of his security at his pleasure.

It is further submitted that although the mere delay of the creditor to collect the debt from the principal debtor will not, of itself, discharge the surety, yet the delay of more than seventeen years, in this case, combined with complications produced by that lapse of time, such as the death of nearly all the parties connected with the execution of the bond and mortgage, and with the re-

lease of the mortgage, and the sale of the land by the mortgagor and principal debtor, may well be held to make that "case of outrageous neglect on the part of the creditor, in omitting to recover his money from the principal debtor, in which the surety would be exonerated," referred to by Chancellor Dargan in Lang v. Brevard, 3 Strob. Eq., 65.

Melton & Clarke, contra.

Sept. 15, 1874. The opinion of the Court was delivered by

MOSES, C. J. That a surety is entitled to

*346

the full benefit of every *security which the creditor holds, or may make available, against the principal debtor, is a proposition admitting of no dispute. As the creditor may subject the security to the payment of his debt, and thus obtain its satisfaction, the surety may compel him to do so, although he may not have known of its existence when he became bound, or even although it may have been given after the contract of suretyship had been entered into. The principle is not contested, and there is, therefore, no necessity to sustain it, either by argument or authority.

The foundation on which it rests involves another conclusion, following as a legitimate result, and, in its consequences, giving rise to questions not of so easy a solution as those which depend on the mere application of the principle itself. These affect the rights of the surety, so far as they depend on the action of the creditor. If he commits any positive act prejudicial to the security he holds, or omits or neglects any act, on the demand of the surety, which the relation in which he stands imposes as a duty, the loss must fall upon him who has contributed to it, and not on the surety who has been free from all participation. If, therefore, there is a loss of the security by the fault of the creditor, the surety will be discharged.

Muller, the respondent, under the Act of 1798, (5 Stat., 130,) held the legal title to the bond which had been assigned to him before January, 1855. The other six bonds, as they are not accounted for, must be supposed either to have been paid to Fair by Bauskett, the principal, or remained in his hands, when, on April 14th, 1863, he released and discharged the lien of the mortgage.

The assignment of a debt carries with it all the collateral securities held for its payment, and equity will enforce them for the benefit of the assignee. The mortgage constitutes a charge on the property mortgaged for the security of the debt, and whoever holds the latter may claim the enforcement of the lien, which is only an incident of or accessory to it.—Story's Eq. § 1047; Martin et al. v. Mowlin, 2 Burrows, 969; Wright v. Eaves, 10 Rich. Eq., 585.

The assignment of the one bond to Muller did not, however, transfer to him the legal title of the mortgage; this remained with Fair, while the respondent had an equitable interest in it to the extent of the debt due him, and could compel the application of its proceeds to the satisfaction of his obligation, in the proportion which it bore to the other bonds, for the security of all of which the mortgage was executed.—Johnson v.

*347

Hart, 3 John. Cases, 322; *Pattison v. Hall, 9 Cowen, 747. Nor had Muller, as assignee of the one bond, any right to the custody of the mortgage as against Fair, the mortgagee, who had the legal title to the other six bonds.

To exonerate the appellant from his liability on the bond, because of the alleged loss of the security through the mortgage, it should appear that it resulted from the fault of the creditor. There has been no attempt in any way to connect the respondent, who had the whole legal interest in the bond, with the act of the assumed discharge by Fair. The appellant had as much control over the mortgage as the respondent. Fair stood in a fiduciary relation to both of them—the mortgage enured to their mutual benefit—and if, on the one hand, it is said by the surety to the creditor: you should have assumed control or dominion over the mortgage, he might well reply: you knew of its existence, and as I have done nothing to destroy its validity, why did you not require the mortgagee who held it to enforce it for your benefit?

The argument for the appellant proceeds upon the ground that the release executed by Fair operated not only as a discharge of the lien of the mortgage, so far as it was a security for the six bonds retained by him, but that it also included and affected the bond assigned to Muller, and as to which Fair had parted with all title. While Fair had the right to the possession of the mortgage he had no power over the bond assigned to Muller, and to secure which the mortgage was in part executed. He was the proper custodian of the instrument, but without authority to release it, save as to the interest which he held in it, through the six bonds which he retained. The purchaser of the land had notice, by the mortgage itself, that it had been given to secure seven bonds. Common prudence, it seems, would have dictated the natural enquiry as to their payment, which would have led to the knowledge of the fact that one of them, at least, had been transferred by the mortgagor. In fact, the endorsement on the mortgage did neither express or imply payment of the bonds it was intended to secure, but purported to be a "release and discharge of the lien and legal effect" of the mortgage, and those who accepted it as such may be able to sustain it for their protection, if there was no obligation on them to enquire as to the right of Fair to

deal with the mortgage, in regard to all the bonds, as if he were the owner of them. Nothing can be inferred from the silence of the respondent as to the proposed discharge

*348

of the lien, at the time it was executed, *for there is no evidence of any notice, on his part, that the act was intended or designed.

In referring to the general principles by which our judgment is to be governed in the case, as presented to us, we do not propose that they shall have any weight beyond the purpose for which they are intended. Of course nothing that we can say here will preclude the purchasers of the land, should the occasion arise, from making any defense as to which they may be advised. We deal only with the case before us, and our judgment here can not prejudice their rights, whatever they may be.

The motion is dismissed.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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5 S. C. 348

CHARLES v. JACOBS.

(Columbia. April Term, 1874.)

[*New Trial* ⇐155.]

A Judge has no power, at Chambers, to grant a new trial on the merits, and much less has he the power to vacate and set aside the judgment.

[Ed. Note.—Cited in Clawson v. Hutchinson, 14 S. C. 517, 521.

For other cases, see New Trial, Cent. Dig. § 315; Dec. Dig. ⇐155; Judges, Cent. Dig. § 116.]

[*New Trial* ⇐162.]

Rule to show cause why a remittitur should not be entered is the proper mode of relief where the record shows that the verdict is for more than the amount due.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 324; Dec. Dig. ⇐162.]

[*New Trial* ⇐155.]

[A motion for a new trial, made in term, cannot be heard in vacation over the objection of either party, unless an order is taken for that purpose, or it is so directed in the rule nisi.]

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 315; Dec. Dig. ⇐155.]

[This case is also cited in Garvin v. Garvin, 21 S. C. 89, as to the process of Circuit Judges to set aside judgment.]

Before Cooke, J., at Chambers, Abbeville, October, 1873.

William B. Charles brought an action in Greenville County against R. H. Jacobs, as administrator of E. O. Jacobs, deceased, on a judgment by confession, and at the September Term, 1873, of the Court of Common Pleas for that County, he obtained a verdict for $4,174.95—the only issue made by the pleadings being that of payment. The defendant moved for a new trial on the ground of newly discovered evidence, and the motion was overruled.

It was afterwards ascertained that the verdict was for several hundred dollars in excess of the amount due on the judgment, and on the 18th October, 1873, the defendant caused the plaintiff's attorney to be served with notice that a motion would be made before the Circuit Judge, at Abbeville, on the 23d day of the same month, or as soon thereafter as the motion could be heard, to vacate and set aside the verdict, judgment and execution, unless, in the meantime, a remittitur for the excess should be entered. The plain-

*349

*tiff's attorney did not appear to resist the motion, and on the 29th October, 1873, His Honor made an order that the judgment be vacated.

The plaintiff appealed on the ground, inter alia, that the Judge had no jurisdiction, at Chambers, to grant the order.

[For subsequent opinions, see 6 S. C. 69; 9 S. C. 295; Goldsmith v. Jacobs, 14 S. C. 624.]

Sullivan & Stokes, Earl & Blythe, for appellants.

Moore, Cothran & Wells, Arthur & Arthur, contra.

Sept. 23, 1874. The opinion of the Court was delivered by

MOSES, C. J. We propose only to consider the validity of the order of the 29th of October, 1873, which the appellant, by his motion, seeks to reverse. With the form of the complaint, or the right of the plaintiff therein to recover, we have nothing now to do. All exceptions of that character are concluded by the verdict of the jury, which must stand until set aside according to the forms provided by law.

The order referred to is substantially for a new trial. This the Judge was without authority to direct at Chambers, even in the County where the judgment was rendered, for, by the 417th Section of the Code, (Gen. Stats., 674,) he can only entertain a motion for a new trial on the merits in open Court; and, by Sections 288 and 289, (Gen. Stats., 636,) "a motion for a new trial, on a case or exceptions, or otherwise, must, in the first instance, be heard and determined at the same term." Much less can he, at Chambers, vacate a judgment by setting aside the whole proceeding on which it is founded. Here, at the term during which the verdict was rendered, a motion for a new trial was, in due form, made and refused. The recourse, then, of the defendant below, if he supposed he had cause of exception, was by appeal to this Court.

The 2d Section of Chapter CV of the General Statutes, under which the respondent made his application, and the provisions of the Code of Procedure in regard to new trials, are all included in one Act. If there is any

repugnancy in the various parts, touching or relating to the same subject, they must, if possible, be reconciled with the apparent intent and design of the Legislature, so far as these can be ascertained from the whole enactment.

Where a subsequent Section of the same Statute so restricts the power of the Circuit Judge that he can only entertain a motion for a new trial in term time, the express prohibi-

*350

tion must apply to the *general right of vacating a judgment, where shown to be erroneous, and thereupon ordering a new trial. A jurisdiction of so important a character must be controlled, in its practical exercise, by some uniformity in the mode by which it is to be administered, or otherwise each Judge might adopt for himself some arbitrary rule which would introduce a diversity of practice in the several Circuits.

An examination of the legislation of the State on this subject since 1868 will explain what effect should now be given to the said second Section of the 105th Chapter of the General Statutes. In 1868, (14 Stat., 136,) the Circuit Court was vested with power to grant new trials, where there had been a trial by jury, for reasons for which new trials have usually been granted in the Courts of law of the United States. How, or under what limitations and conditions as to form, the power was to be exercised, was not provided. Then followed the Act of 1869, incorporated in the said 105th Chapter, (as was also the Act of 1868,) allowing the presiding Judge of the Circuit to set aside a judgment, if erroneous, and to order a trial de novo. These provisions are all introduced into the General Statutes, but they precede those of the Code regulating the mode of the application for and granting of new trials, which is accepted and followed as the law in regard to new trials by the Circuit Courts.

It is not necessary to enquire how far the said second Section may justify the interference of a Circuit Judge in affording relief after judgment, where it was apparent from the record that there was such error as would work manifest injustice. Independent of statutory provisions, the Court of Common Pleas, by virtue of its own inherent right, from the general nature and intent of its jurisdiction, "has always exercised the power of looking into its own records, and, on motion, affording that remedy, after judgment has been entered up, which is obtained by writ of error in the English Courts."—Mooney v. Welsh, 1 Con. Rep., 133; Bank of Pennsylvania v. Condy, 1 Hill, 210. As was said in the last named case, "the plaintiff can not be permitted, by the mistake of the jury in computing interest or fixing the day from which it shall be computed, to recover more than he claimed or showed himself entitled to—the mode of relief is not very essential." The purpose is amendment, not destruction, and the end desired and sought must be in a mode through which it can likely be attained. The Judge, we hold, was without jurisdiction to set aside the verdict. His course should

*351

*have been by a rule to require the plaintiff below to show cause at the next term why a remittitur should not be entered for the excess found by the jury over the true amount due apparent from the record, and, in fact, admitted by the appellant.

It is ordered that the order of 29th October, 1873, be set aside, and that, unless the plaintiff below, within ten days' notice of this order from the Clerk of this Court enter a remittitur for the excess of interest over the true amount due, as will appear by the record, the respondent have leave to apply to the Judge of the Circuit for a rule against said plaintiff returnable to the next succeeding term, to show cause why such remittitur should not be entered.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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5 S. C. 351

COHRS v. FRASER.

(Columbia. April Term, 1874.)

[*Warehousemen* ⇦34.]

In an action against one charged as a warehouseman, to recover the value of goods deposited for safe keeping, the answer set up as defenses: (1) A denial of the alleged bailment; (2) an allegation that the goods were destroyed by irresistible force, and without the fault of defendant; and (3) a plea of the Statute of Limitations: *Held*, That the Statute of Limitations was properly pleaded, and could not be stricken from the answer on the ground of inconsistency.

[Ed. Note.—Cited in Hickson v. Early, 62 S. C. 51, 39 S. E. 782; Charping v. Toxaway Mills, 70 S. C. 474, 50 S. E. 186.

For other cases, see Warehousemen, Cent. Dig. § 75; Dec. Dig. ⇦34.]

[*Pleading* ⇦90.]

An answer under the Code may set forth as many legal defenses as were allowable under the former practice.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 184, 185, 187, 190, 194; Dec. Dig. ⇦90.]

[*Pleading* ⇦365.]

A motion to strike out a defense as inconsistent with other defenses alleged in the answer should be made on notice and before trial, and the practice prescribed by the 21st Rule of the Circuit Courts might well be followed in such cases.

[Ed. Note.—Cited in Bank of Charleston National Banking Ass'n v. Zorn, 14 S. C. 450, 37 Am. Rep. 733; State of South Carolina v. Corbin & Stone, 16 S. C. 545; Ruff v. Columbia & G. R. Co., 42 S. C. 119, 20 S. E. 27; Lenhardt v. French, 68 S. C. 302, 47 S. E. 382.

For other cases, see Pleading, Cent. Dig. §§ 1163–1172; Dec. Dig. ⇦365.]

[*Limitation of Actions* ⇦46.]

Where goods held for safe-keeping are destroyed the Statute of Limitations begins to run

from the time of the loss, or, at the latest, from the time the owner has notice of the loss, and not from the time of demand.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 251; Dec. Dig. ⊂⊃46.]

Before Graham, J., at Charleston, March Term, 1873.

This was an action by Charles H. Cohrs and H. R. Banks against John Fraser & Co. to recover the value of 1,152 bales of cotton held by the defendants for safe keeping, as alleged by plaintiffs.

The first seven paragraphs of the complaint alleged that Crane & Cadow became owners of the cotton in question in June, 1862; that it was then, or soon afterwards, deposited with Frank Hampton, at his plantation, called Woodlawn, in Richland County, near Columbia, under an agreement that,

*352

in consideration of a certain *amount or rate of storage to be paid, he would store and safely keep the said cotton in certain warehouses until called for, and then, on request, deliver the same safely to the owners; and that Frank Hampton died in May, 1863. The eighth paragraph alleged that on the 20th October, 1863, the defendants became the owners of the said plantation, and that they thereupon became bailees of the said cotton, to the owners thereof, on the same terms that the said Frank Hampton had agreed to hold the same. Other paragraphs alleged that the plaintiffs afterwards became the owners of the said cotton, with the right to demand the same, and that, in July, 1872, they demanded the said cotton of defendants, who failed and neglected to deliver the same.

The defendants, by their answers, relied upon three principal grounds of defense, as follows: (1) They denied that they agreed, as alleged in the eighth paragraph of the complaint, to store and safely keep the said cotton until the same should be called for, and to deliver the same safely at the request of the owner: (2) they alleged that on or about the 17th February, 1865, Woodlawn was entered by Federal forces under General Sherman; that they destroyed the said cotton, and all the buildings and other property on said plantation; and that the plaintiffs thus lost their said cotton by a superior and irresistible force, and without negligence or fault on the part of the defendants; (3) and by the eleventh paragraph they alleged that the cause of action did not accrue within four years before the commencement of the action.

When the case was called for trial the plaintiffs moved that the eleventh paragraph of the answers be stricken out, as being inconsistent with the rest of the answer. The motion was denied and plaintiffs excepted.

The plaintiffs then gave evidence tending to sustain the allegations of the complaint as above set forth, but no evidence showing that the defendants made any agreement, either with the plaintiffs or any one else, to keep the cotton, or to deliver it on request. The plaintiffs also proved that the cotton was burned on or about the 17th February, 1865, as stated in the answers, and they further proved that Cohrs, one of the plaintiffs, knew of the loss as early as June or July, 1865. The demand for the cotton was made by letter, dated the 19th July, 1872.

At the close of the plaintiff's evidence the Court granted an order, as follows: "The plaintiffs having closed their evidence in

*353

*the case, and it appearing to the Court that, upon the plaintiff's evidence, the Statute of Limitations is a bar to the action, it is ordered that the plaintiffs be non-suited."

The plaintiffs appealed, and now moved this Court to set aside the order for non-suit, and also renewed their motion to strike out the eleventh paragraph of the answers.

McCrady & Son, with whom were Campbell & Simonton, for appellants.

Magrath & Lowndes, with whom was Memminger, contra.

The opinion of the Court was delivered by

MOSES, C. J. The appellants seek to reverse the judgment of the Court below: First, in refusing his motion to strike out the 11th paragraph of the several answers of the respondents, as inconsistent with the defense set up therein; and, second, in ordering a non-suit, which was granted by reason of the matters of defense contained in the said paragraph. If the first motion should be granted, it will necessarily follow that the second must prevail.

While the forms of pleading heretofore existing in this State, which were those which obtained at common law, have been abolished, "and the rules by which the sufficiency of the pleadings is to be determined are those prescribed by the Code of Procedure," yet we may be permitted to look to the principles on which the science of pleading is founded to ascertain "the rules" which must regulate an answer under the Code, where it is sought, by more than one matter of defense, to defeat the complaint. Under the Statutes of Ann, C. 16, Sections 4 and 5, the defendant might, with leave of the Court, "plead as many pleas as he may think necessary." The argument of the appellants is, that the defenses made by the answers are contradictory and inconsistent. But no rule of pleading can be shown which requires that matters set up by way of defense shall be consistent with each other. On the contrary, separate defenses which cannot be reconciled may be preferred by separate pleas, for if either plea is sufficient to bar the cause of action, the plaintiff must fail, and it makes no difference whether it is to the alleged contract or trespass, or to the remedy. "The defendant may, in differ-

ent pleas, plead as many different grounds of defense as may be thought necessary, though they may appear to be contradictory

*354

*or inconsistent, as in trespass not guilty, a justification, and accord and satisfaction."—1 Chit. on Plead., 542; Com. Dig. Pleader, E. 2. It cannot be questioned that one may plead "non assumpsit" and the Statute of Limitations, and yet these are plainly inconsistent, for the first denies that the defendant ever did assume, while the second implies an assumpsit at the same time, but not within the period limited by the statute.

The Code was not intended to restrict the mode in which a party called to answer a complaint should make his defense. On the contrary, it has rather enlarged his opportunity for setting up the various matters on which he may rely to bar the recovery sought against him. By Section 173 "the defendant may set forth by answer as many defenses and counter claims as he may have, whether they be such as have been heretofore denominated legal, or equitable, or both." In Hollenbach v. Claw, 9 How. Pr. R., 289, it was held that a defendant was not required to admit allegations in the complaint which he might otherwise deny, simply to be allowed to set up affirmative matters of defense. He can deny the alleged assault and battery and false imprisonment, and set up a justification —Ib. And he can deny speaking slanderous words charged in the complaint, and then allege that the words were spoken under such circumstances (describing them) as show that they were not slanderous.—Ib. Lansing v. Parker, 9 How., 288, was an action for assault and battery. The answer set up: 1. A general denial. 2. That plaintiff committed the first assault, &c. 3. That he was in defendant's inn, making a great noise, &c.; he requested him to leave, and he refusing, they gently laid hands on him to remove him, &c. The answer was held proper. These are cases where the pleadings were under the New York Code, and the principle which they enforce can be sustained by reference to many authorities in the reports of that State, in which it originated and was first adopted.

If the answer contains a separate statement of matters sufficient to bar the plaintiff's recovery, without depending on other averments on which it also relies to defeat the action, we cannot perceive how its effect to that end can be restrained by some other part of the answer with which it may appear to be inconsistent. The question would seem to be, does it prevent a recovery? If so, its admitted power should not be controlled in its effect by a reference to other allegations with which it possibly might not

*355

consist. *Where more than one matter of defense is set up in an answer, the sufficiency of each is to be tested by its own intrinsic force for the accomplishment of the end which it proposes.

The design contemplated by the Statute of Limitations would be much affected, if not entirely defeated, if it could prevail only when set up as the only answer to the complaint. The defendant would, in fact, be required to admit everything charged in the complaint before he could claim the benefit which it was intended to confer. If he had not assumed, or had not been guilty, as the case might be, he could not plead "non-assumpsit" or "not guilty," if he desired also to claim the benefit of the statute, because the defenses might be charged with being inconsistent. The appellants here proceed upon the assumption that the respondents confess the contract, and avoid it by alleging "the destruction of the cotton by irresistible force." But such is not, in our view, the effect of the pleadings. By the 8th paragraph of the complaint, the plaintiffs aver a bailment of the cotton undertaken by the defendants on the same terms as accepted by the said Major Hampton; and in consideration of current rates of storage in the city of Columbia, to be paid by the said owners to the defendants, they (the defendants) agree to store, and safely keep, &c., until the same should be called for, and then safely to deliver, &c. The 12th paragraph alleges a demand of the cotton and a refusal. All the answers deny the allegations contained in the said 8th paragraph, and refer the destruction of the cotton, on or about the 17th February, 1865, to superior and irresistible force in the war between the United States and the Confederate States, during the invasion and military occupation of this State, and of the plantation on which the cotton was stored. The contract set out in the complaint is specifically and expressly denied, and if the plaintiff can recover through its force, it must be by adducing on the trial proof to establish it. This, however, would not ensure a judgment for the plaintiff, unless the defense arising out of the statute should fail.

While confirming the decision of the Circuit Court, on the motion to strike out the 11th paragraph from the answers, it may not be out of place to say that a motion of that character should be made before the trial, and certainly before the opening by the plaintiff to the jury. The course pursued leads to the surprise of the defendant, and would either require him to proceed to trial at great disadvantage, or compel a continuance of the

*356

cause. The answers appear *to have been filed September, 1872, and the case called for trial in March, 1873. A different course would better harmonize with the existing practice in regard to motions, the purpose of which is to perfect the pleadings before trial. A motion to strike out a part of a defendant's answer, as inconsistent, contradictory, or for other cause, should be made

after notice in a reasonable time from the filing of the answer. While not strictly within the 21st rule of the Circuit Court, the spirit and principle of that rule well applied to it, and the notice there required might well be adopted for a motion of the character now referred to.

For the proper determination of so much of the appeal as alleges error on the part of the presiding Judge, in granting the non-suit, by reason of the bar of the statute, we must assume that some cause of action, in favor of the plaintiffs, arose from the transaction between the parties in respect to the cotton. To test the correctness of the judgment of the Court, we must regard the contract set out in the complaint as sustained by the testimony. The non-suit was not for want of sufficient evidence to maintain the action, but because the evidence disclosed the fact that the cause of action accrued more than four years before the commencement of the suit. Whatever was the express or implied contract between the parties in reference to the cotton, whether it was mere naked bailment, amounting only to a deposit, or a constructive trust arising from the possession of the cotton, the respondent's obligation was to deliver it on demand. The breach assigned is not the want of proper care in the preservation of the cotton, through which it became injured or lost, but a refusal to deliver it on request.

When did the right to sue accrue? At the moment of the breach of contract, for then the duty which it imposed was violated. If four years have elapsed from the time when the plaintiffs could have commenced their action, the statute, if interposed, must protect the defendants, for the very purpose of its enactment "was to prevent persons from being harassed at a distant period of time after the injury complained of." In June or July, 1865, the appellants had knowledge of the destruction of the cotton, even if they were not aware how or in what manner it was destroyed. The fact of the loss of the cotton was known to them. It was impossible that it could be delivered, and if it could not be, no matter from what cause, as the only liability of the respondents was for the loss, which absolutely prevented the delivery,

*357

the cause of action *arose when it was manifest and evident that this could not be made. A demand could not change the condition of things as they then existed, for the only consequence which could have followed it must have been a refusal, induced by an inability to comply, and this was known to the appellants certainly as early as July, 1865. It would be a reflection on the proud boast of the law—that it is founded on principles of substantial right and justice—if it should require not only a formal but a useless ceremony to give efficacy to its remedies. The refusal to deliver was only the effect of the loss; it was the loss itself that gave the right of action to the appellant, if he had any. Let us test this proposition by supposing that an action had been brought just after the loss, imputing it to the want of due care on the part of the respondents. Would an answer by way of plea, averring a failure or want of demand on the part of the appellants, have barred a recovery?

The action was only maintainable on the theory that the cotton was not delivered, and if an action had been brought in July, 1865, when its loss was known to all the parties, it could not have been defeated by the mere omission of a nugatory act by the plaintiffs. The statute runs from the time of the breach of duty. "Whatever be the form of action, the breach of duty is substantially the cause of action."—Howell v. Young, 5 B. and Cres., 259.

The principles upon which we rest our judgment have been extended to cases where the breach of contract, which gave the right of action, did not come to the knowledge of the plaintiffs until the time fixed by the statute had elapsed.—Battley v. Faulkner, 3 B and Ald., 288; Short v. McCarthy, Ib., 626; Thomas v. Ervin, Chev., 22 [34 Am. Dec. 586]; Clarke v. Reeder, 1 Sp., 398. They have been applied even to cases where the conversion was not only fraudulent, but concealed by the fraud of the defendant, and not discovered by the plaintiff until a time within four years of the commencement of the action.—Miles v. Berry, 1 Hill., 296; Clarke v. Reeder, and the authorities there cited.

The appellants were informed, in July, 1865, of the destruction of the cotton. No change of the relation in which the respondent stood to all the transactions in regard to it took place after that period by any admissions or promises. Although the amount involved was of magnitude, no correspondence in relation to the matter was commenced until September, 1871. All the parties interested appeared indifferent to the

*358

pursuit of it, and in April, 1872, it was *transferred to the appellant, Cohrs, his co-appellant, Banks, retaining his interest of 10 per cent. Not until the 19th July, 1872, was any demand made by them for the delivery of the cotton. We can see no exception in the statute which can save its operation in the case, and the appeal must be dismissed. It is so accordingly ordered.

WRIGHT, A. J., and WILLARD, A. J., concurred.

5 S. C. 358

AIKEN v. TELEGRAPH COMPANY.

(Columbia. April Term, 1874.)

[*Evidence* ⇐244.]

Where a telegraph operator made a mistake in transcribing a message received at his office and delivered the next day, his admission of the error, made several days afterwards, is not evidence against the company—it being no part of the res gestæ.

[Ed. Note.—Cited in Mars v. Virginia Home Ins. Co., 17 S. C. 521; Salley v. Manchester & A. R. Co., 62 S. C. 129, 40 S. E. 111; Maybank & Co. v. Rogers, 101 S. C. 450, 86 S. E. 2.

For other cases, see Evidence, Cent. Dig. § 928; Dec. Dig. ⇐244.]

[*Telegraphs and Telephones* ⇐56.]

There is sufficient privity of contract between the receiver of a message by telegraph and the company to enable the former to maintain an action against the latter for negligence, although the price of transmission was paid by the sender.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 37; Dec. Dig. ⇐56.]

[*Telegraphs and Telephones* ⇐54.]

Express stipulations in the contract for transmission bind the receiver as well as the sender.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 39–47; Dec. Dig. ⇐54.]

[*Telegraphs and Telephones* ⇐37.]

The analogy between common carriers of goods and common carriers of messages is not perfect, and their responsibility differs in a manner corresponding to the difference in the nature of the services they perform.

[Ed. Note.—Cited in State ex rel. Gwynn v. Citizens' Telephone Co., 61 S. C. 91, 39 S. E. 257, 55 L. R. A. 139, 85 Am. St. Rep. 870.

For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 23, 24, 29, 30, 32; Dec. Dig. ⇐37.]

[*Telegraphs and Telephones* ⇐54.]

A contract by a telegraph company, made in pursuance of a regulation in reference to messages sent "during the night, at one-half the usual rates," contained a "condition that the company shall not be liable for errors or delays in the transmission or delivery, or for the non-delivery of such message, from whatever cause occurring, and shall only be bound in such cases to return the amount paid by the sender. No claim for refunding will be allowed unless presented in writing within twenty days:" *Held*, That the regulation was reasonable, and the condition binding upon the receiver of the message.

[Ed. Note.—Cited in Hill v. Western Union Tel. Co., 42 S. C. 368, 20 S. E. 135, 46 Am. St. Rep. 734; Broom v. Western Union Tel. Co., 71 S. C. 509, 510, 51 S. E. 259.

For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 42, 44; Dec. Dig. ⇐54.]

[*Telegraphs and Telephones* ⇐54.]

The condition was not intended, it seems, to exempt the company from liability in case of negligence, nor in such case to limit the liability to the sum paid for transmission.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 39–47; Dec. Dig. ⇐54.]

[*Telegraphs and Telephones* ⇐74.]

In such a case it is not error to refuse to instruct the jury that the company is not liable for an error in transmitting the message, unless it arose from fraud or gross negligence.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 77; Dec. Dig. ⇐74.]

Before Mackey, J., at Fairfield, May Term, 1873.

This was an action by James R. Aiken against the Western Union Telegraph Company, to recover damages sustained by reason of an error in the copy of a message as transcribed and delivered to the plaintiff by an agent of defendant.

*359

*The case, as stated in the brief, is as follows:

James R. Aiken, the plaintiff, was sworn as a witness on his own behalf, and testified—

Witness is a cotton buyer, and has dealt largely in cotton, especially since the war. Winnsboro is a considerable cotton market. There is more cotton sold here than in Columbia. On the following day after its date, about a quarter past eleven o'clock, witness received from the operator of defendants, at Winnsboro, the following telegram, [with the heading printed in red ink]:

"No. 44.

"Half-Rate Messages.

"The Western Union Telegraph Company require that all messages received for transmission shall be written on the blanks of the company, under and subject to the conditions printed thereon, which conditions have been agreed to by the sender of the following Half-Rate Message.

"O. H. Palmer, Sec'y.

"William Orton, Pres't.

"Dated Baltimore, Oct. 12, 1870.

"To James R. Aiken, Winnsboro, S. C.:

"We are offered fifteen five-eighths one hundred low middling, October or November.

"J. I. Middleton & Co."

Witness at once telegraphed to J. I. Middleton & Co. that he would accept the offer. Witness ascertained, for the first time, on 19th October, by letter from J. I. Middleton & Co., that there was a mistake in the telegram; that it should have been fourteen five-eighths. Seven days after the receipt of the message, the operator at Winnsboro admitted to witness that it was his mistake, made in transcribing the message.

The counsel of defendants objected to the declarations of the operator as incompetent and inadmissible against the defendants, but the Court held the declarations admissible, and the defendants duly excepted.

Witness felt bound to fulfill the contract at fourteen and five-eighths, and purchased one hundred bales of cotton at fourteen and seven-eighths, to fulfil the contract. He shipped thirty bales the next day, and the balance afterwards. When the mistake was

discovered it was too late to undo the contract. Middleton & Co. endeavored to do this, but could only get an extension of the time in which to fill the order. Middleton & Co., also considering the hardship of the case, charged no commissions. The loss sustained

*360

*by witness amounted to three hundred dollars and eighty cents, being the difference between the net amount received under the contract for cotton sold, and the amount paid for cotton bought. If plaintiff had been obliged to fill the order according to the time, and paid commissions, his loss would have been seven hundred dollars.

Being cross-examined, witness testified as follows:

The telegram delivered to witness, of date 12th October, 1870, from J. I. Middleton & Co., was written on the company's blank, with the printed matter at the top, in red ink. Witness knew the telegraph company, by their regulations, exempted themselves from liability for mistakes in half-rate messages which were not repeated, but thought these regulations were not valid. At the time the mistake occurred in the telegram from Middleton & Co., witness was receiving telegrams every day from New York and Baltimore, giving the price of cotton. Witness kept well posted in the cotton market. At the time of receipt of dispatch from Middleton & Co. witness thought fifteen and five-eighths (15⅝) a fine price; thought fourteen and five-eighths too low; fifteen (15) would be about right. Low middlings were selling at Winnsboro, on 12th October, 1870, for more than fourteen and five-eighths. Witness made the contract with J. I. Middleton & Co. They made the offer for other parties—spinners. Witness did not know what their names were. Witness, being shown by defendants' counsel the following original despatch, with the printed matter at the top in red ink, said the signature of J. I. Middleton & Co. was genuine:

"No. 45.

"Half-Rate Messages.

"The Western Union Telegraph Company will receive messages for all stations in the United States, East of the Mississippi River, to be sent during the night at one-half the usual rates, on condition that the company shall not be liable for errors or delay in the transmission or delivery, or for non-delivery of such messages, from whatever cause occurring, and shall only be bound in such case to return the amount paid by the sender.

"No claim for refunding will be allowed, unless presented in writing within twenty days.

"O. H. Palmer, Secretary.

"William Orton, President.

"Balt., 12th Oct., 1870.

"Send the following message subject to the above terms, which are agreed to:

*361

*"To James R. Aiken, Winnsboro, So. Ca.:

"We are offered (14⅝) fourteen five-eighths (100) one hundred low middling—October or November. J. I. Middleton & Co."

Figures in despatch crossed with pencil mark. Endorsed on despatch: "13 words. Paid 90 cents."

Witness demanded damages shortly after finding out mistake in telegram.

The plaintiff here rested, and the defendants' counsel moved for a non-suit, on the following grounds:

1. That there was no privity of contract between the plaintiff and the defendants, and nothing in the evidence to make the defendants liable to the plaintiff.

2. That the original message was written by J. I. Middleton & Co., the senders, upon a blank under a printed heading, which stated the terms upon which half-rate messages were received, to wit: "to be sent during the night at one-half the usual rates, on condition that the company shall not be liable for errors or delay in the transmission or delivery or for non-delivery of such messages, from whatever cause occurring, and shall only be bound, in such case, to return the amount paid by the sender," which terms were agreed to by said J. I. Middleton & Co.

3. That the plaintiff had due notice in the printed heading on the blank upon which the message delivered to him was written, that said message was sent as a half-rate message, was written on a blank of the company, under and subject to the conditions printed thereon, and that said conditions had been agreed to by the sender; and plaintiff, in his testimony, admitted his knowledge of the regulations of the company.

4. That the essential element to constitute a valid contract, to wit, the union of the minds of the contracting parties upon one and the same proposition, was wanting in this case.

5. That if any valid contract, binding upon the plaintiff, was made, it was the sale of one hundred bales of cotton to J. I. Middleton & Co. at fifteen and five-eighths (15⅝).

6. That plaintiff, being a large cotton buyer, posted as to the New York and Baltimore market, by daily telegrams, in at once acting upon the receipt of a half-rate message, which contained a mistake of one cent per pound in the price offered for one hundred bales of cotton, did not manifest the care and

*362

prudence which an *ordinarily prudent and intelligent business man should exercise, and was guilty of such negligence as bars a recovery in this case.

[The Court denied the motion on all the grounds, and the defendants excepted.]

The defendants then called S. K. McDonald as a witness, who testified:

Witness is the operator of the Western

Union Telegraph Company in Winnsboro, and was at the time the telegram, of date 12th October, 1870, from J. I. Middleton & Co., to the plaintiff, was received. It was received and transcribed in the night. Four despatches were received that night. Witness received the despatches with an instrument called "The Register," which makes the characters with a small pen or needle. Witness does not recollect whether the impression, when he mistook fourteen for fifteen, was distinct or not. When, several days afterwards, he understood there was a mistake in the despatch, he saw, upon examination, that he had made the mistake in transcribing. The following characters. .—. . . .— . .. — . . —., represent fourteen, and the following, .—. .. .—. — . . —., fifteen. There is as great a variety and difference in the telegraphing of operators as there is in the manuscript of individuals. The despatches of some are difficult to read. The despatch in question was a half-rate message. Witness was new to the business; did not have much experience at that time.

The defendants requested the Court to charge the jury—

1. That telegraph companies cannot, in law, be held to the strict liability of common carriers.

2. That a regulation to the effect that the telegraph company shall not be liable for errors or delay in the transmission or delivery or for non-delivery of messages to be sent during the night at one-half the usual rates, and not repeated, is reasonable and valid.

3. That the telegram, in this case, being sent on such conditions, which were agreed to by the sender, and of which the plaintiff had notice, the defendants are not liable for damages arising from an error in the transmission or delivery of said telegram, unless arising from the fraud or gross negligence of the defendants.

4. That, even if the defendants were guilty of gross negligence, if the plaintiff, by the want of such caution and prudence as a man of ordinary prudence and intelligence should exercise, or in any way, by his negligence, contributed to the damages he sustained, he cannot recover.

*363

*5. That the contract, if any, made by Middleton & Co., through the defendants, as their agents, with the plaintiff, was for the purchase of one hundred bales of cotton, at fifteen and five-eighths cents per pound, and the plaintiff has not sustained any damage which the defendants are liable for, as the plaintiff had his remedy upon his contract against Middleton & Co.

The requests were all refused, and the defendants excepted.

The case was then submitted to the jury, who found for the plaintiff $300.80.

The defendants appealed.

Robertson, McCants & Douglass, for appellants:

The declarations of the operator, made seven days after the receipt of the telegram, in reference to the mistake, and not, therefore, constituting part of the res gestæ, were incompetent and inadmissible against the defendants.—Robinson v. Fitchburg & Wis. R. R., 7 Gray, Mass., 92; 1 Green. Ev., §§ 113, 114; Story on Agency, §§ 136, 137; Cortland County v. Herkimer County, 44 N. Y., (5 Hand,) 22.

The Court erred in refusing the motion for non-suit, made by the defendants at the close of plaintiff's testimony—

1. There was no privity of contract between the plaintiff and defendants, and nothing in the evidence to make the defendants liable to the plaintiff.

(a.) The legal relation of these parties is to be inferred from the fact that the defendants delivered to plaintiff a despatch. This fact alone is insufficient to raise a privity of contract between plaintiff and defendant.

(b.) Whatever contract existed as binding upon the defendants, was made and performed, whether well performed or not, before the plaintiff came into any relation with the parties to the transaction.—Gray v. Ottolengui, 12 Rich., 101; Winterbottom v. Wright, 10 M. and W., 109.

(c.) Even in the case of a common carrier of goods, where the vendor pays the freight, and selects the mode of conveyance, it is held that he must stand to the risk of the delivery of the goods, and is the proper party to bring the action for their loss or damage; but where the vendee is to pay the freight, and selects the mode of conveyance, he is the proper party to bring the action. Here the charge for transmission was paid, and

*364

the risk *of the correct transmission of the telegram was assumed by J. I. Middleton & Co.—Goodwyn, Harrington & Co. v. Douglas, Chev., 175.

2. The original message was written by J. I. Middleton & Co., the senders, upon a blank under a printed heading, which stated the terms upon which half-rate messages were received.

(a.) The message delivered to plaintiff was written upon a blank which, in its printed heading in red ink, notified him that it was a half-rate message, and that the conditions upon which the defendants received and transmitted such messages had been agreed to by J. I. Middleton & Co.

(b.) The plaintiff also admits, in his testimony, that he "knew the telegraph company, by their regulations, exempted themselves from liability for mistakes in half-rate messages which were not repeated."

In McAndrew v. Electric Tel. Co., (33 Eng. L. and E., 180,) held that the condition, "the company will not be responsible for mistakes in the transmission of unrepeated messages,

from whatever cause they may arise," was either "a reasonable regulation," within the meaning of the Act, 16 and 17 Vict., or such a reasonable condition as the defendants, from the nature of their business, might impose on their customers.

It is held, also, in Western Union Telegraph Company v. Carew, (7 Amer. L. Reg., 18, and 15 Mich., 525), that such regulations are reasonable and binding on those dealing with the company.—Breeze & Mumford v. United States Tel. Co., 31 How. Pr. R., 86; Camp v. U. S. Tel. Co., 1 Metcalf, (Ky.,) 154; Ellis v. Am. Tel. Co., 13 Allen, (Mass.,) 226; Playford v. U. K. Tel. Co., L. R., 4 Q. B., 706.

(c.) There is no proof of negligence on the part of the defendants, except the admission of the operator, that he made the mistake in transcribing the telegram. The mere fact that the operator misunderstood certain telegraphic characters is no proof that he did so negligently.

3. The essential element to constitute a valid contract, to wit, the union of the minds of the contracting parties upon one and the same proposition, was wanting in this case. —Kinghorne v. Montreal Telegraph Company, 18 Upper Canada R., 60; Chit. on Con., 9; Scranton v. Booth, 29 Barb., (N. Y. R.,) 171; McCotter v. Mayor and Aldermen of New York City, 37 N. Y., (10 Tiff.,) 325.

*365

*4. If any valid contract, binding upon the plaintiff, was made, it was the sale of one hundred bales of cotton to J. I. Middleton & Co., at fifteen and five-eighths.—2 Red. on Railways, 282, 283, ¶¶ 5 and 6: Durkee v. Vermont Central Railway, 29 Vt., 127; Trevor v. Wood, 36 N. Y., 307; Rose v. U. S. Tel. Co., 34 How. Pr. R., 308.

5. The plaintiff being a large cotton buyer, posted as to the New York and Baltimore markets, by daily telegrams, in at once acting upon the receipt of a half-rate message, which contained a mistake of one cent per pound in the price offered for one hundred bales of cotton, did not manifest the care and prudence which an ordinarily prudent and intelligent business man should exercise, and was guilty of such negligence as bars a recovery in this case.—Rathbun v. Payne, 19 Wend., 399; Munger v. Tonawanda R. R. Co., 4 Coms., 359; Conlin v. City Council of Charleston, 15 Rich., 201; Williams v. Holland, 25 E. C. L., 261; Hawkins v. Cooper, 34 E. C. L., 485; Wilds v. Hudson R. R. Co., 24 N. Y., 430; Button v. Hudson R. R. Co., 18 N. Y., 248; 1 Allen, (Mass.) R., 187.

The Court erred in refusing to charge the jury that telegraph companies cannot, in law, be held to the strict liability of common carriers—

1. The strict liability of carriers, on the ground of public policy, is limited to common carriers of goods, and does not attach to passenger carriers even, and cannot be made, by any reason of analogy, to cover this new sort of bailees—telegraphers.—Nolton v. Western R. R., 15 N. Y., 446; Breese & Mumford v. U. S. Tel. Co., 31 How. Pr. R., 92.

In the case last cited, Judge Johnson, who delivered the opinion, says: "I cannot refrain from observing here, that the business in which the defendant is engaged, of transmitting ideas only from one point to another, by means of electricity operating upon an extended and insulated wire, and giving them expression at the remote point of delivery, by certain mechanical sounds, or words, or single letters of the alphabet, is so radically and essentially different, not only in its nature and character but in all its methods and agencies, from the business of transporting merchandise and material substances from place to place, by common carriers, that the

*366

peculiar and stringent rules by which *the latter is controlled and regulated can have very little just and proper application to the former.

2. The liability of telegraph companies is regulated by contract and such reasonable rules as they may make for the conduct of their business.—Bresse & Mumford v. U. S. Tel. Co., 31 How. Pr., 86.

In the Western Union Telegraph Company v. Carew, 7 Am. L. Reg., 18, (15 Mich., 525,) Judge Christiancy, who delivered the opinion of the Court, says: "We are all agreed that telegraph companies, in the absence of any provision of statute imposing such liabilities, are not common carriers, and that their obligations and liabilities are not to be measured by the same rules; that they do not become insurers against all errors in the transmission or delivery of messages, except so far as by their rules and regulations, or by contract or otherwise, they choose to assume that position, or hold themselves out as such to the public, or to those who employ them.

In Birney v. N. Y. & Wash. Prin'g Tel. Co., 18 Maryland, 341, it is held "that a telegraph company is not a common carrier, but a bailee, performing, through its agents, a work for its employer, according to certain rules and regulations, which, under the law, it has a right to make for its government."

The Court also erred in refusing to charge the jury that a regulation to the effect that the telegraph company shall not be liable for errors or delay in the transmission or delivery, or for non-delivery of messages to be sent during the night at one-half the usual rates, and not repeated, is reasonable and valid.

(a.) It has frequently been held that a regulation to the effect that a telegraph company will not be responsible for errors or delay in the transmission or delivery of unrepeated messages, are reasonable and valid, in cases where full rates were paid, and the messages were received for transmission during the day. So held in Western Union Tel. Co. v. Carew, 7 Am. L. Reg., 18, 15 Mich.,

525; Breese & Mumford v. U. S. Tel. Co., 31 How. Pr. R., 86; Ellis v. Am. Tel. Co., 13 Allen, (Mass.) 226; McAndrew v. Electric Tel. Co., 33 Eng. L. and E., 180; Camp v. Western Union Tel. Co., 1 Metcalf, (Ky.,) 164.

(b.) A fortiori a regulation to the effect that the telegraph company shall not be liable for errors or delay in the transmission or delivery of messages to be sent during the

*367

night, at one-*half the usual rates, and not repeated, must be held to be reasonable and valid.

The Court erred, also, in refusing to charge the jury that the telegram, being sent on such conditions, which were agreed to by the sender, and of which the plaintiff had notice, the defendants are not liable for damages arising from an error in the transmission or delivery of said telegram, unless arising from the fraud or gross negligence of the defendants. —Breese & Mumford v. U. S. Tel. Co., (a case decided in the Commission of Appeals, in 1871, in 45 or 46 N. Y.).

In French v. Buffalo, N. Y. and E. R. R. Co., 4 Keyes, 108, and cases there cited, it is held that where the liability of a common carrier is limited, by special agreement, the burden of proving that the loss was occasioned by the want of due care or gross negligence rests upon the plaintiff, and he cannot rely upon the absence of proof of diligence to support his allegations of negligence.

The Court also erred in refusing to charge that even if the defendants were guilty of gross negligence, if the plaintiff, by the want of such caution and prudence as a man of ordinary prudence and intelligence should exercise, or in any way contributed to the damages he sustained, he cannot recover.—Rathbun v. Payne, 19 Wendel, 399; Williams v. Holland, 25 E. C. L., 261; Hawkins v. Cooper, 34 E. C. L., 485; Wilds v. Hudson R. R. Co., 24 N. Y., 430.

In Ernst v. Hudson R. R. Co., 24 How. Pr. R., 103, it is held by the N. Y. Court of Appeals that "the plaintiff must present a case of unmixed negligence—a case where the injury is the result, exclusively, of the defendant's negligence; where no negligence or default of his own contributed in any degree to producing such injury."

In Lexford v. Large, 24 E. C. L., 394, Denman, C. J., says: "If it is even doubtful whether the defendant's negligence alone caused the damage, that will be sufficient to prevent a recovery."

Under the circumstances of this case, an exercise of common prudence and caution would have led the plaintiff to have the message repeated before entering into such a large transaction. A repetition would have detected the error.

The Court erred also in refusing to charge that the contract, if any, made by Middleton

*368

& Co., through the defendants, *as their agents, with the plaintiff, was for the purchase of one hundred bales of cotton, at fifteen and five-eighths cents per pound, and the plaintiff has not sustained any damage which the defendants are liable for, as the plaintiff had his remedy upon his contract against Middleton & Co.

Rion, contra:

I. Telegraph companies are held to the strict liability of common carriers, except in cases where the non-performance of a duty arises from some cause connected with the peculiar nature of the subtle agency employed in their business.—Geo. W. True et al. v. Inter. Tel. Co., 60 Maine, 16; 2 Red. on Rail., 287, and note; Shear. and Red. on Neg., 626, 627, 628.

II. In this case the failure to deliver the correct message arose, not from any electric disturbance, but from the carelessness of the operator. The operator so acknowledged. The acknowledgment being of a matter pertaining to the subject-matter of his agency, and made while an agent, immediately after he discovered the mistake, binds his principal.—Mattison v. N. Y. Central R. R. Co., 62 Barb., 364. This acknowledgment of operator was concerning himself, and he afterwards testified to it in substance.

III. Telegraph companies may make reasonable regulations concerning the transmission of messages, but cannot avoid liability for their own want of care or skill in the performance of what they undertake.—True v. Inter. Tel. Co., 60 Maine, 17; Graham v. W. U. Tel. Co., 10 Am. L. Reg., 321; Sweetland v. I. and M. Tel. Co., 27 Iowa, 433, 1 Am. Reg., 291, 292; Shear. and Red. on Neg., 636, 637.

IV. The telegraph company is liable for acts of carelessness or negligence of their operator.—Rittenhouse v. In. Line of Tel., 44 N. Y., 265; Graham v. W. U. Tel. Co., 10 Am. L. Reg., 321.

V. The message, being a "night message," relieves the company from responsibility for no error not arising from its being a night message. The error in this case arose from the carelessness of the operator, in a matter in no wise dependent upon the time of the transmission of the despatch.

VI. The message not being repeated does not excuse the company. The mistake did not arise from the message not being repeated, for: (a) the message was correctly transmitted; (b) night messages are not required to be repeated.—Graham v. W. U. Tel. Co., 10

*369

Am. *L. Reg., 323; 2 Red. on Rail., 288, note; Shear. and Red. on Neg., 638.

VII. The contract of the heading of the "red blank" cannot relieve the company from responsibility for an act of such gross negligence as is proven in this case. This exact

point has been decided in the case of Geo. W. True et al. v. Inter. Tel. Co., (supra.)

VIII. Giving the defendants the full benefit of the contract, and they would only be relieved in case: first, of error in the transmission; second, of delay in the delivery; third, of non-delivery. In this case the message was correctly transmitted, and there was only little delay in the delivery. The mistake arose from carelessness of the operator after the message had been transmitted and before delivery.

IX. The receiver of a telegram, when suffering the loss, may bring the action and recover damages.—2 Red. on Rail., 286; Rose v. U. S. Tel. Co., 34 How. Pr., 310; Shear. and Red. on Neg., 632.

X. No contributory negligence was proven. The price apparently offered could not of itself have put the plaintiff on his guard; for if, in fact, he had received 15%, his profit on one hundred bales would have been less than one hundred dollars. The jury have settled this question.

XI. It is not error in a Judge to refuse to charge a proposition correct in the abstract but irrelevant to the facts of the case, and hence likely to mislead the jury. In such a case the duty of the presiding Judge is to refuse to charge as requested, and then to charge the jury by stating the same proposition so modified as to suit the case before the jury.

Oct. 2, 1874. The opinion of the Court was delivered by

WILLARD, A. J. The admission made by the operator employed by the defendants in transcribing and delivering the message in question was clearly inadmissible as evidence. It does not appear that such admission was made concurrently with, and so as to form part of, any act performed by the agent in the course of his agency; but, on the contrary, that they were independent statements, not called for by the nature of his duties, and made several days after that was completed which constituted the alleged wrong on which the case rests. Statements of this character

*370

are entitled to no priv*ilege, but are to be considered as hearsay merely. It would follow that a new trial would have to result on this ground of error alone.

The propositions on which the defendants rely are that the plaintiff has no right of action, inasmuch as he was merely the receiver of a message sent by another, who employed the defendants and paid the consideration for the performance of such service; and that, by the terms of the contract, under which the service was performed, the defendants are exempt from liability for any damage that may have resulted from an error in transcribing and delivering the message sent.

The plaintiff is a privy to the contract under which the service was performed, and has a right to demand due performance. The contract in question is one of a peculiar class, as affecting questions of liability and privity arising under it. It is a contract with one exercising a public employment under express statute powers created for that purpose. The nature of the occupation of that class of persons, and the tender of their services to the community, makes them common agents for the transmission of messages for all persons who may desire and pay for such service, to any person, either as the final receiver of such message or as a means or agent for its further transmission. The object of the contract is to modify and limit the contract which, by operation of law, would arise between the common carrier of messages and any person employing such carrier, in the absence of any stipulation of terms between them. The foundation of the contract is the nature of the carrier's occupation and the fact of employment. The legal consequences flowing from such employment are what the special contract seeks to modify or limit. Every such contract implies a sender of a message, a receiver, and an agent of transmission. The nature of the contract is, in this respect, the same, whether the rights and duties of the respective parties are defined by operation of law, or by express stipulations between themselves. It would, therefore, follow that the question whether the receiver of the message is a privy should receive the same solution, whether the contract is the result of the operation of law or of special terms of agreement between the parties.

The simplest form, then, under which the question of the privity of the plaintiff can be examined, is upon the assumption that a third person had delivered a message to the defendants for transmission to the plaintiff, in the delivery of which the plaintiff had a

*371

*pecuniary interest, and without the stipulation of any terms of transmission. In the case supposed would not the receiver accepting such service be bound to pay for it, and be entitled to demand due performance on the part of the carrier? Clearly he would.

The fact that the receiver had not directly conferred with the carrier as to the duty to be performed would be unimportant. The carrier who undertakes to carry for all dispenses with the necessity of knowing and dealing directly or personally with his employer. His offers of service are intended to meet the requirements of all cases where a message, in ordinary course, is to be transmitted. Such cases embrace those in which the message is transmitted for the benefit of the sender, those in which it is for the benefit of the receiver, and those in which it is for the mutual benefit of both sender and receiver. Construing his contract by the nature of the service to be performed, it is clear that the party for whose benefit the service is to be performed is to be regarded as considered

and included in the obligation resulting from the fact of employment, whether that person stands to it in the relation of sender or receiver. If such is the conclusion where the compensation for the service is not paid until the service is performed, it cannot be altered by the fact that the service is paid for in advance, nor by the consideration as to which one of the parties included paid it. The time when a consideration is paid, and the person by whom paid, are not essential elements of the question, the parties to the obligation being clearly known by the objects intended by the contract.

It is equally clear that any stipulation of an express nature, intended to mould and limit the obligation, must be considered as attaching to the obligation in its fullest extent, and affecting equally all the persons related to it, either as sender, receiver or agent of transmission. Under this view of the contract the plaintiff is entitled to enforce its provisions as a direct party in interest.—Goodwyn v. Douglas, Chev., 174.

The regulation of the defendants, in conformity with which the terms of the contract limiting their liability was made, was a reasonable regulation, and such as the defendants were authorized to make. In examining the proposition just stated, it must be borne in mind that the analogy between common carriers of goods and common carriers of messages is not perfect. The nature of the services performed differs materially in the two cases, and the real responsibility differs in a corresponding manner. The difference

*372

is *obvious, and has been frequently commented upon.—Ellis v. Tel. Co., 13 Allen, (Mass.,) 226. In this respect the refusal to charge that such a difference existed is open to the objection of leaving the opposite proposition, namely, that the responsibilities in the two cases are identical upon the minds of the jury as the law of the case.

In pursuance of the regulation in question certain conditions were printed upon the blanks, on which the sender of a message was required to write the message for transmission, and were so connected with the message, by language importing acceptance by the sender of the terms of such conditions, that the whole formed together a contract of which the conditions formed part.

The conditions were as follows:

"No. 45.

"Half-Rate Messages.

"The Western Union Telegraph Company will receive messages for all stations in the United States, East of the Mississippi River, to be sent during the night at one-half the usual rates, on condition that the company shall not be liable for errors or delays in the transmission or delivery, or for the non-delivery of such message, from whatever cause occurring, and shall only be bound in such cases to return the amount paid by the sender. No claim for refunding will be allowed, unless presented in writing within twenty days."

The regulation in question did not relate to or affect the mode in which or the terms upon which the ordinary business of the defendants was conducted, nor could it affect in any way the right of parties who chose to pay the full rates, and transmit messages by day in the ordinary manner. Messages transmitted by day paid full rates, and were subject to certain specified conditions. The validity of the regulations relating to the transmission of day messages is not questioned in the present case. We must assume that had the sender of the present message sent it by day, he would, upon the payment of the ordinary or full rates, have been entitled to hold the defendants to the full measure of their legal responsibilities. The defendants were not bound to transmit messages during the night time. Had the validity of a regulation declaring that no messages should be transmitted during the night time been in question, it would be impossible to find ground for holding such a regulation unreasonable. There is no analogy among

*373

the rules, applicable to *persons exercising the class of employments to which the occupation of the defendants belongs, that would support a conclusion that such a regulation was unreasonable. So there is no legal necessity compelling the defendants to tender terms and conditions on which messages may be transmitted at half rates. If, then, the parties chose to contract in special terms as to a special and voluntary service of that character, they were at liberty to do so on any terms that might be agreed upon.

The general right of persons exercising this class of employments to vary their legal relations by special contracts is fully recognized, and cannot be questioned. The doubt that has affected cases of this class has arisen from attending circumstances, making it questionable whether the person entering into such special contract with the carrier did so voluntarily or by compulsion, arising out of the nature of the carrier's business. In view of the possibility of abuse of such powers it has been seriously questioned whether the power of demanding concessions from persons dealing with them in their business is within the legal powers of a common carrier. These questions have been complicated by the fact that the most important class of common carriers consists of corporations created for the express purpose of carrying on such business, and whose powers are such only as can be gathered from a fair and reasonable construction of the terms of the laws under which they exercise corporate rights. No principles have been recognized and applied to these various cases that would call in question the right of a common carrier to contract in special terms for a special serv-

ice, out of the course of his ordinary duty, with a person who was at full liberty to deal with such carrier according to his customary terms of dealing.

In McAndrew v. Tel. Co., (33 Eng. L. and E., 180,) the right of a telegraph company, having express statute authority to make reasonable rules and regulations, to affix different rates for transmission according to the degree of risk involved, was affirmed, on the principle that a regulation tending to conform their rates of charge to the responsibilities assumed was in itself reasonable. The conditions in this case provided for an increased rate for repeated messages, and that they should not be responsible for mistakes in unrepeated messages. They also limited the liability of the company in all cases to a maximum sum, unless insured by an additional payment. There is no difference, in

*374

principle, between a *regulation increasing the ordinary rate of charge where certain defined responsibilities are to be assumed, and a regulation diminishing the ordinary charge upon condition of being relieved of certain responsibilities. The two cases are the same as to the bearing of the present question. The conditions in the case just cited did not apply merely to a special service out of the ordinary course, like that of transmission by night, but to all business transacted in the ordinary course. Had that characteristic been presented, additional reasons would have appeared supporting the view of the Court.

Ellis v. Tel. Co., (13 Allen, Mass., 226,) holds the same view as that taken in the last mentioned case. In Massachusetts, it would appear, the responsibilities of telegraph companies are regulated by the statutes, and not by the common law. It would be easier to establish the proposition in question under the rules of the common law, than in view of the Massachusetts statute, as given in that case. The right to establish a different degree of responsibility in the case of repeated and unrepeated messages, attended by a different rate of charge, is fully recognized.

True v. Tel. Co., (60 Maine, 9,) was a case of night messages arising under the following conditions: "That the company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any message beyond the amount received by the company for sending the same." The message in that case was not delivered, in consequence of the negligence of the company's agent. The question of liability under the terms of the contract does not appear to have been discussed, but assumed by the parties. The Court considered the question of the reasonableness of the conditions for the purposes of settling the question of the rule of damages, from the standpoint of construing the contract as "a general and unlimited exemption from all and any liability beyond the sum paid," including all cases of neglect, want of care or attention, of which the company could be guilty—"even gross negligence, and the want of the lowest degree of care." If this is a sound construction of the contract, then clearly a regulation imposing such terms of contract upon all persons dealing with the company was an unreasonable regulation.

According to this construction the company reserved the right to perform or not perform, to perform well or badly, upon the sole condition that the price of transmission must be returned unless the service was properly performed. It is difficult to see how

*375

such a *construction could be arrived at, if that contract was subject to the general rule that contracts must be construed by the nature of the ends in view and the means contemplated for their attainment. The construction placed upon that contract does not appear to have resulted from any necessity growing out of the language of the contract. The object of the contract was a benefit to be derived by the sender through the performance of certain acts on the part of the carrier, compensated by a pecuniary consideration paid in advance by the sender. The language of the contract must be construed so as to effectuate and not defeat this object. If the contract bound the carrier to no exercise of good faith towards the sender, it is in no sense a contract, for nothing is a contract but that which is capable of creating a legal obligation, and when such obligation exists good faith is necessarily implied.

The contract cannot be regarded as in its nature determinable at the will of the carrier upon the condition solely of the repayment of the consideration money. By its clear terms the limitation of the sum that expresses the liability of the carrier is of such a nature as to import an agreed measure of damages applicable to a case of failure to perform properly. There is no language used importing that the repayment of the consideration should be regarded as a complete performance of the contract, nor is provision made for what would be essential in a contract determinable at the will of one of the parties, namely, an expression of that will properly notified to the opposite party. Again, the limitations as to damages applies itself to both the case of an improper performance and one of non-performance, showing that it was intended as strictly a limitation of damages as upon a breach of the duty imposed by it. Inasmuch, then, as it is now allowable to construe the language of a contract in such manner as to separate the obligation created by it from that which is necessarily to be implied from the nature of such obligation, and as good faith is implied in every obligation, it follows that the contract should have been construed in such

manner that its provisions should leave unimpaired the obligation to exercise good faith, necessarily implied in the nature of the contract itself. It is, therefore, necessary, in order to perpetuate the life of the contract, to hold that a case of want of good faith is not within the terms of the contract, and that limitation of damages is not intended to apply to such a case, but must be restricted to the cases of non-performance or of improper performance, within the mind

*376

*and intention of the parties at the time of making the contract. Should this prove to be the true construction of the contract, the positions assumed as depending on the construction of the contract in the case of True v. Tel. Co., would not conflict with those assumed in the proposition under immediate discussion. Sweetland v. Tel. Co., (27 Iowa, 433,) while holding common carriers of messages to as rigid a responsibility as that enforced by True v. Tel. Co., arrives at its conclusions by reasoning of an opposite character to that in True v. Tel. Co. It holds the regulation, which was the same, in substance and effect, as in True v. Tel. Co., reasonable, but puts a construction on the terms of the contract that excludes from the exemption clause all cases in which a want of due care and skill, either on the part of the carrier or his servants, has produced damage. In other words, it only allows the exempting and limiting clauses to extend to cases where, by reason of unavoidable accident or mistake, damage has occurred. It is difficult to see how this construction can be reached without disturbing the clear sense of the terms used by the parties. It is impossible to say that a contract would be without legal life and force where the parties had agreed that no damage should be claimed where such damage resulted from want of skill and care upon the part of the servants of the contracting party, providing such contracting party remained bound to use his best endeavors, in good faith, to secure an effective performance of the contract; nor would the contract be void, if known or confessed want of general carefulness and skill, on the part of one attempting to perform an act, should be recognized to the extent of requiring the party seeking the performance of the act to run the risk of mistakes occurring from either of these causes. In an agreement to perform an act by a person known to be unskillful, or in an unusual manner, or at an unusual time, such a clause would not appear to be inappropriate.

An agreement to perform an act implies, reasonably, that ordinary care and skill shall be exercised in its performance, but it is not a necessary implication, or one that is inseparable from the obligation, considering its nature. In order, then, to narrow the terms of the contract so far, within their primary sense, as was done in Sweetland v. Tel. Co., we cannot affirm that such a construction is a necessity, in order to save the life and efficiency of the contract. Nor does any other good ground for so narrow a construction appear. If, as undoubtedly is the case, a telegraph company can contract in

*377

*such a way as to be rendered liable in case of a damage resulting from the want of care and skill on the part of its servants, then it is very clear that they did so in the case under consideration. If, on the other hand, they cannot create a valid obligation without necessarily binding themselves to the exercise of good faith, then their contract should receive such construction as would be necessary to save it from becoming a nullity. Theoretical views of what would be the soundest policy in the relations between a telegraph company and the individuals of the community are an unsafe guide in expounding the terms in which a particular individual has chosen to contract with such company. Legislation may possibly reach the proper adjustment, but in the end it will be effected in accordance with the interest of the parties and the convenience of the community, through the operation of natural causes, acting directly in the interest of the parties.

In Rittenhouse v. Tel. Co., (44 N. Y., 263,) the grounds upon which that part of the decision of the Court rests that related to the question of general liability, are not sufficiently stated to disclose the principles on which it depends.

The weight of authority clearly supports the view already taken, that the regulation of the defendants, under which the contract was made, was, in its nature, a reasonable regulation, and the contract based upon it must be upheld according to the intent and meaning of its terms.

The principles that have been discussed have a restricted application to the present case, which will be stated. At the close of the plaintiff's case there was no testimony that was of sufficient legal force to authorize a verdict. Whatever should have been the character of the negligence established by the plaintiff's proofs, in order to warrant a verdict in his behalf, there was a failure of proof. The admissions of the operator being disregarded, the fact of an error in transcribing the telegraphic characters, and the consequent delivery of the erroneous message, is all that appeared to charge the defendants with a breach of their contract. The mere fact of the existence of an error in the message, as delivered, is not sufficient proof of negligence, as it may be reasonably referred to some cause within the terms of the exemption contained in the contract.—Sweetland v. Tel. Co., 27 Iowa, 433.

Subsequently, however, to the refusal of the Court to grant the motion for a non-suit the testimony of the operator was introduc-

*378

ed, *to the effect that he "was new to the business—did not have much experience at that time." This testimony afforded some degree of evidence of unskillfulness, sufficient, at all events, to prevent a nonsuit from being entered at the present time, though we are not called upon to determine its force for want of an exception directed to that point.

There was error in the refusal to charge. The first refusal has already been noticed. The second request to charge should have been allowed, as already has appeared. The third request narrows down the liability of the defendants to a case of fraud or gross negligence, and presents too limited a view of the defendants' responsibility. It is not essential that the act of negligence should be of the character to which the very indefinite term "gross" is usually applied, if it spring from disregard or indifference to what was due to the plaintiff. The fourth refusal to charge has no sufficient basis in the evidence, as there is nothing tending to show that the plaintiff has acted otherwise than carefully and prudently. The fifth request is based on the idea that the acceptance of the contract tendered by Middleton & Co. was not binding, as there was a mistake as to the terms of contract offered. If Middleton & Co. incurred obligations on the strength of the message of acceptance, there is no reason for throwing upon them the consequences of plaintiff's misfortune, whether arising from defendants' wrong or otherwise.

It is apparent that there should be a new trial ordered.

MOSES, C. J., and WRIGHT, A. J., concurred.

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5 S. C. *379

*MAGWOOD v. RAILROAD BANK.

(Columbia. April Term, 1874.)

[*Corporations* ⇐134.]

A bank is liable to a cestui que trust of its stock, standing on its books in the name of a trustee "in trust for" such cestui que trust, if it transfers the stock to a purchaser from the trustee without the knowledge or consent of the cestui que trust—the trust being without power of sale, and the cestui que trust being an unmarried female of full age.

[Ed. Note.—Cited in Witsell v. Charleston, 7 S. C. 97; Webb v. Graniteville Mfg. Co., 11 S. C. 408, 32 Am. Rep. 479; Chapman v. City Council of Charleston, 28 S. C. 381, 6 S. E. 158, 13 Am. St. Rep. 681.

For other cases, see Corporations, Cent. Dig. § 523; Dec. Dig. ⇐134.]

Before Graham, J., at Charleston, September Term, 1873.

This was an action by Elizabeth C. Magwood against the South Carolina Railroad Company and the South-western Railroad Bank and H. M. Magwood, for an account of the proceeds of certain stock of the plaintiff, alleged to have been sold without authority. The summons and complaint were afterwards amended, by order of the Court, made on the motion of defendants' counsel, by making the South Carolina Loan and Trust Company, Branch Sons & Co. and A. J. White & Son, the alleged purchasers of the stock, parties defendant.

The facts were as follows:

On and for some time previous to the 24th November, 1866, H. M. Magwood held 232 whole shares of the capital stock of the South Carolina Railroad Company and the South-western Railroad Bank, and 232 shares of the South Carolina Railroad Company, "in trust for the sole and separate use of" Elizabeth C. Magwood, "and not to be subject to the control, the contracts, the debts, or the agreements of any husband of" hers—she being then of full age and unmarried. The certificates for the stock stood on the books of the bank in the name of "H. M. Magwood, in trust for Elizabeth C. Magwood," and a trust, in the same terms, appeared on the face of each certificate, which also stated that "this stock is not transferable, except at the South-western Railroad Bank in Charleston, by the stockholder in person, or by attorney." On the day named H. M. Magwood sold to John E. Phillips 137 of the whole and the same number of the half shares, and the transfer was entered on the books of the bank and new certificates issued to Phillips. This sale, it was admitted, was made with the oral consent of the plaintiff, and no claim upon the railroad company and bank was made by this action because of that transaction.

After the sale above mentioned there remained, in the hands of H. M. Magwood, 95 whole shares of the railroad company and

*380

bank, *and as many half shares of the railroad company, and these were all sold by him without the knowledge or consent of the plaintiff, at the times, to the parties, and in manner following: On the 4th June, 1869, he sold 60 whole shares to the South Carolina Loan and Trust Company, on the 12th November, of the same year, he sold 35 whole shares to Branch Sons & Co., and on the 3d October, 1870, he sold the 95 half shares to A. J. White & Son. The transfers were made at the bank, through attorneys—the power in each case being written at the foot of the certificate, and signed "H. M. Magwood, in trust for E. C. Magwood." At each transfer the original certificate was surrendered to the bank and cancelled, the transfer entered on the books of the bank, and a new certificate issued to the purchasers.

It further appeared that of the proceeds of the sale of 35 whole shares on the 12th November, 1869, $1,203.75 were on the same

day applied by the trustee to the payment of a bond of the plaintiff's, given for the purchase of a house and lot, but there was no evidence that the plaintiff knew of the application or directed it.

His Honor held that the South Carolina Railroad Company and the South-western Railroad Bank were liable to the plaintiff, as for a breach of trust, for the proceeds of the sales of the 95 whole shares and 95 half shares of stock, with interest, less the sum paid by the trustee on the plaintiff's bond, given for the purchase of a house and lot; and after reference to ascertain the amount, a judgment was entered for the plaintiff against the defendants last named, for $5,865.49. He further held that the South Carolina Loan & Trust Company, Branch Sons & Co. and A. J. White & Son were not liable, and dismissed the amended complaint by which they were made parties defendant.

The South Carolina Railroad Company and the South-western Railroad Bank appealed, on the grounds:

1. That the Court erred in holding that the cestui que trust is the actual stockholder.

2. That even if the corporation is the trustee for its stockholders, the Court erred in eliminating H. M. Magwood, and making the corporation the trustee of the plaintiff.

3. That on the facts established by the evidence the corporation could not refuse to transfer the stock, and the Court should have so held.

4. That the negligence of the plaintiff con-

*381

tributed directly to the *breach of trust by Magwood, and estops plaintiff from remedy against any one but H. M. Magwood.

5. That the Court permits the plaintiff to set aside the sale as illegal, and yet retain part of the proceeds of sale, whereas the Court should have held that the acceptance by the plaintiff of part of the proceeds of sale was an acquiescence in the sale.

6. That the rule requiring transfer on the books of the corporation is for the protection of the corporation only, and does not affect the legal or equitable rights of vendor and vendee; and when the legal owner of stock requests the transfer of the same, the corporation cannot in the absence of circumstances exciting suspicion of bad faith, look behind the legal title or adjudicate the equities between the parties, and the Court should have so held.

7. That the property in stock is in the stockholder, not in the corporation, and the latter cannot, by its act, vest or divest the ownership. When it permits a transfer on its books from vendor to vendee, it simply recognizes and records the transaction, without affecting the rights of parties or their liabilities to third persons, and the Court should have so ruled.

8. That while it is the duty of the bank to know the legal title, and ascertain the genuineness of the signature of the legal owner, it is the duty of the purchaser to investigate the title to the thing purchased, and if from a trustee, to ascertain the authority of the trustee to sell.

9. That if the sale by the trustee was valid the purchaser was entitled to a transfer, and no responsibility attaches to the corporation. If the sale was illegal, invalid, then no title passed, and the purchaser holds the property affected with the trust and is bound to account to the true owner for its value, or to restore the property.

10. That when the Court decided that the sale was illegal, the decree should have been that the purchasers from the trustee restore to the plaintiff the shares of which she had been illegally dispossessed, or account to her for the value thereof; whereas the decree decides that the sale was illegal, yet the title of the purchasers good.

11. That under no circumstances could the decree against the corporation be for more than the restoration of the stock, with the dividends accrued thereon.

*382

*Porter & Conner, for appellant:

No mala fides or collusion between bank and trustee is alleged, and the question submitted is whether, on the case made, the bank is liable for having permitted the transfer of the stock.

Corporations have been held liable:

1. Where the power of attorney or assignment was forged, for a corporation is bound to know the signature of its stockholders.

2. Where the corporation issued or transferred spurious stock, because it is estopped from denying its own seal or the acts of its transfer agent.

3. Where it transferred stock to itself as purchaser or holder of a lien or interest in the stock to the prejudice of other creditors.

4. Where the corporation has assumed to decide between conflicting claims who was the legal owner of the stock, and has erred in its decision.

Under one or the other of these heads all the cases will, it is believed, be classed. Under the last head comes a large class of cases, e. g., where A. delivers to B. certificate properly endorsed, but before transfer on books of corporation C. attaches the interest of A. by process served on the corporation. If the bank then transfers, it is liable if it errs. But the question involved in that class of cases is not the transfer by corporation, but the fact of ownership. If the bank errs the transfer is not by the true owner.

The plaintiff, the cestui que trust, alleges the liability of the bank. If the bank is liable, it must be from breach of contract or breach of duty ex contractu or ex delicto; but—

I. There is no contract with cestui que trust, and, therefore, no breach. Whatever contract exists is with the trustee.

II. Is there any breach of duty? What is the duty of the bank? The Act (1836, 19th §,) says "the stock shall be assignable and transferable according to such regulations and upon such terms as may be prescribed and fixed by the said bank corporation, or the Directors thereof;" and the script says "this stock is not transferable, except at the bank, by the stockholder in person or by attorney."

Who is the stockholder? Who holds the stock? Clearly not the cestui que trust. She has the beneficial interest, it is true, but she does not hold the stock—is not the owner of the stock.

The very interposition of trustee is because she is not to hold the stock.

*383

*How can she be regarded as holder, or owner, or proper party to transfer, when the very object of creating the trustee is to prevent her holding, or owning, or transferring the stock?

In Farmers' and Mechanics' Bank v. Wayman & Stockett, 5 Gill, 356, the Court held that as the stock stood on the books of the bank in the name of Wayman & Stockett, trustees for A. Jones, wife of
the bank had notice of the trust, that Wayman & Stockett were the legal proprietors of the stock, and that the bank could not allow the title to the stock to pass by a transfer, by any other person than the trustee, without becoming responsible. The bank permitted the transfer to be made by the cestui que trust, and was held responsible therefor.

So clear is the inability of the cestui que trust to transfer or meddle with the stock, that when the trustee dies or moves away, she cannot even draw the dividends, but must wait until new trustee is appointed.

The trustee is the stockholder; he holds the stock; the legal title is in him; he votes. —Angell on Corp., § 131.

He receives the dividends.

In case of sale, he delivers certificate and makes the order, and to him the purchase money is paid.

In many cases he is the only party the bank can know. Stock is frequently registered "John Smith, Trustee," or "Trustee for A. B.," initials only being used and merely to distinguish the individual stock of John Smith from that which he holds for another, or as broker or agent.

The only safe rule the corporation can adopt is to see that the transfer is made by the legal owner, and that is all the law requires. To go beyond that is to involve the corporation in complexity and depreciate the value of the stock.

There is no peculiar sanctity about stock. It is property, bought and sold as property, and the same law which governs sales of other property governs sales of stock.

The vendor sells, the vendee purchases. The bank can neither give title, nor divest title, nor determine the question of title. The two first appertain to the parties, the third to the Court.

But it is said the bank transfers. This is a confusion of terms.

The bank does not transfer. It only records the transfer and gives certificates of the fact. The stock is not transferred by the bank, but at the bank by the stockholder.

*384

The title to the stock is *not in the bank but in the stockholder, and the transfer must necessarily be by the party in whom the title is.

The entry or record of the transfer on the books of the corporation is for the benefit of the corporation and its protection.—Union Bank v. Laird, 2 Wheat., 390; Black v. Zacharie, 3 How., 513; State Bank v. Cox, 11 Rich. Eq., 348; Angell Corp., § 375; Bank of Utica v. Barron, 2 Cowen, 770; Commercial Bank v. Kortright, 22 Wend., 362.

The legal right to supervise the transfer was intended for their benefit.—Brent v. Bank of Washington, 10 Peters, 616.

The transfer from vendor to vendee, and the entry on or record of the transfer on the books of the corporation, are separate and distinct transactions.

The title to stock will pass, although no transfer has been made on the books of the corporation.—Angell Corp., §§ 564, 565; Commercial Bank v. Kortright, 22 Wend., 348, 363; Quiner v. Marblehead Insurance Company, 10 Mass., 482; Bank of Utica v. Barrow, 2 Cowen, 777; New York and New Haven Railroad Company v. Schuyler, 34 N. Y., 80; State Bank v. Cox, 11 Rich. Eq., 344, 348, 350; Sargent v. Franklin Insurance Company, 8 Pick., 96; Gilbert v. Manchester Insurance Company, 11 Wend. 628; Smith v. Northampton Bank, 4 Cush., 1.

If, then, the title passes by delivery of the scrip, and the bona fide holder for value presents the stock, indorsed by the legal owner, what right has the bank to refuse to transfer.

It has before it the evidence that the vendor was the legal owner of the stock, that he has sold it to a bona fide vendee, and that his order to allow vendee to transfer is genuine. What more can it require? The title in vendee is complete, and if the bank does not permit transfer when it should, it is liable for all damages accruing. It has duties to the vendee as well as to the vendor.

It is conceded that the above is sound law, as regards individual property, but not as regards trust property; that, as to trust property, the bank must see that the trust is duly executed.

We deny the proposition. The bank looks and can look only to the legal title.—Davis v. Bank of England, 2 Bing., 407; Franklin v. Bank of England, 9 B. & C., 156; Parsons v. Bank of England, 5 Vesey, 669;

Hartga v. Bank of England, 3 Vesey, 58; Commercial Bank v. Kortright, 22 Wend.,

*385

363; Churchett v. Bank of *England, 11 Mees. & Wel., 323; Morse on Banking, 166; Bank v. Lanier, 11 Wall., 378.

Any other doctrine would resolve every corporation into a Court of Equity. It must adjudge the equities at its peril, or, declining to transfer, impede the transactions of commerce.

Nay, more, it must pass upon the validity of the contract of sale, for the only ground upon which the bank can refuse to transfer is, that vendee has not good title.

Take ordinary case. A trustee for married woman, and after her death for children of marriage, no power of sale expressed. If trustee has not implied power, then every sale must be under order of Court, for the Court alone could bind infants.

The English cases all establish the doctrine that it is not the duty of the bank to look into the trust, but only to regard the legal title.

It is contended that the doctrine rests upon statute, and not upon reason, and therefore does not apply here. This is error; there is no statute enacting such rule.

(The counsel here referred to English statutes and cases to show that the decisions in that country rested upon reason and not upon statute, and they also commented upon the decision of Taney, C. J., in Lowry v. Commercial Bank, Tan. Cir. Ct. Dec., 335.)

The United States statute of 1790 enacts that the public stock "shall be transferable only on the books of the treasury by the proprietor or proprietors, his, her or their attorney." In United States v. Cutts, 1 Summer, this clause came up for construction, and Mr. Justice Story said: "No person can transfer the same as such owner, or entitle himself to receive the dividends, unless he stands as a recorded proprietor upon these books, and there is a manifest propriety and policy in the view in making the provision, as it would avoid, on the part of the Government, all inquiries into and examination of any equitable or other titles, or liens set up as acquired under a proprietor by any third person dealing with him," pp. 142, 143. "* * * I understand the statute to provide only for legal transfers, and to look to them, and them only, leaving the parties at liberty to create whatever equitable titles and liens they may choose, and to enforce them by the general remedies between them and their representatives which the jurisprudence of the country recognizes for such purposes." A trustee of stock is the legal proprietor,

*386

*but the beneficial interest belongs to the cestui que trust. (144.) To the same point is Townsend v. McIver, 2 S. C., 43 and 44.

We grant that the trust should be duly executed, and the cestui que trust protected. On whom does the duty of inquiry and protection fall? That is the real question.

What is the familiar law as to all other classes of property?

Why that the purchaser must look to that. If he buys, with notice of the trust, he takes subject to the trust, he becomes trustee for the cestui que trust. The transfer of title has no other effect than to substitute him as trustee, and the cestui que trust can follow the property as long as a shred of it is traceable.—Matthews v. Heyward, 2 S. C., 244, and cases there cited.

And the same doctrine is applicable to stock.—Duncan v. Jaudon, 15 Wall. 165. S. C.: 8 Blatch. 430; Simons v. Bank, 5 Rich. Eq., 272.

And it is casting the burden upon the proper party, upon him who voluntarily enters into the contract for his own benefit, who has the stimulus of interest, who exercises his own judgment, and if title is defective can go back upon his vendor.

If the vendees, the Loan and Trust Company, A. J. White and Branch, had good title to the stock, then the bank was bound to transfer and could not refuse.

If the vendees had not good title, then they could hold the property tortiously; the right and title remained in plaintiff, and she can recover from them the property or its value. They hold the property subject to the trust. They were parties to the breach of trust, and are, with Magwood, responsible to the cestui que trust.

All the vendees are responsible and accessible. They have been made parties, and can be bound by the decree. The fact that plaintiff never pursued them justifies the inference that she regarded their title as good, and if their title was good, then it is a logical sequence that the bank was bound to transfer.

This is the rule as to all other property. Why should it not hold equally as to stock?

The law requires a deed of land to be recorded at Mesne Conveyance. Suppose a trustee should sell in breach of trust, would it not be curious to hold the Register of Mesne Conveyances responsible, because he had allowed the transfer, and yet the two things are alike.

To hold that the bank, which has no in-

*387

terest in the transaction, *but simply records the transfer for purposes of its own, is to be the guarantor of the title to the vendee is startling.

It makes the corporation, the only party who has no interest, the guarantor and bondsman of all the parties. The bank is to guarantee the title to the vendee, and pay the purchase money to the vendor.

The duty and responsibility of the bank and of the several parties to the transaction are fully stated in Bank of Virginia v. Craig, 6 Leigh. 400.

Stock stood on the books of the bank. Fox guardian of Lewis Craig. Fox sold and transferred the stock and embezzled proceeds. Craig, on coming of age, brought action against the bank. The Circuit decree held the bank liable. The bank appealed, and the Circuit decree was reversed.

(This case was strongly relied on by the counsel, and their brief contained extracts at length from the opinion of the Court. They also cited Central Railroad Banking Co. v. Ward, 37 Geo., 515, 531; Albert v. Savings Bank, 2 Md. R., 168, and other authorities.)

Rutledge & Young, for Elizabeth C. Magwood, submitted the following points and authorities:

I. That in case of trusts the beneficiary is the true owner; and the principle is the same, whether the property consists of stock in a bank, or railroad company, or other personalty. If it consists of stock, the cestui que trust is the true stockholder.—Lewin on Trusts, 585 to 595, et seq.

Stock in a railroad company is a personalty, and subject to same principles.—Johns v. Johns, 1 Ohio, 350; Ashton v. Langdale, 4 Eng. L. and Eq., 80; Arnold v. Ruggles, 1 Rhode Is., 165; Nightingale v. Devisme, 5 Burr, 25, 93; Sewall v. Bart Water Power Co., 4 Allen, 282; Bank v. Lanier, 11 Wall, 369.

These doctrines are in no way varied by the nature of the trust in the present case.—Staggers v. Matthewes, 13 Rich. Eq., 153; Heath v. Bishop, 4 Rich. Eq., 50.

II. That the corporation whose stock is thus owned is the trustee of the stockholders, holding the corporate property in trust, to manage it with care for the benefit of the stockholders; to use due diligence in protecting their interests from detriment or destruction; to pay debts, and finally to distribute pro rata. And when the corporation is notified of the true ownership of any stock, and

*388

negligently *permits it to be transferred, by some one not legally authorized to do so, thereby divesting the owner of his rights, and destroying the evidence of his ownership, it is guilty of a breach of trust.—Davis v. Bank of England, 2 Bing., 405; Farmers' and Mechanics' Bank v. Wayman & Stockett, 5 Gill, 356; Lowry v. Commercial and Farmers' Bank of Baltimore, Taney's Cir. Ct. Dec.; Albert v. Savings Bank, 2 Md. R., 166; Chew & Goldsborough v. Bank of Baltimore, 14 Md. R., 315; Mechanics' Bank of Alexandria v. Louisa and Amelia Seton, 1 Pet., 309, 310; Simons v. Bank, 5 Rich. Eq., 272; 2 Story's Eq. Juris., § 1252; Mumma v. Potomac Co., 8 Pet., 281; Hill on Trustees, 3d Am. Ed., side pp., 174, note 2; Bayard v. Farmers' and Mechanics' Bank, 52 Penn. R., 233. The latter case decides all the points in this proposition.

Banks are liable on analogous principles in cases of forged powers of attorney and signatures.—Vide note to Ex parte Swan, 448, Common Bench Rep. Eng. Com. L. R., 97, citing Pollock v. National Bank, 3 Seld., 274; Ashby v. Blackwell, Amb., 503; Duncan v. Luntly, 2 McN. & Gow., 30; Coles v. Bank of England, 10 Adol. & Ell., 446; Sloman v. Bank of England, 14 Sim., 488, 490; Swan v. North British Ins. Co., 2 H. & G., 175, 7 C. B., 400–448; 7 Hurleston and Norman, 603, 661.

III. That the stock, being in the name of a trustee, for a certain person specified therein, is notice sufficient to show the corporation to whom the stock really belongs, and to excite its inquiry as to the legal authority of any other person, offering to transfer or dispose of the same, to perform such act.—Porter et al. v. Bank of Rutland et al., 19 Vt., 425; Blandell v. Stevens et al., 16 Vt., 179; Sug. on Vend., 532; 4 Johns. Ch. R., 39–44; Anderson v. Van Allen, 12 Johns., 343; Atkinson v. Atkinson, 8 Allen, 15; Lowry v. Com. Bank, Taney's Cir. Ct. Dec.; Albert v. Savings Bank, 2 Md. R., 166; Sturtevant v. Jaques, 14 Allen, 523; Bayard v. Farm. and Mech. Bank, 52 Penn., 233; Simons v. Bank, 5 Rich. Eq., 272; Street v. Laurens, 5 Rich. Eq., 242.

IV. That the bank and road so transferring is responsible to Elizabeth C. Magwood for the stock, and must pay to her its value.—Farmers' and Mechanics' Bank v. Wayman & Stockett, 5 Gill, 356; Pollock v. National Bank, 3 Seld., 274; Atkinson v. Atkinson, 8 Allen, 15; Perry on Trusts, § 844.

V. That the stock in question stood in the name of "H. M. Magwood, in trust for Elizabeth C. Magwood," and H. M.

*389

Magwood *had no authority, under the instrument creating the trust, or from its character, or from Elizabeth C. Magwood, expressly or by implication, or from her acquiescence or ratification, to make such transfers.—Story on Agency, § 127, note 2; Ib., § 133; Story's Eq. Juris., §§ 384–395; Lewin on Trusts, § 523; Perry on Trusts, § 850, and cases cited; Thompson v. Furch, 22 Beav., 325, and 8 DeG. M. & G., 560; Prevost v. Grats, 6 Wheat., 487; Fish v. Miller, 1 Hoff. R., 280.

VI. That the trustee, the holder of the dry legal estate in the stock, by his transfer, passed nothing more than an inchoate claim in equity to his vendee to have the stock transferred to him, and could not pass the perfect legal title without the voluntary act of the bank, by which act alone the cestui que trust could be deprived of his property.

The idea, therefore, that the bank is a mere register of transfers, and no more, is legally inaccurate.—Union Bank of Georgetown v. Paine, 2 Wheat., 393; Black v. Zacharie, 3 How., 513; Northrop v. Newtown and Bridge Turnpike Co., 3 Conn., 544; Marl Man. Co. v. Smith, 2 Conn., 579; Also

5 Conn., 246; Shipman v. Ætna Ins. Co., 29 Conn., 246; Bank v. Lanier, 11 Wall. 377, 378; 3 Kent's Com., 453; Lowry v. Com. Bank, cited above; Bayard v. Farmers' Bank, cited above.

VII. That the cestui que trust, in any event, has the option to proceed against the bank, or follow the funds, if practicable to do so.—Perry on Trusts, § 843, and notes.

VIII. In case it should be decided, however, that the trustee, by his transfer, passed the legal title to the assignees of the stock, and that the bank had no power to refuse to transfer on the books, and merely registered the fact, and that the perfect legal title of the stock was passed to the purchasers thereof, and that the bank incurred no responsibility by reason of such transfer, the respondent, Elizabeth C. Magwood, is entitled to recover from the purchasers of the stock, because each purchaser of the stock took it subject to the trust, if he bought with notice of it, and is liable to account to the cestui que trust for its value.—Perry on Trusts, §§ 831–835, et seq.: Ib., § 217, 189, 190, note 4; Mangles v. Dixon, 3 House of Lords Cas., 737; Lewin on Trusts, Sp., 725; Street v. Laurens, and Simons v. Bank, 5 Rich. Eq.; Hassey v. McIlwain, 2 Will. Ch., 426; Adair v. Shaw, 1 Sch. & Lef., 262;

*390

Mead v. Lord Orrery, 3 A. A. Kyns., *238; Adams' Eq., 62; Mechanics' Bank v. Seton, 1 Pet., cited supra; Duncan, Sherman & Co. v. Landan, 15 Wal.

Such being the legal doctrines, the fact of notice of the trust to each purchaser depends upon the evidence in the cause.

Buist & Buist, Simonton & Barker, and Hanckel, for other respondents.

The opinion of the Court was delivered by

WILLARD, A. J. The leading question is, whether a corporation is liable to a cestui que trust under a trust of corporate stock declared on its books, where it transfers such stock upon the authority of a trustee without power to alienate or the consent of the cestui que trust.

The plaintiff, to maintain her judgment, must show that she has a remedy, either at law or in equity, against the defendants.

In equity the corporation is bound to protect the title of a cestui que trust, under a trust of its stock declared upon its books, against the exercise of powers forbidden by or inconsistent with the nature and terms of such trust.

It is not necessary here to affirm, as a general proposition, that, from the very nature of the legal relation subsisting between a corporation and its stockholder, a trust arises charging the corporation with the responsibilities of a trustee towards the stockholder. A more limited view of the equities springing from the relations of the parties will be sufficient for the purposes of the present case. The validity of a trust of corporate stock is not and cannot be questioned. To such a trust, when declared on the books of the corporation, such corporation cannot be a stranger, from the nature of the trust itself. The declaration upon its books carries at the same time the force of notice of the trust and of an acceptance of a certain undefined responsibility connected with it. To define that responsibility recourse must be had to the nature of the legal duties incident to its relation to its stockholders. The legal duty of the corporation to assure the title of its stockholder is moulded to conform to the state of relations between the trustee of stock and the cestui que trust. The corporation is not simply the custodian of the technical title of the stockholder, but of the subsistence of what the stock represents for the purpose of beneficial enjoyment by the stockholder. As the duty of the corporation is

*391

commen*surate with the right of the stockholder to the full beneficial enjoyment of that which is represented by the stock, it would follow that, where the legal title and the beneficial right to the stock are in different persons, the duty of the corporation would extend to the protection of both. The legal duty of the corporation having thus become moulded to conform to the state of relations between the parties to a trust of stock, it is manifest that the corporation is to be regarded as so far a privy to the trust that any act on its part, tending to defeat the object of trust, will subject it to proceedings undertaken for the administration of the trust.

The line of reasoning adopted in Bayard v. Bank, (52 Penn., 232,) goes beyond that already presented, developing the characteristics of a trust in the general relation of the corporation to its stockholder. If the reasoning in that case is fully supported, it would necessarily substantiate the view already presented, and, on the other hand, if the discussion in that case should be regarded as taking a range wider than that essential to the decision of the case, the conclusion of the Court would still give authoritative support to the views here advanced.

It is not essential to the views here presented to consider the liabilities of the corporation as of the same nature and extent as those of the trustee. While the trustee is bound to activity in enforcing the powers lodged in him for attaining the object of the trust, the duty of the corporation must be regarded as circumscribed by the nature of its general legal duties springing from its relation to its stockholders. Thus limited, the evil of exacting from the corporation an undue attention to the particulars of the administration of the trust, as commented upon in Hortgo v. Bank, (3 Yes., 55,) could not arise. Inasmuch as the trust in the present case was declared on the books and face of the scrip to the extent of naming the cestui

que trust, it follows that if the action of the trustee in disposing of the stock was without authority, and tended to defeat the object of the trust, the corporation is liable in equity to the extent of any damage sustained by reason of its co-operation with the trustee to that end.

It is not contended that the trustee had any express power to alienate the stock. Can a power to that end be implied? If so, it must be upon the ground that such a power was within the intention of the trust, as a means of obtaining its object. The object of the trust in the present case was limited to

*392

a provision against a *contingency that had not arisen at the time the trustee assumed to alienate the stock. The trust was for the benefit of an unmarried female. Its object was that in the event of her marriage the property in question should not be subject to the marital rights of her husband. She remained unmarried to the time of the alienation of the stock. Whatever might be the powers of the trustee in the event of the contingency on which the whole life and force of the trust depended, it is clear that while the cestui que trust remained unmarried, sui juris, the trustee had no duty to perform to which power to alienate was essential, and, therefore, there is no ground to imply a power to sell and transfer the stock. Unless the defendants assumed the existence of consent on the part of the cestui que trust to the disposition of the stock they could regard the transaction in no other light than as an assumption by the trustee of a right of control that he did not possess, nor had they the right to assume the consent of the cestui que trust without clear evidence of the fact of such consent.

It must, therefore, be concluded that the defendants are liable for the transfer of the stock, it appearing that such transfer occasioned the loss of the trust estate.

The conclusion of the Circuit Judge, that the purchasers of stock were not necessary parties, would seem to follow from the view already taken.

If the only ground in equity for the plaintiff's action against the defendants was their complicity in a breach of trust, as strangers to the trust, it might well be that the purchasers should be made parties with the defendants, as they, with the trustee and the corporation, without whose assistance the breach of trust could not be made effectual, would have to be regarded as privies, as it regards such breach of trust. Here, however, the plaintiff stands upon equities of a different nature, to which the purchasers are strangers, and she is not bound to make them parties.

The Circuit decree should be affirmed.

MOSES, C. J., and WRIGHT, A. J., concurred.

5 S. C. *393

*JENKINS v. CHARLESTON.

(Columbia, April Term, 1874.)

[*Municipal Corporations* ⇐966.]

The City Council of Charleston may lawfully tax its own stock, as well that owned by non-residents as that owned by residents of the city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2045–2061; Dec. Dig. ⇐966.]

[*Constitutional Law* ⇐137.]

Such a tax does not impair the obligation of the contract.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 354; Dec. Dig. ⇐137.]

[*Municipal Corporations* ⇐966.]

Stock of a municipal corporation, payable and transferable only at the treasury of the corporation, has its situs within the corporation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2045–2061; Dec. Dig. ⇐966.]

[*Municipal Corporations* ⇐966, 978.]

Where a city taxes its own stock it may enforce payment by deducting the amount of the tax from interest due on the stock.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2051, 2105; Dec. Dig. ⇐966, 978.]

Before Graham, J., at Charleston, March Term, 1873.

This was an action by T. C. Jenkins against the City Council of Charleston, to recover $871.69, a balance alleged to be due by the defendant to the plaintiff for interest, at six per cent., which accrued during the years 1870 and 1871, on certain stock of the defendant owned by the plaintiff.

The plaintiff was a citizen and resident of the State of Maryland, and owner of the stock in question. By ordinances of the City Council of Charleston, passed to raise supplies for the years 1870 and 1871, a tax of two cents upon the dollar was laid for each of those years on the value of all property within the city, its stock inclusive, and the City Treasurer was directed to retain the tax assessed on the city stock, out of the interest thereon, when the same is due and payable. The taxes assessed for the years 1870 and 1871, on the stock owned by the plaintiff, amounted to the sum above mentioned, and this sum was deducted by the City Treasurer from the interest due the plaintiff for those years.

Neither any Act of the State, nor the ordinance under which the stock was issued, declared it exempt from taxation.

The action was brought to recover the sum thus retained, with interest, and the ground chiefly relied upon was, that the ordinances imposing the tax impaired the obligation of the contract between the city and the owner of the stock.

There were four other actions tried at the same time, each brought by a different plain-

tiff, and all founded upon substantially the same state of facts and presenting the same question, the only difference, as to one of them, being that the plaintiff was a resident of the city.

The cases were tried by the Court without a jury, and His Honor the Circuit Judge decided: (1) That the taxes were constitution-

*394

ally *and legally imposed; and (2) that the mode by which payment was enforced was lawful.

Judgments were accordingly entered for the defendant, and the plaintiff appealed.

Magrath & Lowndes, Porter & Conner, DeSaussure, for appellants.

Seabrook, City Attorney, Pringle, contra.

Oct. 6, 1874. The opinion of the Court was delivered by

MOSES, C. J. The general power of the City Council of Charleston "to make such assessments on the inhabitants of Charleston, or those who hold taxable property within the same, for the safety, convenience, benefit and advantage of the said city, as shall appear to them expedient," is not disputed on the part of the appellants. Whatever may be the extent of its authority in this regard, or how far the Legislature may have devolved upon it any of its own attributes of sovereignty, so far as the taxing power is concerned, within its municipal limits, the only questions raised in the cases are: 1st. Can the city of Charleston tax its own stock? 2d. If it is vested with this right, can it exercise it as to such of its stock as is held by non-residents?

The argument on the general question was rested alone, by the appellants, on the ground that the tax imposed by the corporation impaired the obligation of the contract which existed between the holder of the stock and the city. That a contract was created imposing obligations on both parties, binding them to its performance according to its true intent, is too plain for doubt. The States are prohibited by the 10th Section of the 1st Article of the Constitution from passing any "law impairing the obligation of contracts," and if this right of the City Council to levy the tax in question, which it could only exercise through the powers granted by its charter, is in violation of the said prohibition, it follows, as an inevitable consequence, that the parties must be relieved of the tax of which they complain.

Taxation is a power not only necessary but indispensable to governments. Its exercise by the States can only be controlled by constitutional limitations. While these are observed and recognized, the wise and prudent enforcement of the power must depend on the wisdom and discretion of those to

*395

whose hands the preroga*tive is entrusted. The mere possession of governmental powers, without adequate means of execution for the public good, would be but as a "barren sceptre" for defense. There may be other limitations, as where the power is resorted to for the purpose of attaining an end, which, under the taxing power, could not be legitimate, as, for instance, if under the guise of a tax the Legislature designed to inflict a penalty. Mr. Cooley, in his Constitutional Limitations, p. 129, says: "Where the power which is exercised is legislative in its character, the Courts can enforce only those limitations which the Constitution imposed, and not those implied restrictions which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism and sense of justice of their representatives."

The general power being inherent in the government, those who deny the existence of the particular right sought to be enforced, must show it, as clearly forbidden by positive declaration, or arising from an implication too clear to be resisted. If the right of taxation existed as a power in the government at the time of the contract, and so entered into it as to become one of its necessary elements and attributes, then the obligation of the contract is not impaired by the imposition of the tax, because it was a property which attached to the contract and became one of its controlling attributes.

All property is held by individuals subject to the exercise by the State of the sovereign power which it holds over it. Where the State creates a municipal corporation, it devolves upon it a portion of that power, to the extent conferred by its charter. Whatever rights it can exercise, through its substitution in the place of the State, within its prescribed territorial boundaries, is by force of the very sovereign power which attached to the State. The duties of such a corporation are civil and political, as well as municipal. Where the right to tax has been conferred upon a body of that character, the intention to surrender it generally, or in any particular instance, must be shown by express act, or, as we have said in regard to its relinquishment by the State, by plain and unmistakable intent; in the language of Ohio Life and Trust Company v. DeBolt, 16 How., 435 [14 L. Ed. 997], referring to Providence Bank v. Billings [4 Pet. 514, 7 L. Ed. 939], and the case of the Charles River Bridge Company [11 Pet. 420, 9 L. Ed. 773], "by words too plain to be mistaken."

Mr. Dillon, in his treatise on Municipal Corporations, Section 589, says: "The power of taxation and the power of eminent domain, subject to both of which all private

*396

property is held, although they *originate in political necessity, are in their nature materially different. For the taxes paid or money exacted under the taxing power, no direct specific compensation is made, but

where property is taken under the right of eminent domain, this can be done only to the limited extent required by the particular object or enterprise in favor of which it is exercised, and then only on the condition of making to the owner direct and full compensation in money for the particular and unequal sacrifice which he would otherwise be obliged to make for the public benefit."

The power of taxation is at least as high a prerogative of government as that of eminent domain, for while taxation does take private property for public use, it acts in this particular instance without the correlative obligation of compensation, for the reason that in the one case the property of an individual is taken for the public good, and made subservient to it without including other property similarly situated, while in the other all property of the same kind is held subject to the imposition of a tax, and must contribute to the fund which it is proposed to raise.

In West River Bridge Co. v. Dix, 6 How., 507 [12 L. Ed. 535], while it was admitted that the charter was a contract between the State and the company, it was held "that the right of eminent domain did not interfere with the inviolability of contracts; that all contracts are made subject to that right, and the contract in question was not violated by its exercise."

In the opinion of the Court it is said: "But into all contracts, whether made between States and individuals, or between individuals only, there enter conditions which arise not out of the literal terms of contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed, and must be presumed to be known and recognized by all; are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, whenever a necessity for their execution shall occur. Such a condition is the right of eminent domain." At page 531 it is said: "No State, it is declared, shall pass a law impairing the obligation of contracts, yet, with this concession constantly yielded, it cannot be justly disputed that in every political sovereign community there inheres neces-

*397

sarily the right *and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large:" and, on page 532: "This power, denominated the eminent domain of the State, is, as its name imports, paramount to all private rights vested under the government, and these last are, by necessary implication, held in subordination to this power, and must yield, in every instance, to its proper exercise.

It is impossible not to perceive that the same principle which ran through and controlled the judgment in that case must apply where it is sought to resist the payment of a tax, because its imposition interfered with the inviolability of a contract.

Taxation is, in every regard, as much an inherent power of government as is that of eminent domain. Mr. Justice Woodberry, in a separate opinion in the same case, p. 539, says: "I take the liberty to say, then, as to the cardinal principle involved in this case, that, in my opinion, all the property in a State is derived from or protected by its government, and hence is held subject to its wants in taxation, and to certain important public uses, both in war and peace." At page 542 he says: "And because, on a like principle, taxes may be enforced on such property, as well as all other property, though coming by grant from the State, and may be done without violation of the contract, when there is no bonus paid or stipulation made in the charter not to tax it. This is well settled."

In Gilman v. City of Sheboygan, 2 Black., 513 [17 L. Ed. 305], Mr. Justice Swayne said: "The Act of 1854 authorized the borrowing of money, the issuing of bonds, and the levying of a tax upon all the property in the city, for the purposes specified. The imposition, modification and renewal of taxes, and the exemption of property from such burdens, is an ordinary exercise of the power of State sovereignty. There is no pledge, express or implied, that this power should not thereafter be exercised.

In Providence Bank v. Billings, 4 Pet., 562 [7 L. Ed. 939], Chief Justice Marshall, delivering the opinion of the Court, said: "The power of legislation, and, consequently, of taxation, operates on all the persons and property belonging to the body politic. This is an original principle, which has its foundation in society itself. It is granted by all, for the benefit of all. It resides in government, as a part of itself, and need not be reserved when property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. However

*398

absolute the right of an individual *may be, it is still in the nature of that right that it must bear a portion of the public burthens, and that portion must be determined by the Legislature."

In Beanster v. Hugh, 10 N. H., 143, "the power of taxation" is said "to be essentially a power of sovereignty or eminent domain."

Mr. Justice McLean, in delivering the opinion of the Court in State Bank of Ohio v. Knoop, 16 How. [369, 14 L. Ed. 977], said: "The power of taxation has been compared to that of eminent domain, and it is said, as re-

gards the question before us, they are substantially the same. These powers exist in the same sovereignty, but their exercise involves different principles. Property may be appropriated for public purposes, but it must be paid for. Taxes are assessed on property for the support of the government under a legislative Act."

Is there any thing in the contract itself which, by necessary implication, can be construed into a stipulation or covenant for exemption from taxation by the city? The control remains undisturbed—unchanged. The obligation on the city to pay the annual interest is not denied. The performance of all it imposes is admitted, and the agreement remains as perfect in form, and as binding in effect, as when it was first executed. But, it is said, if the city assesses a tax on the value of the stock, the holder does not receive the amount of the interest agreed to be paid. It is diminished to the extent of the tax. This result, however, is not effected by any change of the contract or refusal of the Council, to recognize it as imposing on them a liability to pay the accruing interest, but the stock becomes less valuable to the holder, because the authority representing, to a certain extent, the sovereignty of the State, interposes and lays a charge upon it for public purposes through a tax. The same consequence follows from the imposition of taxes by the city on all other property admitted to be liable to it. The tax on real property and on that of personal, having a tangible form, to the extent of its demand, lessens the value of such property. The tax from income, no matter from whatever source derived, necessarily reduces its amount. It is difficult to perceive why the propositions now insisted on by the appellants may not as well apply to the whole principle on which the right to tax is founded.

In the case of Providence Bank v. Billings, already referred to, Chief Justice Marshall uses this language: "If the power of taxation is inconsistent with the charter, because it may be so exercised as to destroy the object for which the charter is given, it is

*399

equally *inconsistent with every other charter, because it is equally capable of working the destruction of the objects for which every other charter is given. If the grant of a power to trade in money to a given amount, implies an exemption of the stock in trade from taxation, because the tax may absorb all the profits, then the grant of any other thing implies the same exemption: for that thing may be taxed to an extent which will render it totally unprofitable to the grantee. Land, for example, has in many, perhaps in all the States, been granted by government, since the adoption of the Constitution. This grant is a contract, the object of which is, that the profits issuing from it shall enure to the benefit of the grantee; yet the power of taxation may be carried so far as to absorb these profits. Does this impair the obligation of the contract? The idea is rejected by all, and the proposition appears so extravagant that it is difficult to admit any resemblance in the cases; and yet if the proposition for which the plaintiffs contend be true, it carries us to this point. That proposition is, that a power which is in itself capable of being exerted to the total destruction of the grant is inconsistent with it, and is, therefore, impliedly relinquished by the grantor, though the language of the instrument contains no allusion to the subject. If this be an abstract truth it may be supposed universal; but it is not universal, and, therefore, its truth cannot be admitted in these broad terms in any case. We must look for the exemption in the language of the instrument, and if we do not find it there it would be going very far to insert it by construction."

Mr. Blackwell, in his work on Tax Titles, pp., —, says: "If the tax is laid to raise a revenue for the expenses of the State, it shall be laid equally on all the property in the State." A resident of Charleston might convert his entire property into city stock, and according to the proposition contended for on the part of the appellant, while enjoying all the protection which the corporation afforded him, and all others in its limits, may contribute nothing to its support—not even to the very taxes through which the interest on his own stock is to be raised. The holders of all other property are to be assessed, while he, reaping all the advantages, bears none of the burthens of a property holder. Nor can the fact that the right may be abused operate to defeat its exercise. The same argument would apply to destroy all the functions of government.

As was said by Ch. Justice Marshall, in his opinion from which we have already cited: "However absolute the right of an indi-

*400

*vidual may be, it is still in the nature of that right that it must bear a proportion of the public burthens, and that portion must be determined by the Legislature. The vital power may be abused, but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the State Government. The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security where there is no express control against unjust and excessive taxation, as well as against unwise legislation generally."

Regarding the city stock as personal property liable to the tax imposed, it remains to be considered whether such stock, held by non-residents, can be taxed by the said corporation. The right is resisted entirely on the ground that personal property has no

situs in itself, but follows the domicile of its owner. But this is not true as a general and unvarying rule, for its application will be found to be trammelled and encumbered with so many exceptions, that the principle upon which its very existence depends is not only affected but destroyed. Personal property of a visible and tangible kind is taxed where it is found, without regard to the residence of the owner, and his domicile in one State will not so affect the possession of property beyond it as to subject it to taxation by the State in which he resides. If the rule contended for is without restriction, then the right to tax would be regulated, not by the actual situs of such personal property, but by the domicile of the owner. Mr. Story, in his Conflict of Laws, Section 380, referring to the principle, says that "Lord Loughborough has stated it with great clearness and force in one of his most elaborate judgments."—Vibb v. Worswick, 1 H. Blk., 690. "It is a clear proposition, (said he,) not only of the law of England, but of every country in the world where law has the semblance of science, that personal property has no locality. The meaning of that is not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner, both with respect to the disposition of it, and with respect to the transmission of it, either by succession or by the act of the party." He evidently here restricts the rule to the disposition and transmission of such property. Ch. Kent, in the first volume of his Commentaries, p. 406, refers to the rule as a "fiction of law," and says: "It may now be considered as part of the settled jurisprudence of

*401

this country, that personal property, *as against creditors, has locality, and the lex loci rei sitæ prevails over the law of the domicile with regard to the rules of preference in the case of insolvent estates." So, too, in regard to attachment laws, or any proceeding by which the Court, not having jurisdiction of the person, obtains control of the property by its process against it, and makes it amenable to its judgment, thus acting on the party through his property, wherever the latter may be found, without respect to his domicile.

Mr. Story, in the same work first referred to, Section 550, himself says: "The general doctrine is not controverted, that although movables are, for many purposes, to be deemed to have no situs except that of the domicile of the owner, yet this being but a legal fiction, it yields whenever it is necessary, for the purposes of justice, that the actual situs of the thing should be examined." Does it consist with our idea of the justice which should govern the daily transactions of men, that the State which protects the property that by its proper and discreet arrangement, gives it additional value, should not receive the consideration for these results in contribution to its expenses, while the State, which affords it no protection and adds nothing to its value, should control it through the mere domicile of the holder? If it can not do this as to visible property, on what principle can the right be claimed as to stock, because it is a thing incorporeal. The chose has value, as well as the visible property. While the use of the latter may yield its possessor income, the stock does the same thing, and in the very place where it was issued.

In Hoyt v. The Courts, 23 N. Y., 228, in the opinion of the Court, by C. J. Lemstock, it is said: "These and other illustrations, which are mentioned, demonstrate that the fiction or maxim mobilia personam sequntur is by no means of universal application. Like other fictions, it has its special uses. It may be resorted to when convenience and justice so require. In other circumstances, the truth, and not the fiction, affords, as it plainly ought to afford, the rule of action * * *; accordingly there seems to be no place for the fiction of which we are speaking in a well adjusted system of taxation."

In Green v. Van Buskirk, 7 Wall., 139 [19 L. Ed. 109], it was held that "the fiction of law, that the domicile of the owner drew to it is his personal estate, where ever it

*402

may happen to be, yields, whenever, for *the purposes of justice, the actual situs of the property should be examined."

The case of Cleveland, Painsville and Ashtabuld R. R. Co. v. Pennsylvania, 15 Wallace, 300 [21 L. Ed. 179], is much relied on by the appellants, but we do not think that the ruling there can sustain the proposition on which the cases here depend. There the question presented, as the opening remarks of the opinion admits, "applies to the interest or bonds of the railroad company, made payable out of the State, issued to and held by non-residents of the State, citizens of other States." The stock involved here was issued by the city of Charleston, payable and transferable there, and there alone can renewals of certificates, in case of loss, be obtained. The opinion in the case just referred to admits that the situs of public securities does not depend on the domicile of the owner. On page 323 it is said: "It is undoubtedly true that the actual situs of personal property, which has a visible and tangible existence, and not the domicile of its owner, will, in many cases, determine the States in which it may be taxed. The same thing is true of public securities, consisting of State bonds and bonds of municipal bodies, &c.; but other personal property, consisting of bonds, mortgages, and debts generally, has no situs independent of the domicile of the owner."

A clear and manifest distinction is here drawn between bonds of municipal corpora-

tions and those of private bodies and individuals. The title to bonds and debts generally can not only be transferred anywhere, and legal demand of payment made on the debtor, and suit brought wherever he may be found, or, he being absent and his goods present, they may, by attachment proceeding, be subjected to their payment. But the debt of the municipal corporation is only transferable and demandable at its office, and it can only be sued in a Court which has jurisdiction over territory within which its own limits are prescribed. All the qualities which demand it seem to give it a local existence, so far as its issue, transfer and payment are concerned.

We are sustained in the views which have induced our conclusion by the opinion of Chief Justice Waite, in the case of Tappan v. Merchants' Bank of Chicago [19 Wall. 490, 22 L. Ed. 189], Supreme Court of the U. S. Dec., I, 1873. He says, in the course of it, that "shares of stock in national banks are personal property. They are a species of personal property, which is, in one sense, intangible and incorporeal, but the law which creates them may separate them from the

*403

person of their *owner, for the purpose of taxation, and give them a situs of their own. * * * The shareholder is protected in his person by the government at the place where he resides, but his property in this stock is protected at the place where the bank transacts its business. If he were a partner in a private bank doing business at the same place, he might be taxed there on account of his interests in the partnership. It is not easy to see why, upon the same principle, he may not be taxed there on account of his stock in an incorporate bank. His business is there as much in the one case as in the other. He requires for it the protection of the government there, and it seems reasonable that he should be compelled to contribute there to the expenses of maintaining that government. It certainly can not be an abuse of legislative discretion to require him to do so."

Objection has not been urged, in the argument, as to the particular mode provided by the ordinances for the collection of the tax. If the party was liable to the tax it worked no injury to him. Resort to summary proceedings at variance with the general spirit of our laws has been allowed against delinquent tax-payers, and has been permitted very much by the necessity of the occasion, which requires energy and promptness in collecting the public dues of that character.—State v. Allen, 2 McC., 59; Blackwell on Tax Titles, 28. A resident of the city might convert his whole estate into such stock, and the corporation left without remedy for the tax assessed upon it, unless it could be deducted from the interest payable to the holder. A non-resident holder of such stock could be reached for the tax in no other way.

All the cases involve the same questions, and the motion in each is dismissed.

WRIGHT, A. J., concurred.

WILLARD, A. J. In my judgment it is not necessary to consider the question whether the attempt by the city government to impose the tax in question was an act tending to violate the obligation of a contract. If the Constitution of the State, or the statutes conferring the taxing power upon the defendants, had that effect, the question would properly arise.

I am satisfied that neither the Constitution nor statutes conferring municipal power on the city government are to be construed as

*404

*supporting the exercise of the taxing power called in question in the present case.

The plaintiff is not a resident or inhabitant of the city of Charleston, nor is he liable to taxation there, for municipal purposes, as the owner or holder of either real or personal property within that city. There is no special authority conferred either by the Constitution or the statutes to reach the imposition of a tax in such a case, nor can it be implied from the general authority to levy and collect taxes.

In order to impose a tax there must be a person liable to taxation, either directly, as in the case of a poll-tax, or by reason of some subject of taxation—either real or personal property—within the taxing jurisdiction. The grant of authority to the city government to tax is limited by the nature of taxation and the rules of law governing its exercise, and where the statute is silent on the subject, the Courts are competent to apply the limitations thus imposed by the recognized principles applicable to the case.

The only ground on which the tax before us can be supported is, that the plaintiff was the owner of city stock. In substance and legal effect the city stock is merely the evidence of debt due from the city to the holder of its stock. It bears no analogy to stock in an incorporated company, as in the latter case the stockholder is part owner of the capital and earnings of the company, while the holder of the city stock has no right beyond that of claiming a sum certain, and interest at an agreed rate.

The question, then, resolves itself into this: whether the city can impose upon the non-resident holder of its obligation any part of the duty of supporting the municipal government. It is clearly against reason and justice. It is a case of a debtor claiming support from his creditor while acquiring the means of paying his debt.

A principle so clearly wrong needs no elucidation, nor need it be encumbered with laborious considerations of the legal idea of

the situs of property. It is simply an abuse of the taxing power, recognized at once by the application of those rules of right dealing that are open as well to the common sense of the community at large as to those fettered by legal learning.

[Reversed, Jenkins v. Charleston, 96 U. S. 449, 24 L. Ed. 760.]

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5 S. C. *405

*WELSH v. KIBLER.

(Columbia. April Term, 1874.)

[*Covenants* ⇐⇒46.]

The general covenant of warranty contained in a deed of release under the Act of 1795 includes a covenant for quiet enjoyment.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 46; Dec. Dig. ⇐⇒46.]

[*Covenants* ⇐⇒97.]

A covenant for quiet enjoyment is broken by a judgment in dower for money assessed in lieu of dower.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 134; Dec. Dig. ⇐⇒97.]

[*Limitation of Actions* ⇐⇒47.]

Where the breach of a covenant for quiet enjoyment is a recovery in dower, the Statute of Limitations does not commence to run against an action for the breach until the return of the Commissioners in Dower is confirmed. Q. Does it commence to run before payment in a case, where a sum of money is assessed in lieu of dower?

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 254–258; Dec. Dig. ⇐⇒47.]

[*Covenants* ⇐⇒128.]

In an action on a covenant for quiet enjoyment, where the breach assigned is a recovery in dower, the measure of damages is the sum recovered in lieu of dower, and for rents and profits, and for costs.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 243; Dec. Dig. ⇐⇒128.]

Before Mackey, J., at Lancaster, October Term, 1873.

Action commenced April 29th, 1872, by J. R. Welsh, against A. J. Kibler, as administrator of J. A. Cunningham, deceased, to recover damages for an alleged breach of a covenant for quiet enjoyment.

The answer denied the allegations of the complaint, and pleaded the Statute of Limitations.

The plaintiff proved that on the 8th January, 1861, one Hasseltine, and Cunningham, the intestate of defendant, executed their deed of release, whereby they conveyed to the plaintiff, for value, a certain lot of land in the village of Lancaster; that the deed contained a general covenant, in the form prescribed by the Act of 1795, to warrant and defend all and singular the premises unto the plaintiff, his heirs and assigns, against all persons whomsoever; that on the 3d April, 1867, Mary E. Massey, widow of Samuel B. Massey, deceased, filed a bill in equity against the plaintiff, wherein she claimed dower in the lot; that the plaintiff filed an answer to the bill and defended the suit; that this was done at the request of defendant, Cunningham being then dead; that on the 29th June, 1867, a decree was made for admeasurement of complainant's dower, and also for an account of rents and profits; that on the 17th June, 1868, the Commissioners to admeasure dower made their return, whereby they recommended that a certain sum of money be paid by the plaintiff in lieu of dower; that the plaintiff filed exceptions to the return; that on the 20th June, 1868, the Commissioner of the Court filed his report on the account for rents and profits, stating the sum due to the complainant to be $86.66; that on the 27th June, 1868, the report of the Com-

***406**

missioner of the Court was *confirmed, and a further decree made modifying the return of the Commissioners to admeasure dower, and ordering the plaintiff to pay to the complainant $166.66 in lieu of her dower; that on the 15th November, of the same year, the plaintiff paid to the Commissioner of the Court $370.72, in full of the sums above mentioned, the interest thereon and the costs of the suit, and that Hasseltine had been adjudged a bankrupt on his own petition.

The defendant offered no evidence.

His Honor charged the jury: (1) That the covenant of warranty was broken by the recovery in dower; (2) that the Statute of Limitations did not commence to run until the plaintiff paid the sums recovered from him; and (3) that the jury might find for the plaintiff, as damages, as well the sum paid by him on the decree for rents as that paid by him in lieu of dower.

The defendant excepted to the charge.

The jury found for the plaintiff $438.26, and the defendant appealed, on the ground of error in the charge on all the points above stated.

Moore, for appellant:

If dower is a breach of the covenant of seizin, then the right of action accrued to plaintiff before the bill in equity was filed, and plaintiff is clearly barred by the Statute of Limitations.—Jeter v. Glenn, 9 Rich., 374; Brisbane v. McCready, 1 N. & McC., 104; Hamilton v. Wilson, 4 Johns, 72; Mackey v. Collins, 2 N. & McC., 186. There was no disturbance of the plaintiff's possession—no entry or ouster; and there was, therefore, no breach of the covenant for quiet enjoyment. —Waldron v. McCarty, 3 Johns, 471; Greeny v. Kellogg, 2 Johns, 1; Dudley v. Trolliot, 3 T. R., 584; Wotton v. Hele, 3 Saund., 177; McCaskill v. McCaskill, 3 Rich., 196.

The breach was committed when the right was established by the decree declaring Mrs. Massey entitled to dower. The action, therefore, was barred when it was commenced.—Bugg v. Somers, 1 McM., 333; Lewis v. Lew-

is, 5 Rich., 12; 4 Kent, 538; Wilson v. McIlwee, 1 Strob., 66.

The measure of damages was the value of the dower, and there was error in the charge that the jury might find more than the sum assessed as such value.—Jeter v. Glenn, 9 Rich., 374.

Allison, contra.

*407

*Nov. 3, 1874. The opinion of the Court was delivered by

WRIGHT, A. J. The clause of general warranty usually inserted in conveyances of real estate in this State, following the form prescribed by the Act of 1795, (5 Stat., 255,) among other covenants, includes one for quiet enjoyment by the vendee, his heirs and assigns.—Jeter v. Glenn, 9 Rich., 374.

Such is the deed of Cunningham to Welsh. It is not disputed, on the part of the appellant, that it was broken, but it is insisted that the claim of dower worked a breach of the covenant of seizin, which became absolute on the death of Massey, the husband, and the action of the respondent is, therefore, barred by the Statute of Limitations.

The appellant further insists that, even conceding that there was a breach of the covenant for quiet enjoyment, the statute commenced to run on the 29th June, 1867, when the writ for the admeasurement of dower was ordered by the Court. A general warranty of title has the effect of a special warranty of seizin, and, therefore, an action may be maintained before eviction, if the vendor has no title at the time of sale. But where the warranty constitutes a covenant for quiet enjoyment only, then the statute will not commence to run until eviction.—Johnson v. Veal, 3 McC., 449.

In Jeter v. Glenn, 9 Rich., 374, it was held that the general warranty, in the form of conveyance prescribed by the Act of 1795, includes a contingent right of dower. In Lewis v. Lewis, 5 Rich., 12, it was held that where dower is claimed and assigned, or the value thereof assessed, the covenant for quiet enjoyment contained in the deed of conveyance is broken.

It is true, in general, that to constitute a breach of covenant for quiet enjoyment there must be an actual entry and ouster; where, as in this State, however, there is a claim of dower, it may be satisfied without an allotment by metes and bounds of one third of the land for the life-time of the widow, and, therefore, actual entry or ouster is not required before such covenant may be said to be broken. In fact, the demandant in dower does not rest on an adverse and independent title for its recovery, but founds her right on the assumption that the defendant is in possession by and through the seizin of the husband, during his coverture with her. The order, as in this case, confirming the right of the widow, and decreeing for her a certain

*408

amount of money, in compensation for *and in lieu of her dower in the premises, established in her behalf a money decree, which, while it gave no right of entry, could be enforced against all the property of defendant. It is in vain to contend that the allowance of the writ, under order of January 29th, 1867, "was fully equivalent to eviction, and that the Statute of Limitations then commenced to run." So far from an assignment of her one third being conferred by the order, it did no more than to require the Commissioner, to whom it was directed, to allow by metes and bounds one third of the land, and in the event that could not be done, without manifest disadvantage, then to assess one sixth of the whole value of the land, to be paid the widow, in lieu of her dower.

Until the return was confirmed, it gave no right to the demandant which she could enforce, and, in point of fact, exception was taken to the return and sustained. The final order of confirmation was made June 27th, 1868, and the summons in this action was served on April 29th, 1872.

We do not propose to decide whether the statute only commenced to run from the day of the payment of the amount decreed in favor of the widow, for, whether it commenced to run from the date of the decree or day of its payment, in neither event was the lapse of time sufficient to bar the action.

The third exception, too, cannot be sustained. The damages to which the respondent here was entitled for the breach of the warranty was the amount of the full recovery of the widow against him. That included the sum found to be due, as well for rents and profits and the costs as for the sum assessed in lieu of the dower.

This was all recovered by the widow in her suit against him, and this he is entitled to reclaim from the appellant on his breach of warranty.

The motion is dismissed.

MOSES, C. J., and WILLARD, A. J., concurred.

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5 S. C. *409

*Ex Parte HEWETT.

(Columbia. April Term, 1874.)

[*Constitutional Law* ⇐180; *Homestead* ⇐7.]

As against creditors, whose debts were contracted before the adoption of the present Constitution of the State, the homestead exemption therein provided for cannot be allowed, for, as to such debts, it impairs the obligation of contracts.

[Ed. Note.—Cited in Bull v. Rowe, 13 S. C. 365; Agnew v. Adams, 17 S. C. 370.

For other cases, see Constitutional Law, Cent. Dig. § 499; Dec. Dig. ⇐180; Homestead, Cent. Dig. § 9; Dec. Dig. ⇐7.]

Before Thomas, J., at Darlington, December, 1874.

This was a petition by Columbus W. Hewett and Brainard N. Hewett, minor children of Thomas N. Hewett, deceased, for the homestead exemption allowed by the Constitution.

The petition was filed March 18th, 1872, in the Probate Court, and was heard, in the first instance, by the Judge of that Court.

It appeared that Thomas N. Hewett died during the late war, leaving some real estate, which had been sold before the petition was filed, under a decree made by the Court of Equity, in a case of Ham against Nelson and others, to which the petitioners were parties defendant.

The bill in Ham v. Nelson was for sale of the realty and to marshal assets. It was filed December 30th, 1867, and the decree for sale was made September 29th, 1868. The sales were made in October, 1868, and November, 1869, and the proceeds were in the custody of the Circuit Court.

The Probate Judge made no decree, but suggested that application be made to the Judge of the Circuit Court.

The application was now made to the Circuit Court, and His Honor made a decree that $1,000 of the proceeds of the sales be invested in the purchase of a tract of land, for the use of the petitioners, as a family homestead.

The creditors of Thomas N. Hewett, deceased, appealed.

Edwards & Dargan, for appellants.

Charles, contra.

Nov. 3, 1874. The opinion of the Court was delivered by

WRIGHT, A. J. We do not think it necessary in this case to determine whether, after the dismissal by the Probate Judge of the petition of the respondents, filed in 1868, claiming a right of homestead in the land of which their father died seized—no appeal

*410

hav*ing been taken—they are not thereby precluded from ever again setting up such demand. Neither is it necessary to consider whether, being parties to the bill—answering, without setting up the right of homestead, and making no objection to the sale of the land—they can now claim the homestead privileges, either in the real estate sold or by the appropriation of any of the proceeds of its sale for the investment in land for such purpose.

The conclusion of the Probate Court, on their second petition, filed 18th March, 1872, did not amount to a judgment. It was but the bare suggestion of the Judge, and the only mode by which any status in Court can be accorded to the said respondents is to regard them as intervening by petition in the cause pending in the Circuit Court.

The intestate died during the late war. In December, 1867, a bill was filed in the Court of Equity, to marshal the assets of his estate, and for a settlement of it. The petitioners were parties, answering in due form. On 29th September, 1869, an order was made for the sale of all the lands of which he died possessed, which was concluded by 7th of December, 1869.

The appellants are his creditors, and, as he died before 1868 they were creditors prior to the adoption of the State Constitution, which, by the 32d Section of the 2d Article, exempts the homestead of each family, not to exceed the value of a certain amount, from liability to levy or sale on mesne or final process from any Court. The debts, therefore, to meet which the lands were sold, must necessarily have arisen before the adoption of the Constitution.

We have decided, in Cochran, Ex'r, v. Darcy [5 S. C. 125] (Nov. T., 1873,) that the Constitution, so far as it proposed by the said provision to affect contracts of a date prior to its ratification, was in violation of Article I, Section 10, of the Constitution of the United States, which prohibits the passage of laws impairing the obligation of contracts. The creditors here all represent debts which existed before the adoption of the Constitution, and, as to them, the homestead provision is void and of no effect.

The motion of the appellants to reverse the decree of the Circuit Judge is granted.

MOSES, C. J., and WILLARD, A. J. concurred.

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5 S. C. *411

*LUCKEN v. WICHMAN.

(Columbia. April Term, 1874.)

[*Equity* ⇐377; *Jury* ⇐13.]

In a case triable by the Court, under Section 277 of the Code of Procedure, a party has no right to demand a jury unless he proceeds in the manner prescribed by the 29th Rule of the Circuit Courts.

[Ed. Note.—Cited in Ex parte, Apeler, 35 S. C. 420, 14 S. E. 931.

For other cases, see Equity, Cent. Dig. § 788; Dec. Dig. ⇐377; Jury, Cent. Dig. § 39; Dec. Dig. ⇐13.]

[*Trial* ⇐367.]

Where a jury is not demanded in a case triable by the Court the mode of trial, whether by the Judge, a Referee, or a jury, is discretionary with the Court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 879, 886; Dec. Dig. ⇐367.]

[*Executors and Administrators* ⇐473, 474.]

An action against an administrator, for account and distribution, by plaintiffs, alleging themselves to be the wife and children of the intestate, is triable by the Court, although the only issue made by the pleadings is the fact of marriage.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2051; Dec. Dig. ⇐473, 474.]

[*Jury* ⟸13.]

The declaration in the Bill of Rights, Section 11, that "the right of jury trial shall remain inviolate," does not apply to cases within the equitable jurisdiction of the Court.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 35–83; Dec. Dig. ⟸13.]

[*Trial* ⟸370.]

Where, in cases triable by the Court, the Judge is in doubt as to the conclusion deducible from the evidence, he may submit the question to a jury, and if his conscience is not enlightened by the finding, he may submit it to another jury, or even disregard the finding altogether, and adopt a different conclusion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 881, 885; Dec. Dig. ⟸370.]

[*Appeal and Error* ⟸901.]

Where the appeal is from a decision resting wholly upon fact, the onus is upon the appellant to make it clearly appear that the conclusion is erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1771, 3670; Dec. Dig. ⟸901.]

Before Maher, J., at Colleton, February Term, 1873.

This was an action by Rosina A. Lucken and her four infant children, Catharine A. Lucken, Theodora B. Lucken, John T. Lucken and Welham Lucken, against Albert Wichman, administrator of Henry W. Lucken, deceased, for account and distribution.

The complaint alleged that Henry W. Lucken died intestate, leaving as his heirs and distributees, the plaintiff, Rosina A., his wife, and the other plaintiffs, his children; that he left a considerable personal estate, and that the defendant had administered thereon.

The fact of marriage between the plaintiff, Rosina A., and the intestate, was denied by the answer, and this was the only issue made by the pleadings.

The case was tried by the Court without a jury, and His Honor, after hearing the evidence, written and oral, and argument of counsel, filed a judgment, in which he stated his finding of fact to be, that no contract of marriage had ever been made between the intestate and the plaintiff, Rosina A., and that they never held to each other the relation of husband and wife, and adjudged that the complaint be dismissed with costs.

The plaintiff appealed upon grounds, which objected—

1. To the jurisdiction of the Court to try the issue in the action without a jury.

*412

*2. To the trial of the issue in the action by the Court without a jury.

And upon other grounds setting forth exceptions to the conclusions of the Court upon questions of fact.

Henderson & Behre, Youmans, Williams & Fox, for appellants.

Tracy & Bell, contra.

Nov. 9, 1874. The opinion of the Court was delivered by

MOSES, C. J. That the question of marriage was to be considered and determined by the issue made in the cause did not necessarily demand its reference to a jury. Important as that fact and the consequences which follow it may be to the appellants, it, of itself, constitutes no exception to the mode of trial provided by law.

Issues of fact in certain actions must be tried by a jury, unless waived in the manner prescribed by the Code, (Section 276,) while "every other issue" is triable by the Court which, however, may order it, or any specific question of fact involved therein, to be tried by a jury or Referee, (Section 277). The 29th Rule of the Circuit Court directs the course which must be followed in cases where the trial of issues of fact is not provided for in Section 276 of the Code, when either party shall desire a trial by jury.

It appears from the record before us that a jury was not claimed under the Rule, and the mode of trial, therefore, was discretionary with the Court. The complaint was for an account and distribution of the estate of an intestate. The form of proceeding in that Court, where relief is invoked through other than its common law power, never required a jury as an indispensable adjunct. The whole case is left to the determination alone of the Judge, and the 11th Section of the Declaration of Rights, which requires that "the right of jury trial shall remain inviolate," was not impaired, because no change in the administration of the equitable functions of the Court had been made in this regard.

If, however, the parties had a legal claim to a jury, and withheld their application, with what semblance of reason or justice can they complain of any deprivation of their rights? Having the power to demand a reference of the issues of fact to a jury, they chose to submit it to the decision of the

*413

Judge, who had complete *jurisdiction without its intervention. Can they, after this, complain that his judgment is void, when they refrain from asking, in due form, a trial by jury, which, on demand, must have been accorded to them?

The issues of fact, as well as of law, were for the judgment and determination of the presiding Judge, and if his conclusion, from the testimony in regard to the facts, was, in his own mind, so free from doubt as not to require the aid of a jury in their solution, any reference to such a tribunal would have really been without meaning or design. The purpose of the evidence was to produce a conviction in the mind of the Court, and when this was accomplished, its whole end had been answered. If it was in doubt as to any question of fact arising in the case, it was at liberty, at its discretion, to refer it to a jury. Such, too, was the practice here-

tofore in the highest appellate Court in this State, in cases brought before it involving facts of doubtful issue. But, even there, the verdict of the jury on the facts was not held conclusive, and it would either disregard the finding and decide for itself, or send the issue to another jury for trial. This practice was not founded on any supposed rights of the parties, or followed out of any deference to them, but was purely, and only, to satisfy the conscience of the Court. If it was convinced by the testimony, it adopted its own conclusions, independent of any aid or sanction through the help of a jury.

Here, after a very full, nay, exhausted examination and consideration of the evidence, the Circuit Judge has reached a conclusion, so far as we can infer from his decree, without any reservation of doubt.

We do not propose to enter into any discussion in regard to the testimony introduced at the trial by the respective parties, on the comparative weight of which the judgment of the Court rested.

The existence of a marriage is a question of fact. Whether founded on an express contract, or inferred from circumstances, which necessarily imply that the relation of husband and wife existed between the parties, the result must be obtained through the medium of the evidence adduced in the cause. If it depends on an express contract, there will be less difficulty in ascertaining the fact, for there the evidence will refer to a particular transaction, and nothing is to be determined but its effect. If, however, it depends on cohabitation and repute, then the effect must be judged by a comparison of all the circumstances relied on by both sides, and

*414

even cohabitation *and repute will not avail "where the proof is clear that the parties were never married." Such is the result of the authorities in South Carolina, and, if we err not, in all the States where marriage is regarded merely in the light of a civil institution.

Where a decree resting alone on facts is sought to be reversed, the contestant must show that it is clearly erroneous. The obligation thus imposed upon him is necessarily a light one, for if the error is clear, there will be no difficulty in exposing it. In Sullivan v. Thomas, 3 S. C., 545, this Court is said to have all the powers of the late Court of Appeals and Court of Errors, as it regards "cases of Chancery," and can revise any decision on the ground of errors of law or fact. "The Court of Appeals would not disturb the decision of a Judge, as to a question of fact, when the determination of the fact rested upon doubtful or disputable proof, but sustained the conclusions of fact of the court below, unless clearly erroneous."—Ibid. In Williams v. Beard, 1 S. C., 325, we had occasion to declare, after a review of the course of the Courts of the last resort in this State, in regard to the judgment of a Chancellor, on mere questions of fact, that a party seeking its reversal must shew "that the overbearing weight of the testimony leads to a conclusion different from that to which, on consideration of it, he has adopted." The same rule was announced in Womack v. Austin, 1 S. C., 438. We can discover in the decree before us no such error of fact as to authorize our interference.

It is true, as said in the able argument of the counsel for the appellants, that in cases of this character the Court will, if possible, give such a construction to the acts of the parties as will save the reputation of the woman and free the children from the brand of bastardy.

Where the acts in proof create such a doubt that the judicial mind vacillates and hesitates between adverse conclusions, the benignant rule which requires a construction favorable to that result, which will preserve the character of those concerned, may well be applied. But where the Court is not left in doubt, its consequences upon individuals must be disregarded.

The marriage relation must, in fact, exist between parties who claim the benefits which follow it. The proprieties which regulate society, and without which some of its dearest and most cherished objects would be defeated, must be preserved in their purity. In Agg v. Davies, 2 Phil., 344, it is said:

*415

"The public has an interest *in having the lawful relation of parties clearly ascertained." Mr. Poynter, in his work on Marriage and Divorce, p. 56, says: "While society grants certain civil advantages to marriage, it has a right to dictate the conditions on which such advantages are to be obtained;" * * * "besides, as marriage depends on society for protection, it is highly expedient that its existence should be unequivocally demonstrated."

We fail to perceive in the case any evidence by which the marriage relation between the parties can be said to have existed, and the motion is dismissed.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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5 S. C. 415

THEW v. PORCELAIN MANUFACTURING COMPANY.

(Columbia. April Term, 1874.)

[*Judgment* ⇦68.]

A confession of judgment by a manufacturing corporation, given by its President, for money borrowed, set aside, it not appearing that power to give it was expressly conferred, or was to be inferred from the acts, declarations and course of dealing of the corporation,

or that the confession had been ratified and confirmed by acquiescence or otherwise.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 113, 116, 118, 120, 123, 125, 127; Dec. Dig. ⇐68.]

[*Corporations* ⇐420.]

The President of a manufacturing corporation has no power, merely as President, to give a confession of judgment.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1661; Dec. Dig. ⇐420.]

[*Judgment* ⇐654.]

A judgment dismissing a complaint, not upon the merits, but upon some technical ground, as that neither the complaint nor the evidence showed a cause of action sufficient to give the Court jurisdiction by action under the Code, is no estoppel.

[Ed. Note.—Cited in Duke v. Postal Telegraph Cable Co., 71 S. C. 102, 50 S. E. 675.

For other cases, see Judgment, Cent. Dig. § 1165; Dec. Dig. ⇐654.]

[*Judgment* ⇐67.]

There was no Statute of Limitations in 1868 barring the right to move to set aside a judgment for irregularity.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 113, 116, 118, 120, 123, 125, 127; Dec. Dig. ⇐67.]

[*Corporations* ⇐384.]

A confession of judgment by a corporation need not be under its corporate seal.—Ob. dic.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1801; Dec. Dig. ⇐384.]

[*Judgment* ⇐37.]

A confession of judgment by a corporation, through its officer duly authorized, is the direct act of the corporation, and not its act by agent or attorney, within the Act of 1785.—Ob. dic.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 50; Dec. Dig. ⇐37.]

Before Carpenter, J., at Edgefield, March Term, 1873.

This was a special proceeding, commenced by rule to show cause, to obtain an order setting aside a judgment for irregularity.

The facts were these: The Southern Porcelain Manufacturing Company is a corporation, under a charter from this State, granted in the year 1856. In 1868 it carried on business in the County of Edgefield, at a place which was afterwards included within the limits of the new County of Aiken. R. B.

*416

Bullock was then, and for *several years previous had been, the President of the corporation, and G. Schaub, its General Agent. On the 15th day of May, 1868, Bullock, acting as President of the corporation, gave to "George W. Thew, Cashier of the National Bank of Augusta," in the State of Georgia, a confession of judgment "for the Southern Porcelain Manufacturing Company," in the sum of $56,383.98. It was signed

"Southern Porcelain Man'g Co.,
"R. B. Bullock, President and Treasurer," [L. S.]

and immediately below the signature was a note, or memorandum, in these words: "The company having no common seal, R. B. B.," and it was written or endorsed upon a declaration in assumpsit, in which Thew, as Cashier, was plaintiff, and the corporation was defendant, and which counted upon a promissory note for the same sum as that of the confession. This note was given in consolidation of two other notes, dated the 24th March, 1868, one for $35,185.86, signed by G. Schaub, as the General Agent of the corporation, and the other for $20,615.75, signed by Bullock, as its President. The confession was given at Augusta, and on the 19th day of the same month and year judgment thereon was duly entered in the Clerk's office of the Court of Common Pleas for Edgefield County.

The consideration of the two notes, dated the 24th March, 1868, was money previously and at different times loaned by the bank for the use of the corporation. The last loan was one made in August, 1867, for $5,000, at which time it was agreed between Bullock and the officers of the bank that, in consideration of the loan then made, the whole debt due to the bank should be secured by a confession of judgment with stay of execution for one year. The consolidation note and confession of the 15th May thereafter was given in pursuance of that agreement.

Shortly after the confession was given Bullock resigned his office of President, and James Hope succeeded him.

In February, 1871, the corporation commenced an action, by summons and complaint under the Code, against Thew, to set aside the judgment for irregularity. This action was tried at Aiken, May Term, 1873, before His Honor Judge Maher, who decided the case upon its merits, and, on the 5th August, filed his judgment, whereby he dismissed the complaint, on the ground that the judgment by confession was valid and binding upon the corporation. An appeal was taken to the Supreme Court by the corporation, and, at November Term, 1873, the

*417

appeal was heard. The Supreme *Court declined to consider the case upon its merits, holding that neither the complaint nor the evidence stated or established a cause entitling the plaintiff to relief in the form of proceeding it had adopted, that is, by action under the Code; that, in that form of proceeding, the Court was without jurisdiction; and, on the 22d December, 1873, the judgment of the Court was filed dismissing the appeal. See the case as reported, [Southern Porcelain Mfg. Co. v. Thew] ante, p. 5.

Thew, being about to enforce his execution upon the judgment by confession, by levy and sale of the property of the corporation, on the 1st January, 1874, a notice was served upon him, that, upon the evidence and affidavits used at the trial of the action above mentioned, a motion would be made before Judge Maher, on the 5th, for an

order requiring him to show cause before the Court for Edgefield why the judgment should not be set aside and vacated, upon the grounds taken on the appeal from Judge Maher's decision; and also on the further ground that the confession was made in Augusta, in the State of Georgia, and in fraud and collusion between Bullock and the bank; and also to set aside wholly, or to suspend until the final decision in this proceeding, the execution on the judgment.

The motion was made before His Honor Judge Maher, who granted an order, by which, after reciting that the Judge of the Fifth Judicial Circuit was absent from the State, he ordered that the execution be stayed until further order therein shall be made by the Court of Common Pleas for the County of Edgefield. This order was dated January 5th, 1874.

Thew, the plaintiff in the judgment, gave notice that he appealed from the above order, and would move the Supreme Court to revoke the same, on the ground that it is contrary to law; that the Judge of the Fifth Judicial Circuit has no jurisdiction of the case, and, if he had, that it is res adjudicata.

On the 23d January, 1874, a second notice was served upon Thew, in nearly the same terms as the notice of the 1st January, above mentioned, that a motion would be made before Judge Carpenter for an order to show cause why the judgment should not be set aside and vacated upon the same grounds set forth in the first notice; and on the 21st February, Judge Carpenter made an order to show cause, as applied for, and also an order to suspend all proceedings upon the execution until the final determination of the proceeding.

*418

*Thew made return to the rule, wherein he showed, for cause, why the judgment should not be aside and vacated—

1. That the judgment was confessed and entered in May, 1868, and the acquiescence therein for near six years, even had there been fraud in the same, constitutes an implied ratification, three years being sufficient to raise such an implication, even against an infant.

2. Because the confession was made in good faith, to secure a bona fide debt, which was discounted by the bank in the regular course of business, and used by the company for the improvement of their property.

3. Because, if there be fraud in the confession, it was committed by R. B. Bullock and George Schaub, who the company held out to the commercial community, the one as their President and Treasurer, sole Director and accredited Commercial Agent, the other as their General Agent, thus enabling them to practice a fraud on the bank, who is an innocent creditor.

4. Because, on the 24th of March, 1868, George Schaub, the General Agent aforesaid, the active mover in this proceeding, made his note for $35,185.86 to the bank, at thirty days, which is signed "G. Schaub, General Agent Southern Porcelain Manufacturing Company," which note is endorsed by R. B. Bullock and J. Jefferson Thomas, the then partner of Schaub, and a stockholder in the company; and on the same day R. B. Bullock made another note for $20,615.75, signed by him as President, and endorsed by him, which two notes, with the interest, make the note on which the confession was made; so that if there be fraud in the transaction, it was a fraud committed on the bank by the accredited agents of the company.

5. Because the case is res adjudicata.

6. Because the Statute of Limitations is a complete bar, and which is now pleaded.

7. Because the Court has no jurisdiction.

The return was supported by affidavits of W. E. Jackson, President of the Bank, Thew, its Cashier, and Judge Gould, its Solicitor at the time the confession was given.

On the 10th March, 1874, the rule was heard, and His Honor made the following order:

Carpenter, P. Upon hearing the return of the plaintiff, George M. Thew, to the order requiring him to shew cause why the judgment in this case should not be vacated and

*419

set aside, and after due *consideration of the same, and of the argument thereupon by the counsel of the respective parties, it is ordered that the defendants, the Southern Porcelain Manufacturing Company, have leave to file their suggestion, setting forth the grounds upon which they seek to vacate and set aside the judgment by confession in this case; that the said plaintiff, George M. Thew, do plead to the said suggestion so to be filed; and that the said defendants be the actors in the said suggestion.

And it is further ordered, that after the filing of such suggestion, a copy of the same be served upon the attorneys of the said plaintiff, and that, within thirty days thereafter, a copy of the pleading of said plaintiff to the said suggestion be served upon the attorneys of the said defendants; and that, thereupon, the issue so made up be entered by the Clerk upon the proper docket of this Court.

From the above order the plaintiff appealed, on the grounds:

1st. That it is contrary to law, for, while the notice charges "fraud and collusion," the affidavits do not support the charge.

2d. That His Honor Judge Carpenter has no jurisdiction.

3d. That the case is res adjudicata.

4th. That acquiescence for three years is ratification.

5th. That the Statute of Limitations is a complete bar.

The defendant also gave notice of appeal, as follows:

From the order made by His Honor Judge Carpenter, dated and entered in the office of the Clerk of the said County, on the 10th March, 1874, the defendants appeal, and will endeavor to maintain that the proper order in this proceeding would have been an order to vacate and set aside the judgment in this case; and in support of their said appeal the defendants will rely upon the grounds following:

In the return of the plaintiff to the order requiring him to show cause why the judgment by confession in this case should not be set aside, there is no denial or question whatever of the facts following:

1. That the confession of judgment in this case was made before "action brought."

2. That the corporate seal of the defendants, the Southern Porcelain Manufacturing Company, is not affixed to that confession.

3. That said confession of judgment was made in the city of Augusta, in the State of Georgia, by Rufus B. Bullock, then the President of the said company; and it is, there-

*420

fore, respectfully *submitted that the said judgment is, by the operation and effect of the Act of Assembly of 1785, (7 Stat., 232,) "absolutely null and void;" that His Honor the Circuit Judge ought, therefore, to have ordered that the said judgment be vacated and set aside; and he having failed so to do, that such order ought now to be made by the Supreme Court of South Carolina.

[For subsequent opinion, see 8 S. C. 286.]

Aldrich, for Thew, plaintiff.
Carroll, Bacon, for the corporation.

Nov. 9, 1874. The opinion of the Court was delivered by

WRIGHT, A. J. By the understanding of the counsel on the hearing of the case in this Court, its consideration is not to be limited to the grounds of appeal from the order of His Honor Judge Maher, of January 5th, and that of His Honor Judge Carpenter of March 10th, 1874.

The discussion embraced all the points not only made by the pleadings and the evidence in the case of the Southern Porcelain Manufacturing Company and Thew, Cashier of National Bank of Augusta, but involved the grounds on which Judge Maher, by his decree of 5th August, 1873, sustained the confession of judgment which is the subject of the present litigation between the parties. Its validity is now the question for our determination. There can scarcely be any dispute as to the legal principles which are to be applied in the examination and decision of the case before us. So far as they refer to the relations which exist between principal and agent, they must be so well understood as scarcely to need a reference to the authorities which establish them.

Where a question is made as to the acts of agents, which cannot be referred to any special or express authority, and can only have validity through an implication of authority, the same rule applies to corporations which obtains between individuals in the same connection. "Indeed, by the whole course of decisions in this country, corporations, in their contracts, are placed upon the same footing with natural persons, open to the same implications, and receiving the benefit of the same presumptions."—Ang. & A. on Corp., 218.

The act of no agent can bind his principal, if it is not within the scope of his authority; but the extent of the authority is not to be regulated by, nor is it dependent upon, an express grant; but it may be measured by the transactions of the agent with third per-

*421

*sons, with the knowledge and approval of the principal, where the rights and interests of the latter are concerned.

There may be no error in respect to the legal principle upon which the Circuit Judge rests his conclusions. In our view, however, the error consists in drawing wrong conclusions from the facts, and applying the requisitions of the law, as if to legitimate deductions.

The principle affirmed by Mr. Justice Story, in Bank v. Dandridge, 12 Wheat., 70 [6 L. Ed. 552], and referred to in the decree, must be admitted as a controlling rule, where it applies. It is founded on the doctrine of presumption, from which "a delegated authority" is inferred. Giving it the utmost possible extent, and examining with care the pleadings and the evidence in the case, we cannot conclude "that the confession of judgment in question was an act within the powers conferred upon President Bullock, comprehensive as they may have been."

He who proposes to bind another by the act of a third party must show his authority to do so. He who avers that an act in his favor, affecting another, committed by a third person, was by the authority of such other, must show it. While he is not required to exhibit written warranty, or, even between natural persons, a specific verbal direction, he must show such a course of action, in regard to his dealings for and on behalf of the supposed principal, with his knowledge, as would lead others, with whom he dealt, naturally to conclude that he was clothed with full power to execute the proposed act. It is not to be understood that the rule is to be so narrowed as to require a party to show that an act of the identical or like character with the one with which it is sought to charge the principal has been recognized and sanctioned by him. If the

act can be referred to general powers, presumed from other and previous transactions —if the nature of the former dealing was of a kind to impress the community, from their confirmation by the principal, with the belief that a general and unrestricted power in this particular line of business was intended to be conferred—or, by silence of the principal, an impression, even erroneous, was made on the public, he would still be bound.

The rule, as stated by Chief Justice Marshall, in Schimmelpennich et al. v. Bayard et al., 1 Peters, 290 [7 L. Ed. 138], is as comprehensive in presenting the principle in question as if it had been extended by more diffusive expression. He says: "It is be-

*422

lieved to be a general *rule that an agent with limited powers cannot bind his principal, when he transcends his powers. It would seem to follow that a person transacting business with him, on the credit of his principal, is bound to know the extent of his authority; yet if the principal has, by his declaration or conduct, authorized the opinion that he had given more extensive powers to his agent than were, in fact, given, he could not be permitted to avail himself of the imposition, and to protest bills, the drawing of which his conduct has sanctioned." This inference depends on the nature of the acts themselves, and the effect which is to be given to them through the evidence in the particular case.

The Circuit Judge here has drawn a conclusion from them adverse to the company, which is claimed to be bound by the judgment.

Our examination of the pleadings and the evidence leads us to a different result. We are not unmindful of the indisposition of the Court to interfere with the conclusions of the Circuit Judge on questions of evidence. His decision on the facts will not be disturbed, when their determination rests upon doubtful or disputable proof, unless it is clearly erroneous and overborne by the weight of testimony.—Sullivan v. Thomas, 3 S. C., 545; Womack v. Austin, 1 S. C., 428; Blackwell v. Searles, 1 S. C., 117; Williams v. Beard, 1 S. C., 325. And the onus will be thrown on those who assail it to show wherein the error consists.

After 10th March, 1862, according to the by-law on that day adopted, the stockholders of the Porcelain Manufacturing Company constituted the Board of Directors, three of whom were to make a quorum. Bullock, on the 1st of March, 1864, was elected President, and so continued until May, 1869. Although it is true that the general if not the active business of the company was committed to him, we fail to discover in the testimony any act of his in negotiating loans on account of the company, without its knowledge, or engaging in any "transaction involving precisely the same general powers." There is a manifest difference between the incurring of debts by the President or Manager of a corporation, for the current expenses which are absolutely necessary for the prosecution of the work in which it is engaged, and raising money, on loans, pledging the property of the company for their payment. The one way will be looked for in the routine of a business, the other is of an extraordinary character, only occasionally resorted to, and, from the very circumstances, should demand of those who treat

*423

*with the officer of a corporation, in a matter of that kind, at least the exercise of so much caution and prudence as may be necessary to ascertain the authority under which he acts. If, as is said, the company was required, at its peril, to see that its officers did not habitually transcend their powers, it surely may be answered that parties dealing with one who professes to represent another, and to bind him by his acts, should be required to make some inquiry as to the right and power by which he is authorized to engage in the particular transaction. It is not contended that Bullock had even any general power to contract debts on the credit of the company. The very course of the stockholders, in regard to loans for the use of the company, seems to imply a want of power on the part of Bullock to raise them at his own will and at his option. Thus, on January 10th, 1866, the stockholders authorized the President to negotiate a loan of $5,000, and pledged therefor the works of the company. On 23d April, 1866, another loan of $8,000 was authorized to be raised by the President. On the 6th September, 1866, a report was made to the stockholders by the President, giving a full and elaborate account of the progress of the company, and the character and extent of its operations.

It, therefore, appears that to meet bills due, and to fall due, (including the previous loans,) the company, on the 1st of October following, would have a total indebtedness against it of $43,000, for the payment of which the works and franchises of the company were pledged.

As is said by the Circuit Judge, "in what form the company's property and franchises had been pledged, was not stated in this report, nor does it appear in the evidence. It may have been merely a pledge of credit." No loan was suggested in the report, but a recommendation that the required amount be raised by an assessment on the capital stock of fifty per cent. The paper was referred to a Committee to report on a fixed day, and, in the meantime, a resolution was adopted authorizing the President to negotiate a loan of $19,000, and to pledge therefor the property of the corporation to pay off the indebtedness of the company and place it in full operation. On the 10th September there-

after the Committee made its report, and recommended the assessments—the amount to be secured by a resolution of the stockholders pledging the property and profits of the concern for its payment.

The amount was to be raised by notes of

*424

the stockholders, at *ninety days, without interest. That if the said call was not responded to by the 1st October ensuing, the President was authorized to sell the property and works of the company to pay the debts of the concern, the surplus, if any, to be divided pro rata among the stockholders. The report was received, the resolution appended adopted, and the report, both of the Committee and the President, with accompanying papers, ordered to be printed. The notes were given payable at this very bank, to the order of President Bullock, and were met after maturity. The company, after this provision, not only for the payment of its debts but for the current expenses on its work, may well have rested under the impression that its affairs had all been satisfactorily arranged, particularly when they had individually incurred a liability for the benefit of their corporation, and more especially when their President had not communicated to them any necessity for a new loan, or to raise money in any form.

The ratification by the Board of the acts of Bullock merely affirmed what he had already done, not in the raising of any loan, but in the contracting of debt, which the company recognized and assumed. So far from implying a power to negotiate loans, or borrow money in the future, the very fact that its sanction was deemed necessary to confirm what had been done was a declaration by the company that it had never been granted. The action, too, of the stockholders, in raising the amount to meet the liabilities of the company by an assessment upon themselves, requiring a loan to be secured "by a lien upon the property and profits of the concern for its payment," is a clear intimation that they preferred to be themselves creditors of their own company, rather than to stand in that position either to the President or others. It is also not without significance in another regard, and that is, the apparent intention, by their action, of freeing their corporation from debt, and so keeping it, and if they failed to raise the money through themselves, to sell the property and wind up the company.

After this deliberate action on the part of the body by accommodation loans to President Bullock, and by discounts of drafts of Schaub, the General Agent of the company, within a little over six months from the time that the stockholders had furnished Bullock, for the use of the company, with $50,000, a liability was claimed against it by respondent, the National Bank of Augusta, for $65,000, including the $5,000 advanced to the President as a further loan, in considera-

*425

tion of the confession of judgment, and *this, too, on the part of a bank at which the notes of the stockholders had been payable, and through which they had been collected, and which, it is no forced inference to draw, did know the action of the corporation in September, 1866.

Assume, for the present, that the company was liable to the bank for the debts thus created, was the confession and act within the scope of the powers of the President of the company? for if it was not, it did not bind it. That it was not in the ordinary powers of his office, is almost admitted by the attempt to sustain it as an implied authority, from the course of the dealings of the company, in regard to the President, and his course in the management and conduct of its affairs; for no act, not within such ordinary course, can bind the corporation, unless done at its instance, or direction, or with its permission.

In Fulton Bank v. N. Y. and Sharon Canal Co., 4 Paige, 134, Walworth, C., said: "There is certainly nothing in the acts of incorporation giving the President any greater control over the property or funds of the companies than is given to any other Director. He, therefore, was not authorized to draw checks for money deposited in the name of the company, by virtue of his office as President merely." So here, unless there is something to justify the bank in supposing that Bullock had power to secure the debt by giving a judgment, the confession is void and without effect. Even if conceded that Bullock had power to contract debt for the company to an unlimited extent, this could not imply the right to confess judgment to a creditor. The authority to contract debt for and on behalf of the company is one thing, but the right to give preference to a creditor is another; and it is still another to give a lien, which binds the whole property of the corporation, depriving it of the power to dispose of any of it, no matter what the pressure or necessity, or how small the whole debt, in comparison with the value of the property bound, without the permission of the creditor who may hold such lien.

The profits and property of this company had been pledged by its action in September, 1866, for the security of the amount then advanced by the stockholders. The irresistible presumption is, that the notes were not paid by the earnings of the company, and the lien, therefore, not released. But be that as it may, this resolution of the Board shows that the stockholders were not wanting in

*426

*the prudence which dictated a retention of their own property and its profits within their own control.

There is another circumstance, worthy of notice, in regard to the confession. By the finding of facts it appears "that President Bullock affirmed he was fully authorized to make the arrangements, and pledge the property of the company to secure the debt. Judge Gould, the solicitor of the bank, declined giving an opinion upon South Carolina law, and consulted with Judge Aldrich, of that State, upon the question of the validity of the proposed confession, Judge Aldrich advising that a copy of the resolution authorizing Bullock to act in that matter be filed with the record."

According to the affidavit of Judge Gould Bullock said: "There was no express resolution of the company authorizing him to make the arrangement." Full opportunity was thus afforded the bank to ascertain the exact nature of the powers conferred by the Southern Porcelain Manufacturing Company on its President, so that it could have been at once ascertained whether he had authority to make the proposed confession. Not only were they put on the inquiry for the written authority, if any existed, but their counsel advised that a copy of the resolution under which Bullock claimed his right to act should be filed with the record. "Where an authority purports to be derived from a written instrument, in such a case the other party is bound to take notice that there is a written instrument, and he ought to call for and examine the instrument itself, to see whether it justifies the act of the agent; for, under such circumstances, it is but a reasonable precaution and exercise of prudence, and he is put upon inquiry, and if, from his omission to examine, he should encounter a loss from the defective authority of the agent, it is properly attributable to his own fault, since he must know that he has no other security than his reliance upon the credit of the agent."—Story on Agency, § 72.

How can the bank complain that Bullock was enabled to practice any wrong by the position in which he was placed by the company, when it had within its power the means of ascertaining the precise authority with which he was vested, by a reference to the very terms by which it was granted.

We cannot see how the act of the confession by Bullock can be sustained by any reference to his general powers as President and Manager of the company, clothed with

*427

all the powers neces*sary to its proper management. In Ang. & A. on Corp., 292, it is said: "The general agent of a manufacturing corporation is not authorized to sell or convey the real estate, or to mortgage or pledge as security for a loan the machinery of the company, without special authority, though it may be incident to his power, as agent, to borrow money, give promissory notes, and many other acts, in the ordinary course of the business of the company." Stone v. Wyse, 7 Cowen, 219, is one of the cases referred to in support of the text, which it thoroughly sustains. The Court therein say: "It may be incidental to his power, as agent, to borrow money, give promissory notes, and to do many other acts in the ordinary business of the company; but the idea is quite novel that, merely as agent, he could sell or convey the estate. To effect such an object special authority seems indispensable, nor is there any principle or precedent in support of the power set up in this case."

Our examination of the testimony does not satisfy us that there was, on the part of the company, any act of any kind which can be construed into a ratification or recognition of the judgment.

The ground assumed by the appellant, that the matter is res adjudicata, cannot be maintained.

The judgment of this Court in the case of the Porcelain Company v. Thew, Cashier, did not dispose of the merits or pass upon any of the points on which the Circuit Judge based his decree. It was because the complaint did not set out any sufficient cause of action, and that none was made by the evidence introduced without objection by the defendant, that the appeal was dismissed. There was no ground alleged upon which the jurisdiction of the Court could attach in regard to the relief sought. The merits were not determined.

The note to the case of the Dutchess of Kingston's Case, 2 Smith's Lead. Cases, 672, well expresses the rule which must operate here in the particular now considered. "It is well settled that the estoppel of an adjudication made on grounds purely technical, and under such circumstances that the merits could not come into question, will be limited to the point actually decided, and will, therefore, not be a bar to a subsequent action brought in such a form as to avoid the objection which proved fatal in the first."

In Gist v. Davis et al., 2 Hill Eq., 342 [29 Am. Dec. 89], Ch. Harper says: "The rule is unquestionable, that where the same matter

*428

has been deter*mined by a decree between the same parties, that will be a bar to a new bill; but then it must appear that the rights of the parties were actually considered and adjudicated."

The proper construction of the 7th Section of Act of 1871, (14 Stat., 695,) cannot extend its operation beyond the suits then pending in the Counties named. The Judge, therefore, of the Fifth Judicial Circuit had jurisdiction of the motion which he entertained. The judgment was a record of his Court for the County of Edgefield. The order was made on the 10th March, 1874, and it was not until the Act of March 14, 1874, (15 Stat., 632,) that the records in the various Courts of the

Counties—of parts of which the County of Aiken was constituted—where the defendants resided in the said County, were ordered to be transferred to it.

When the right accrued to the respondent to test the validity of the judgment by some legal proceeding, there was no statute fixing any limitation of time within which it must be commenced. Whether there now is it is not necessary to determine. According to the practice existing in this State, it would seem that if a motion to set aside a judgment was made in five years, it would not be barred by lapse of time.—Mooney v. Welsh, 1 Mill, 133.

The rule was adopted in analogy to the bar to the recovery of real estate. That has now been extended, and whether the analogy will follow it is not the question before us. There may be cases where lapse of time, with other circumstances, might operate to confirm a judgment within a period even less than five years.

We concur in the Circuit decree, in the view which it takes of the Act of 1785, in regard to the confession. A seal is not necessary to a confession of judgment by an individual, and we do not consider the dictum of the presiding Judge, in Bivingsville Manufacturing Company v. Bobo, 11 Rich. [386], as authority for the proposition that a corporation can only confess judgment before action brought by affixing the corporate seal. If it can confess judgment before action brought, by affixing the seal, and thus avoid the effect of the Act, the validity depends not on the party making it, (whether as the corporation, principal, or an agent or attorney,) but on the mere fact of the seal. "The general rule of law that a corporation acts by and under its common seal has, from the earliest times, been subject to exceptions, arising out of the extreme convenience, amounting almost to a necessity, of dispensing with the reason of the rule when its ap-

*429

plication would occasion great *trouble or loss of time, or tend to defeat the very object for which the company was created."—Grant on Corp., 60.

The general rule, even in England, has of late been much modified. "In this country, where private corporations, for every purpose, are so multiplied that their facility of action has become a matter of public importance, in the language of Kent, the technical rule has been condemned as impolitic, and essentially discarded."—Ang. & A. on Corp., 265.

The confession by a corporation, through its own officer, (duly authorized,) is the act of the corporation done by itself, and not, in the view of the Act of 1785, by an attorney or agent. It is as any other act of the corporation in which the signature of the officer (properly empowered,) is alone sufficient to impress validity.

The motion is refused, and it is ordered and adjudged that the said confession of judgment referred to in the pleadings be vacated and set aside.

MOSES, C. J., concurred.

WILLARD, A. J., concurred to the extent of holding that the confession of judgment was irregular, and that the practice requiring a prompt application to set aside a judgment for irregularity is not settled in this State.

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5 S. C. 429

STATE v. McQUAIGE.

(Columbia. Nov. Term, 1874.)

[*Criminal Law* ⇐1166½.]

Exceptions for error, in overruling challenges for cause made by a prisoner on trial for murder, will not be considered where the jury was completed without exhaustion of the right of peremptory challenge.

[Ed. Note.—Cited in State v. Gill, 14 S. C. 412; State v. Clyburn, 16 S. C. 377; State v. Dodson, Id., 460; State v. Anderson, 26 S. C. 601, 2 S. E. 699; State v. Campbell, 35 S. C. 32, 14 S. E. 292; State v. Weaver, 58 S. C. 110, 36 S. E. 499; State v. Hayes, 69 S. C. 298, 48 S. E. 251.

For other cases, see Criminal Law, Cent. Dig. § 3117; Dec. Dig. ⇐1166½.]

[*Jury* ⇐59.]

It is a good ground of challenge to the array on the trial of a prisoner for murder, that the Jury Commissioner is a near blood relation of the deceased, and that he assisted at the drawing of the jury.

[Ed. Note.—Cited in State v. McNinch, 12 S. C. 94; State v. Merriman, 34 S. C. 34, 12 S. E. 619; State v. Perry, 73 S. C. 200, 53 S. E. 169; Humphrey v. Palmer, 89 S. C. 405, 71 S. E. 977; Robertson v. Western Union Tel. Co., 90 S. C. 434, 73 S. E. 786.

For other cases, see Jury, Cent. Dig. § 270; Dec. Dig. ⇐59.]

[This case is also cited in Humphrey v. Palmer, 89 S. C. 401, 71 S. E. 977, and distinguished therefrom.]

Before Townsend, J., at Marlborough, May Term, 1874.

John R. McQuaige, the prisoner, was under indictment for the murder of Robert J. Breeden, deceased; of the thirty-six petit jurors composing the original panel for the present term, five did not attend, and their places

*430

were supplied by five others summoned *from the by-standers. The panel being thus complete, the prisoner submitted, in writing, a challenge to the array, on the ground that the Jury Commissioner was a first cousin of the deceased, and that he assisted at the drawing of the jury.

The challenge was overruled, and the prisoner excepted.

Of the jurors, as they were called to be

sworn, nine challenges for cause were made by the prisoner—two of which were allowed and seven overruled. Of the seven overruled three were challenged because they had married second cousins of the deceased—three because they were tenants, servants, croppers or employees of Joseph J. Breeden, the Jury Commissioner, who was a first cousin of the deceased, and one because he was a servant of P. L. Breeden, a first cousin of the deceased and brother of the Jury Commissioner. Of the seven jurors whose challenges for cause were overruled, one was accepted by the prisoner, and the other six peremptorily challenged by him. The prisoner made seventeen peremptory challenges in all.

In each case where a challenge for cause was overruled, an exception on behalf of the prisoner was taken to the ruling of the Court.

The prisoner was found guilty. He then moved the presiding Judge in arrest of judgment, on the same ground taken in his challenge to the array. His motion was overruled, and, after sentence, he appealed, on the ground of error in the Circuit Court: (1) In overruling his challange to the array; (2) in overruling his challenges for cause; and (3) in overruling his motion in arrest of judgment.

Hudson, for the appellant, contended: (1) That the challenge to the array should have been sustained.—Whart. Cr. Law, § 2, 948; 3 Black. Com., 359, 365; 1 Chit. Cr. L., 540; 3 Wait's Pr., 103; Baylis v. Lucas, 1 Cowp., 102; and (2) that the challenges for cause should also have been sustained.—Whart. Cr. Law, § 3016; Chit. Cr. Law, 541; Harrisburg Bank v. Forster, 8 Watts, 304; 3 Black. Com., 363; 3 Wait's Pr., 105; Churchill v. Churchill, 12 Verm., 661; Armstrong v. Timmons, 3 Harring., 343; The People v. Bodine, 1 Denio, 281.

McCall, Solicitor, contra, cited 1 Bish. Cr. Pr., §§ 763, 702; Whart. Cr. Law, §§ 2987, 3031; State v. Price, 10 Rich., 356; People v. Ransom, 7 Wend., 417; Goodrich v. Burdick, 26 Mich., 39.

*431

*Dec. 15, 1874. The opinion of the Court was delivered by

MOSES, C. J. It is true that the system which exists in South Carolina, and probably in every State of the Union, for selecting a jury, as well for the trial of criminal as civil causes, differs from that which prevails at common law. Here the names of those who are authorized to act as jurors are prepared and placed in a box, from which they are drawn by the officer charged with that duty. At common law the jury is selected by the Sheriff from those qualified to sit, without regard to any designation by lot or chance.

Our Courts, however, have applied the same rules which have been established by English precedents for the government of those employed in the same high function, notwithstanding the essential difference which exists in the manner of its exercise. All the obligations which the common law imposes upon Sheriffs in the selection of juries are recognized in this State to their fullest extent, and will be enforced whenever the acts of those charged with the same duty are in question. The rights of parties in civil cases are in no way diminished by the change in the mode, and those accused by indictments are entitled to the benefit of any exception which would avail them under the common law system.

According to the existing law the process of preparing a jury list, and drawing juries from it in each County, is confided to a Board, consisting of a Jury Commissioner, to be appointed by the Governor and confirmed by the Senate, the Auditor and the Chairman of County Commissioners.—Gen. Stat., Ch. III, §§ 1, 3, 4. It is substituted in the place of the Sheriff and Clerk, who, before the change, were the officers upon whom the drawing of juries devolved, by the statutes and rules of Court which were then of force, in regard to their functions in that behalf. The mere difference in the mode of attaining the same end has in no way affected or disturbed the analogy, as to the results and incidents of the system now in use here and that which prevailed at common law, and we were not persuaded to the contrary by the argument on behalf of the State.

It is not necessary to consider the alleged error of the Court in not sustaining the exception of the prisoner to such of the jury as he challenged, because of their relation to the Commissioner, or to the deceased, by blood or affinity, or as being servants, tenants or employees of the Commissioner, and other relatives of the deceased, for, if it could avail him, he has lost its benefit by

*432

not exhausting *his peremptory challenges before the jury for his trial was complete.—State v. Price, 10 Rich., 356. The principle so ruled proceeds upon the ground affirmed by the Supreme Court, in the United States v. Marchant, 12 Wheat., 482 [6 L. Ed. 700], "that the right of peremptory challenge is not, of itself, a right to select, but a right to reject jurors." The same doctrine was announced in The State v. Wise & Johnson, 7 Rich., 413.

But the objection that the Court refused to sustain the challenge to the array must prevail. The obligation resting on one engaged in drawing a jury involves a duty of such a high, important and delicate character, that its exercise must be free even from a suspicion of partiality. It is true that no charge of wrong is imputed to the Commissioner. Courts must be governed by general principles. It is better for the community that a

definite and established rule should prevail, not affected by any condition or provision, to be applied by any inquiry as to intention or motive, the ascertainment of which is almost impossible, save through the oath of the party whose act may be the subject of challenge and examination.

It would be but a loss of time, which, under the pressure of business before us, we could not afford, to refer to the many authorities which may be found, sustaining a challenge to the array, if the officer making the return is a blood relation of either of the parties, or in a position, in regard to the deceased, which must necessarily subject him to a feeling, at least, of prejudice against one charged with his murder. It is sufficient to refer to the words of Blackstone, at the 365th page of his third volume. No Judge who ever adorned the English bench more justly prized the value of the trial by jury than did this eminent jurist and commentator. In extolling "the constitution and frame of the tribunal, which the law of England has provided for the test and investigation of truth," he includes, among its "remarkable" incidents, "its caution against all partiality and bias, by quashing the whole panel or array, if the officer returning is suspected to be otherwise than indifferent." A principle, whose foundation rests upon natural justice, and whose effects, in its practical results, can never conduce to wrong—a rule so long recognized as one of the safeguards of jury trial—must not be abandoned without reason, and, least of all, must it be shorn of any of its efficacy, when applied to a case involving human life.

It is urged that the objection "is not well taken, because the deceased cannot be said to

*433

be directly or indirectly a party to the *action." A wise and humane provision of the law cannot be controlled by so narrow and contracted a limitation. If there ever is an occasion for its enforcement, it is when the officer stands in near relationship to the deceased. All the reasons which recommend it, as between parties to the record, in a civil cause, apply with greater force where the impulses of nature restrain the free exercise of impartiality. The books, too, make no distinction, and if the Sheriff, or other officer officiating in drawing a jury, is a blood relation to the deceased, it is ground of challenge to the array.

In fact, too, there was not the least necessity for the Jury Commissioner to exercise, on the occasion referred to, the functions of his office. He may well have refrained, and, without his action in the matter, the jury could have been lawfully drawn. By Act No. 544, approved March 14, 1874, Section 3, (15 Stat., 638,) amending the former Act, a majority of the three persons named as Jury Commissioners "shall," in the language of the statute as amended, "constitute a Board."

The motion for a new trial is granted, and the case remanded to the Circuit Court for Marlborough.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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5 S. C. 433

STEWART v. BLEASE.

(Columbia. Nov. Term, 1874.)

[*Dower* ⟸95.]

A return by a majority of Commissioners in Dower, assessing a sum of money to be paid in lieu of dower, must stand, unless fraud or error of law or fact be shown, and this although the minority dissent in writing.

[Ed. Note.—Cited in Irwin v. Brooks, 19 S. C. 101, 102; Simonds v. Haithcock, 24 S. C. 210.

For other cases, see Dower, Cent. Dig. § 340; Dec. Dig. ⟸95.]

Before Moses, J., at Newberry, May Term, 1874.

The judgment of His Honor the Circuit Judge is as follows:

Moses, J. To rightly understand the issues involved in this appeal, it is necessary that a brief history of this action should be given.

Eliza R. Stewart filed her petition in the Probate Court for Newberry County, on the 2d day of November, 1869, to have admeasured her dower in certain lands, which were

*434

sold by the *United States Marshal during the life-time of her husband, Robert Stewart, to the defendant, Henry H. Blease, the said Robert Stewart having died on the 21st day of August, 1869.

The defendant, Henry H. Blease, denied her right to dower in said lands. Upon the hearing in the Probate Court the demandant's right of dower was sustained, and a writ for its admeasurement ordered to issue.

From this decree of the Probate Court the defendant appealed to the Circuit Court, where, after a hearing, his appeal was dismissed, and the decree of the Probate Court affirmed. The defendant then appealed to the Supreme Court. This last Court dismissed the appeal, and affirmed the decree of the Court below, (4 S. C. p. 37.)

In the Probate Court a writ for admeasurement of dower was framed, directed to Robert L. McCaughrin, Joseph Caldwell, Jordan P. Pool, Daniel M. Ward, and Thomas P. Slider, as the five Commissioners.

To this writ Robert L. McCaughrin, Joseph Caldwell and Jordan P. Pool—a majority of the Commissioners—made their return, setting forth that they had gone upon the lands, and that they were unable to admeasure the petitioner one-third of the lands in question without manifest injury to both parties, and that they had assessed a sum of money to be paid to the demandant in lieu of dower, and

that they had assessed the land as worth, on the 17th day of February 1869—the date of alienation—$14,000, and that the sum of money to be paid to the dowress should be the one-sixth of $14,000, to-wit: the sum of $2,333.33⅓, with interest at 7 per cent. thereon from the 21st day of August, 1869, the date of the death of Robert Stewart.

The other two Commissioners in Dower, by written statement, objected to the return of the majority, alleging that the lands in question were capable of division, so as that one-third should be given to dowress, and that the valuation of the majority was too high.

Upon a motion being made in the Court of Probate for the confirmation of the return of the Commissioners, the defendant filed exceptions, and demanded that testimony should be heard to sustain the exceptions. The Judge of the Probate Court held that it was competent to hear testimony to show in what manner the Commissioners had performed their trust.

*435

*None of the five Commissioners were examined.

At least seven witnesses were introduced by defendant. No witnesses were presented by petitioner. After argument, the Judge of Probate decided that the writ was exactly conformable to law; that the Commissioners were, by law, made the judges of the practicability of dividing the lands, and that he could not see anything in the testimony to justify the return of the writ to the Commissioners for the purpose of changing their return in that particular; that the value put upon the lands by the Commissioners was not too great; and that the defendant's absence, at the time the Commissioners went upon the land, was not an error or irregularity on the part of the Commissioners sufficient to set aside their return. The Judge of Probate confirmed the return of the Commissioners and made it the judgment of that Court.

From this decree, dated May 16th, 1873, the defendant has appealed to this Court upon twelve grounds, which are now set forth:

1st. The said return was made under circumstances adverse to a full and faithful discharge of the duties of the Commissioners, and unfavorable to the arriving at correct conclusions in the premises, to-wit: without the assistance of a surveyor, or of plats to guide them, and without the presence of any one who could inform them of the condition of the land when alienated, its true boundaries, and the improvements and value thereof put upon the land since its alienation.

2d. The said Commissioners would not allow the defendant to be present at the admeasurement of demandant's dower, although he asked such permission, and notwithstanding they were notified by defendant's counsel not to proceed to execute the writ, without giving the defendant an opportunity to be present, thus preventing the defendant, to whom all the matters were best known, from showing them the land, its true boundaries, and such improvements as were added thereto, and thereby enabling them to come to proper conclusions as to the condition and value of the land when alienated, and also of the practicability of its division, without disadvantage.

3d. The Commissioners, in their said return, imagining that they had viewed the entire body of land, made their estimate upon 934 acres, more than one-third of which, to wit, 341 acres, and that, too, of very inferior character, as was established by proof uncontradicted, they failed to see, and which

*436

they were not aware was *included in the land in controversy, thus manifesting that their judgment as to its value and the impracticability of its division was erroneous.

4th. The evidence before His Honor established, conclusively, that the defendant had put permanent improvements of considerable value on the land since its alienation, which were not pointed out to the Commissioners, and of which they took no account in making up their return.

5th. His Honor the Probate Judge utterly disregarded the return of two of the Commissioners, erroneously styling it a statement, in which they show that the land, being divided by public roads into three separate tracts, of about equal value, the demandant's dower could have been assessed to her without disadvantage, which opinion is sustained by the testimony on the part of the defendant, and is uncontradicted by the plaintiff.

6th. The said return of the Commissioners assess a sum of money in lieu of dower, when the dower could have been admeasured without disadvantage to the demandant, and the defendant consented to any admeasurement, expressly requesting the Commissioners to lay off to her so much land as might be deemed proper, without too much regard to his interest in the premises.

7th. The lands are valued, in said return, at too high an estimate—higher than that at which it was alienated by the husband, and in all probability much higher than the Commissioners themselves would have assessed it, had they fully discharged their duty in viewing the whole land, or had they been informed of its true character.

8th. The return does not show the quantity of the land nor the data upon which the judgment of the Commissioners was founded.

9th. The return shows that the Commissioners undertook, without authority, to fix the time from which the sum assessed by them in lieu of dower should bear interest.

10th. The return does not show the value of each tract of land separately, nor state the number of acres in each separate tract.

11th. The return of the Commissioners should not have been confirmed, in that the

Commissioners failing to do their first duty in admeasuring dower, when it is practicable they should have then assessed one-third of the annual interest on the purchase money from the death of alienor to the death of the demandant, in lieu of her dower.

*437

*12th. His Honor the Probate Judge further erred in his decree in misapprehending the testimony introduced by the defendant, and especially of the witnesses mentioned in said decree, as well as of the kind of property conveyed in the deed from Robert Stewart to Henry H. Blease, there being also personalty included in that sale.

I will first notice the exceptions in their order, and, secondly, state my judgment of the law and facts.

The first exception, as will be readily perceived, strikes at the want of those requisites which would enable Commissioners to properly admeasure dower, viz.: absence of a surveyor or plats, and information relative to true boundaries, &c.

I am forced to the conclusion that the defendant has failed to establish, by the testimony of witnesses, or the return of the majority of the Commissioners, or the statement of the two dissenting Commissioners, any one of the facts referred to in this exception, and it is, therefore, overruled.

The second exception is, that the Commissioners did not allow the defendant to be present at the admeasurement, as he requested, and did not regard the notice of defendant's counsel, forbidding them to proceed in the absence of the defendant.

I am at a loss to conceive how the statement that the Commissioners would not allow the defendant to be present can be founded upon anything in the testimony of the defendant's own witnesses. He knew that the Commissioners were proceeding to the discharge of their duty; he was not prevented by Commissioners from attending, if he had seen proper to do so; he did not seek the permission of the Court, upon which he was in attendance as a juror, to be allowed to accompany the Commissioners.

As to so much of the exception as relates to the notice given by defendant's counsel to Commissioners, while it is established such notice was given, it is clearly no error on the part of Commissioners to refuse to listen to the verbal notices of counsel, when such notices may contravene the instructions of a writ issuing from a Court. It may be as well to remark, in this connection, that any set of Commissioners should refuse, under similar circumstances, to listen, for one moment, to such instructions from attorneys. It was the duty of counsel for defendant, if the action of the Commissioners was prejudicial to his client, to have sought the aid of the Court in its correction. The exception is overruled.

*438

*The third exception relates to the failure of the Commissioners to view the entire body of the land. This is a question of fact, and from the testimony I decide that the defendant has failed to establish its existence. It is, therefore, overruled.

The fourth exception, having reference to permanent improvements put upon the land by defendant, and of the failure of the Commissioners to take the same into account, is another question of fact, which I decide the defendant failed to establish. It is overruled.

The fifth exception, referring to a failure on the part of the Probate Judge to properly characterize the statement of the two dissenting Commissioners, establishing the division of the body of land into separate tracts by roads, and the practicability of its division by the Commissioners under the writ, I decide it no error. Technically, it was a statement, and it failed, with the aid of testimony, to convince the Court below that the lands could be divided without injury—I agree with the Judge of Probate. This exception must be overruled.

The sixth exception complains that the Commissioners assess a sum of money when a division of the land was practicable, and defendant consented to any division they might deem proper, without too much regard to his interest.

By law, the Commissioners are invested with the duty of determining the practicability of division of lands; when no fraud or error is established, their return is conclusive. It is a matter of no difference that the defendant offered to let them lay off land as he did. The Commissioners are required, by their oaths, to act impartially. When they fail to lay off land, they are directed and required, by the writ, to assess a sum of money to be paid the dowress in lieu of dower. I fail to see any error in the conduct of the Commissioners, so far as this exception extends, and it is overruled.

The seventh exception avers that the estimate of the Commissioners, as to the value of the lands in question at the time of alienation by decedent, was too high. The testimony of witnesses, the price mentioned in the deeds from Robert Stewart and United States Marshal to defendant therefor, fail to establish this exception; indeed, if anything, it would seem the land was valued too low by the Commissioners. The exception is overruled.

The eighth exception refers to the fact

*439

that the Commissioners *neglected to embrace in their return the quantity of land and the data upon which the judgment of the Commissioners was founded.

It is true that the Commissioners do not mention the number of acres, yet the writ is specific, and it has not been contended that

that tract contains less than the acreage mentioned in the writ. The Commissioners do furnish the data upon which their judgment is founded. They value the land, and assess a specific part of that valuation as the amount by them recommended to be paid in lieu of dower. The exception must be overruled.

The ninth exception charges that without authority the Commissioners attempted to fix the time at which interest shall accrue upon the amount recommended to be paid. By reference to the writ, which is the chart of the Commissioners, the date of the death of Robert Stewart is mentioned, and by express terms of said writ they are required to assess interest from that date. The correctness of that date is not questioned by the defendant. This exception must be overruled.

The tenth exception alleges that the Commissioners failed to state the value of each tract separately, or the number of acres in each tract. No such duty is imposed upon them by the writ. The land is referred to as a body, and its boundaries mentioned, but it is not referred to as made up of separate tracts, nor is there any foundation in fact, according to the testimony offered at the trial for the statement, that the lands in question are not one body of lands. This exception must also be overruled.

The eleventh exception insists that the Commissioners should have assessed the one-third of the annual interest on the purchase money from the death of the alienor to the death of the demandant in lieu of her dower. This is no error. It is true when a fund is in Court, a fund realized from the sale of lands in which dower is claimed, the Court sometimes orders the interest on the one-third thereof to be paid to the dowress. But while this is true, at the same time the practice adopted by the Commissioners in this case has been too long pursued by the permission of the Court to be disturbed. This exception is overruled.

The twelfth exception charges that the Probate Judge failed properly to apprehend the testimony offered by the defendant, and also the kind of property conveyed by deed from Robert Stewart to defendant. I see no error in the decree, as affected by this exception, and it is overruled.

*440

*Having thus disposed of the exceptions filed by defendant, it may be as well to enter into some consideration of the law bearing upon the questions here involved.

The law pertaining to admeasurement of dower may be administered in either the Court of Probate or the Court of Common Pleas. The statute which confides the care of such interests to the Court of Probate is quite explicit. The writ framed in this case is in exact conformity with the statute. By the statute the Commissioners entrusted with its execution were required to go upon the lands in dispute; to lay off demandant's dower, by admeasuring her the one-third part thereof, if such could be done without manifest disadvantage; but in case they could not so admeasure the one-third part thereof, then, in that event, they should assess a sum of money, to be paid to the demandant in lieu of her dower therein. The Commissioners are made the judges of the practicability of division, and in event of that failure, to assess a sum of money to be paid demandant. A majority of the Commissioners may do this. In case such Commissioners were guilty of fraud, or proceeded upon erroneous principles, their return would be set aside, and to establish either of these it would necessarily require that the Court, before whom issues were tried, should hear evidence. That evidence might be by affidavit or by oral testimony.

It seems to me that the Court of Probate has afforded the defendant full opportunity of developing his attack upon the Commissioners who made the return in this case, and he has failed, both there and here, to establish the propriety of setting such return aside.

It is therefore ordered, adjudged and decreed, that the appeal be dismissed, and that the decree of the Probate Court be affirmed.

It is also ordered that the appellant pay the costs of this appeal.

And it is further ordered that the judgment of this Court be certified to the Probate Court for the County of Newberry, by the Clerk of this Court, for such further proceedings as may be required to carry out the purposes of this decree, and that of the Probate Court herein.

The defendant appealed from the judgment of the Circuit Court, overruling all the grounds of appeal taken by the said defend-

*441

ant *from the decree of the Probate Court, and moved the Court for a reversal of the same.

Jones & Jones, for appellant.
Baxter & Johnstone, contra.

Dec. 22, 1874. PER TOTAM CURIAM. No error of law is shown on the part of the Court below; neither do we perceive anything which, according to the practice of this Court, in regard to the evidence, will permit its interference.

It is, therefore, ordered that the motion be dismissed.

5 S. C. 441

BACOT v. HEYWARD.

(Columbia. Nov. Term, 1874.)

[*Trusts* ⟸181, 278.]

A trust for the joint use of husband and wife, during their joint lives, and for the use of the survivor for life, and then, after the death of the survivor, in trust, to deliver up the property to the issue of the marriage, &c., is not executed until delivery of the property after the death of the survivor.

[Ed. Note.—Cited in Waring v. Cheraw & D. R. Co., 16 S. C. 424.

For other cases, see Trusts, Cent. Dig. §§ 328, 398; Dec. Dig. ⟸181, 278.]

[*Trusts* ⟸181.]

The trustee of a bond given for the purchase money of slaves compromised the debt by taking one-half and giving a release for the other money. This was done before the question as to the validity of such bonds had been settled. In an action against the obligor by a cestui que trust, who was sui juris when the compromise was made, but who was not consulted, because he was absent from the State and his whereabouts unknown, *held* that the obligor was discharged by the release, the compromise having been made under such circumstances as would have entitled it to the sanction of the Court had previous application been made.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 234, 235, 328; Dec. Dig. ⟸181.]

[*Trusts* ⟸181.]

Although, as a general rule, a trustee may not compromise a debt, yet where he does so under such circumstances as would have obtained for it the sanction of the Court, had a previous application been made, it will be sustained if afterwards questioned.

[Ed. Note.—Cited in Geigers v. Kaigler, 9 S. C. 403, 426; Pool v. Dial, 10 S. C. 448.

For other cases, see Trusts, Cent. Dig. §§ 234, 235, 328; Dec. Dig. ⟸181.]

Before Graham, J., at Charleston, April Term, 1873.

This was an action by R. D. Bacot, plaintiff, against D. Heyward and W. G. DeSaussure, defendants.

By a deed of marriage settlement, dated 20th April, 1843, between R. H. Bacot, the intended husband of the first part, Mary L. Cuthbert, the intended wife of the second part, and George Cuthbert, trustee of the third part, certain bonds, the property of the intended wife, were conveyed to the trustee, in trust for the husband and wife, during their joint lives, and

*442

the survivor for *life, and, after the death of the survivor, "in trust, to deliver up to the issue of the said intended marriage, or the representatives of such of the issue as may be deceased, they taking among them a parent's share, all the property" conveyed to the trustee, "freed and discharged from all further and other trusts, to be held by them, their heirs, executors, administrators and assigns forever." R. H. Bacot, the husband, died in 1862, and Mary L., his widow, survived until 1865, when she also died. Five children, issue of the marriage, survived their mother, Eliza M. F. Bacot and the plaintiff, R. D. Bacot, being two of them.

In 1868, George Cuthbert, the trustee, was dead, and of the bonds included in the settlement two only remained, one of which was a bond given by D. Heyward, the defendant, for the purchase money of slaves, and they were in the custody of the Court of Equity, and in the hands of one of its Masters. In the year last mentioned Eliza M. F. Bacot filed a petition in the Court of Equity, praying that she be appointed guardian of such of her brothers and sisters as were minors, but was unable to give the bond required of her, and thereupon the Master submitted a report to the Court, wherein he stated that the cestius que trust were in necessitous circumstances, and as there was no one who had authority to sue upon and enforce collection of the bonds, he recommended that they be delivered to W. G. DeSaussure, Esq., a kinsman of the parties; that he be substituted as trustee under the deed of marriage settlement, without being required to give security as trustee; and that he be directed to institute such legal proceedings as may be necessary for the recovery of the debts.

Upon that report the following order, dated December 18, 1868, was made by the Court:

Lesesne, Ch. Upon hearing the report of Master Gray read, in which is set forth the terms of the trust deed therein referred to, and in view of the peculiar circumstances of the case, and of the necessities of the parties interested under the said deed, ordered that the same be confirmed.

And it is further ordered that Wilmot G. DeSaussure, a kinsman of the said parties, be substituted as trustee under the deed of conveyance, in trust between Richard H. Bacot, Mary Louisa Cuthbert, and George Cuthbert, trustee; that the bonds of Daniel Heyward and William W. Elliott, to the said

*443

George Cuthbert, *trustee, be delivered to him, and that he be authorized and empowered to institute such legal proceedings thereupon, for the recovery of the debts and interest due thereupon, as he may be advised to; and that, upon the recovery thereof, he do account with and pay over to the several parties in interest their respective proportions thereof, the costs and expenses of such recovery, and of these proceedings, being first deducted therefrom.

Mr. DeSaussure commenced action on the bond of Heyward, and on the 12th March, 1870, recovered judgment thereon, the sum actually due upon the condition being $22,615.28. The judgment was taken, subject to the final decision, by the Court of last resort, of the then pending question as to the validity of "negro bonds."

After the judgment was recovered, and before the Supreme Court of the State had de-

cided "negro bonds" to be valid, as it afterwards did, (see Calhoun v. Calhoun, 2 S. C., 283.) a compromise was agreed upon and carried into effect, between Mr. DeSaussure and Mr. Heyward, whereby, in consideration of a sum of money, equal to, or very near equal to, one half the debt, paid by the latter to the former, Mr. DeSaussure signed and delivered to Mr. Heyward a discharge, in writing, from all further liability on the bond, delivered up the same to him, and entered satisfaction on the judgment.

The compromise was known and approved of by all the cestuis que trust, except R. D. Bacot, the plaintiff, who, at the time it was agreed upon and effected, was absent from the State, and, although of age, was not consulted, because it was not known where he was.

On his return to the State the plaintiff refused to recognize the entry of satisfaction on the judgment as binding upon him, and commenced this action to have the same set aside and vacated, so far as his rights were concerned, and for the recovery, from Mr. Heyward, of his proportion or share—one-fifth—of so much of the debt as had not been paid to the trustee. No relief was demanded as against Mr. DeSaussure.

At November Term, 1873, the Court made an order, which—reciting that the pleadings presented the following question: "Did Mr. DeSaussure assume any authority to act for the plaintiff when he made his settlement with the defendant?"—directed that the parties have leave to submit this issue to a jury, at the next term of the Court.

*444

*At March Term, 1874, this issue was submitted to a jury, who found the following verdict: "We find that Mr. DeSaussure did assume authority to act for the plaintiff when he made his settlement with the defendant."

On April 23, 1874, the following decree, dismissing the complaint, was made by His Honor:

Graham, J. By the order made by me in this action on the 5th November, 1873, it was ordered that the parties to the cause have leave to submit to a jury the question of fact made in the case.

This was the question whether Mr. DeSaussure did assume any authority to act for the plaintiff when he made the settlement with the defendant.

At the February Term of the Court, on the 17th March, 1874, this question having been submitted to a jury, they found as follows: "We find that Mr. DeSaussure did assume authority to act for the plaintiff when he made his settlement with the defendant."

The question of fact being thus settled, I am of the opinion that, although Mr. DeSaussure, the trustee, had no express authority to compromise the claim of the plaintiff, yet the trustee, having assumed such authority, his action in the matter can now be confirmed and validated, if approved by the Court.

And upon examination of the compromise made by him as trustee of the plaintiff, it appearing to me that it was made in good faith, and was in itself equitable, and justified by surrounding circumstances and the position of the claim at that time:

It is ordered that the compromise made by Mr. DeSaussure, the trustee of the plaintiff, with the defendant, be approved and confirmed, and that the complaint be dismissed.

The plaintiff appealed upon the ground:

Because, it being admitted that the plaintiff was of full age at the date of compromise, the Court erred in deciding that although Mr. DeSaussure, the trustee, had no express authority to compromise the claim of the plaintiff, yet the trustee, having assumed such authority, his action in the matter can now be confirmed and validated, if approved by the Court.

Walker & Bacot, with whom were Simonton & Barker, for appellant.

Hanckel, contra.

*445

*Jan. 14, 1875. The opinion of the Court was delivered by

MOSES, C. J. The complaint prays no relief against Mr. DeSaussure, the trustee, who is made a party defendant in the cause. Whatever liability (if any,) he may have incurred for the entry of satisfaction on the judgment against the respondent, Heyward, the appellant, forbears from enforcing it.

The verdict of the jury, on the issue submitted to it, establishes the fact that the trustee "did assume authority to act for the plaintiff when he made his settlement with defendant." We can not regard this conclusion as in any way affecting the right of the parties. Whether Mr. DeSaussure did or did not induce Mr. Heyward to suppose that, in the compromise of the judgment, he was authorized to act for the plaintiff, can be of no material consequence. He could not bind the latter by any assumption of powers which he did not in fact possess. So far as the plaintiff was concerned, it was no element in the case that could in the least operate to the prejudice of his right. If the powers exercised by the trustee did attach to his office, the bare assumption of it, without authority from the plaintiff, could in no way contribute to the confirmation of his act.

The issue passed upon by the jury may be of consequence in one aspect. If it was intended to determine the fact alleged in the answer of the trustee, that, according to the express understanding with Mr. Heyward, the entry of satisfaction was not to conclude the plaintiff, but, so far as it involved his interest, was to be subject to his decision, we can then see its propriety, and, perhaps, its necessity. From the pleadings we must so

hold, while we may be allowed to say that it was not framed in words the best calculated to express its purpose.

In January, 1867, by the order of the Court, on a petition for guardianship, in which all the children were before it, the assets of the estate of their mother, derived from her marriage settlement, (which included this bond,) were placed in the hands of the Master of the Court of Equity, and were, therefore, in its custody, and subject to its control. By the order of the Chancellor, of 18th December, 1868, based upon the report of the Master, in regard to the destitute and necessitous condition of the children, whose whole property consisted of this bond and one other, Mr. DeSaussure was substituted trustee under the original deed, ordered to

*446

collect the *bonds, and, on their recovery, to account with and pay over to the several parties in interest their respective proportions.

Even applying the Statute of Uses, by analogy, to trusts of personalty, the trust, under the deed of marriage settlement, was not executed, because, after the death of the survivor of the husband and wife, the property was still to remain in the hands of the trustee, to enable him to execute the final purpose of its creation, to wit: the delivery "to the issue of the marriage, or the representatives of such of the issue as may be deceased," of all the property conveyed by the deed. The order of the Chancellor prescribed the course which Mr. DeSaussure was to pursue in regard to the bond. He was to institute legal proceedings for its recovery, and, when collected, to pay to the several parties in interest their respective proportions of the proceeds. No one was authorized to receive but him, and through him the distribution was to be made. Not until such disposition did the trust terminate. The minority of some of the cestuis que trust disqualified them from so receiving their shares as properly to discharge the trustee, and though such of them as were sui juris were in a position to accept their proportions, and thus release the trustee, yet equity does not recognize the partial execution of a trust as destroying or discharging it, but regards it as a whole, only to be determined by its entire execution.

In the decree Ex parte Gadsden, 3 Rich., 477, which was affirmed by the whole Court, Chancellor Harper says: "It was suggested in the cause that, as the trust was for a married woman and her children, as tenants in common, the estate might remain in the trustee, so far as the share of the feme covert was concerned, and the interests of the children be executed in them. The grounds on which I have decided the cause make an answer to that suggestion. The whole fee was conveyed to the trustees, and the estate remained in them, at all events, during the life of Collar, and there is nothing to divest it afterwards. The power to sell relates to the whole estate, and, to satisfy that, the whole estate must remain in them. I was of opinion, however, that in no case could there be such a partial execution of a use. The estate is one, and must be executed either in the trustee or the cestui que trust. As observed by Lord Hardwicke, in Gibson v. Rogers, this Court will not make fractions and consider them as trustees for only part of the inheritance."

The terms of the settlement in Harley v.

*447

Platts, 6 Rich., 310, *cannot, in their effect, be distinguished from the language of the deed under which the plaintiff here claims. There the Court held that the trust was not executed on the death of the wife, but remained in the trustee until the delivery of the property to the daughter, on her becoming sui juris, or to some one legally authorized to receive for her.

The appellant (Bacot) was a minor when the order of the Chancellor was made—was absent beyond seas—and his whereabouts unknown when the compromise was effected by the trustee, who was without the means of ascertaining his wishes in relation to it, nor did he return home for some months subsequent to the completion, through the consent of those sui juris, who were in reach of the trustee.

The compromise having been concluded, under the circumstances stated, and carried into effect by the entry of satisfaction on the judgment, the plaintiff calls upon the Court to set it aside and require the defendant (Heyward) to pay him his proportion of the bond, which was discharged by the agreement between the trustee and Heyward.

It cannot be questioned that, as a general right, incident to his office, a trustee has no power to compromise a debt on behalf of his cestui que trust. Any other rule would at once destroy all the safeguards which the Courts, both of law and equity, surround property thus held, and by freeing the hands of the trustees from the fetters with which the judicial wisdom of years has seen proper to bind them, would allow them to destroy where they should protect. While, however, the general right is withheld, its denial is subject to conditions and exceptions which qualify the rule. If the Court which is asked to vacate it finds, from an examination of the circumstances under which it was made, that its sanction to the trustee, if previously applied for, would have been accorded, it will recognize it as an act consistent with the principles and doctrines which it enforces, and sustain it where the consent of one sui juris now, as the event has transpired, interested to defeat it, by force of preventing causes, could not be obtained by the trustee.

Mr. Lewin, in his work on Trustees, p. 513, says: "But under particular circumstances, the trustee is held capable of exercising the discretionary power of the bona fide proprietor; for the trust estate might otherwise be injuriously affected. The necessity of the moment may demand an immediate decision,

*448

while the sanction of *the parties who are beneficially interested cannot be secured without great inconvenience."

In Sanders on Uses and Trusts, 431, it is said: "It is, generally speaking, a rule that a trustee releasing or compromising a debt due to the trust estate must answer for the loss occasioned by such release or compromise; yet this rule must always depend upon the particular circumstances of the case, for when a trustee, in releasing or compounding a debt, acts from prudential motives, and with a view to benefit the trust property, the Courts will consider his conduct not excusable, but in many instances laudable."

Perry on Trusts, 436, says: "But there are circumstances where a trustee must exercise the discretionary powers of an absolute owner, otherwise great loss might happen to the estate. The exigencies of the moment may demand immediate action." The principles thus enumerated have been accepted as the governing rule, applicable to the subject now under examination, in the opinion of this Court, in Smith v. Prothro, 2 S. C., 373.

If the force of circumstances preclude all opportunity of consultation with the cestui que trust, sui juris, in the particular matter in which the trustee is called upon to act, where the chances of loss appear equal to those of gain to the parties interested in the trust confided to him, his resort should be to the Court for instructions for his guidance. The pressure of the occasion may even prevent this, and compel the trustee to rely and act on his own honest judgment. If the nature of the transaction, though it may even be the compromise of a debt, shows that he was actuated by good intention, and exercised due caution and fidelity in respect to the interests of his cestui que trust, a Court of Equity will confirm what it would, on due application, have ordered, for the result to the trust property, in either event, is precisely the same. "It is a general rule of equity that what is compellable by suit, or would have been ordered by the Court, is equally valid, if done by the trustee without suit, i. e. without the sanction of the Court."—Lewin on Trusts, 513, and the authorities there referred to.

In Sollee v. Croft, 7 Rich. Eq., 45, Chancellor Wardlaw, delivering the opinion confirmed by the whole Court, says: "It is quite proper to sanction now, when all the parties are represented, whatever the Court should have then authorized, and especially what the Court did then authorize upon sufficient evidence, but not in a form to bind all parties in interest."

*449

*In the case before us the validity of the judgment was subject to the decision of this Court on a question which had attracted great public attention, not only from the very large pecuniary interests which would be affected by it throughout the State, but from the fact that it involved questions of a political character, arising out of the but lately adopted Constitution. The opinions of those who stood foremost in the legal professions were divided—the public, regarding the doubts on both sides as well founded, realized the position. So great was the diversity of views, that the Court of the last resort, in an adjoining State, on the very question growing out of the Constitution, reached a conclusion the very opposite to that at which we arrived. If the provision in our Constitution, which forbade the collection of debts, of which the consideration was slaves, had not been held a violation of the Constitution of the United States, the whole judgment recovered by the trustee before us would have been lost. The doubt not only prevailed, but, from the distracted opinions of those in whose legal ability the greatest confidence had been reposed, the community accepted it as well justified by the nature of the question, and adjustments were made by cautious and prudent persons, induced by the great uncertainty which prevailed as to what would be the final judgment of the Court. Under these circumstances, the compromise of the respondents would well have recommended itself to the approval of the Court, if it had been previously sought.

In this view, the judgment of the Circuit Judge must be affirmed, and the motion dismissed.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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5 S. C. *450

*LESESNE v. WITTE.

(Columbia. Nov. Term, 1874.)

[*Wills* ⇐675.]

A devise, in these words, "I devise all my estate to my beloved wife, feeling entire confidence that she will use it judiciously for the benefit of herself and our children," confers upon the wife an estate in severalty, in fee, without trust or limitation over.

[Ed. Note.—Cited in Blum v. Evans, 10 S. C. 58; McCreary v. Burns, 17 S. C. 51; Rowland v. Rowland, 29 S. C. 59, 6 S. E. 902; Howze v. Barber & Drennan, 29 S. C. 471, 7 S. E. 817; Bank of Florence v. Gregg, 46 S. C. 182, 24 S. E. 64.

For other cases, see Wills, Cent. Dig. § 1588; Dec. Dig. ⇐675.]

[*Wills* ⇐614.]

The tendency of the modern authorities is not to raise trust out of terms merely ex-

pressive of a wish, entreaty, confidence or recommendation.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1393-1416; Dec. Dig. ⟸614.]

[*Specific Performance* ⟸8.]

An action for specific performance addresses itself to the sound discretion of the Court.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 17, 18; Dec. Dig. ⟸8.]

[*Specific Performance* ⟸93.]

In such cases time is not generally considered as of the essence of the contract.

[Ed. Note.—Cited in Lyles v. Kirkpatrick, 9 S. C. 269.

For other cases, see Specific Performance, Cent. Dig. §§ 245–248; Dec. Dig. ⟸93.]

[*Specific Performance* ⟸124.]

Either party is entitled, as matter of right, to an order of reference upon the title.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 400; Dec. Dig. ⟸124.]

[*Specific Performance* ⟸92.]

If a plaintiff is able, at the time of the decree, to remove objections to the title, he should be allowed to do so.

[Ed. Note.—Cited in Lyles v. Kirkpatrick, 9 S. C. 270; Miller v. Cramer, 48 S. C. 295, 26 S. E. 657.

For other cases, see Specific Performance, Cent. Dig. §§ 233–244; Dec. Dig. ⟸92.]

[*Specific Performance* ⟸92.]

Where the objection to the title is an incumbrance, as, for instance, a mortgage, an offer to extinguish it with purchase money, to be paid, by the terms of the contract, when the conveyance is executed, is a reasonable one, and should not be rejected.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 233–244; Dec. Dig. ⟸92.]

[*Specific Performance* ⟸95.]

Where more than a year had elapsed since the death of a devisor, and the executrix had duly advertised for creditors, an objection to the title of the devisee, that there might be creditors who had not presented their claims, cannot prevail.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 257–277; Dec. Dig. ⟸95.]

[This case is also cited in Lyles v. Kirkpatrick, 9 S. C. 271, as to the question of costs.]

Before Graham, J., at Charleston, June Term, 1874.

This was an action by Sarah L. Lesesne against Charles O. Witte, for specific performance of a contract for the sale of a lot of land in the city of Charleston.

By an order of the Court, dated January 31, 1874, it was referred to a Referee to take testimony, and from his report, dated June 3, 1874, it appeared that D. Lesesne, formerly a merchant of the city of Charleston, departed this life on the 10th February, 1871.

By his last will he devised and bequeathed as follows:

"I, Daniel Lesesne, of Charleston, make my last will and testament in manner following, that is to say: I give, devise, and bequeath all my estate, real and personal, of what nature or kind soever, that I may have the right to dispose of at the time of my death, to my beloved wife, Sarah Lewis Lesesne, feeling entire confidence that she will use it judiciously for the benefit of herself and our children; and I appoint my said wife executrix of this my last will and testament."

This will was admitted to probate, before the Judge of Probate for Charleston County, on the 15th February, 1871; and, on the same day, the plaintiff qualified as executrix thereon.

Soon after qualifying, the executrix pub-

*451

lished the notice required *by law, calling upon all persons having demands against the estate of the testator to present attested statements thereof. No claims were proved against the estate, either within the time prescribed by law or subsequently.

At the time of his death the testator was seized in fee of the premises hereinafter mentioned, and on the first of March, 1873, at Charleston, the plaintiff, through Lowndes & Grimball, her agents, entered into an agreement, in writing, with the defendant, Charles O. Witte, as follows, that is to say:

"Memorandum of agreement made and concluded this first day of March, 1873, by and between Lowndes & Grimball, agents of the estate of Daniel Lesesne, of the first part, and C. O. Witte, of the second part: For, and in consideration of the sum of six thousand dollars, to be paid in manner hereinafter described, Lowndes & Grimball, agents estate Daniel Lesesne, agree to sell to C. O. Witte all that lot of land, with the buildings thereon, on the west side of East Bay, known as No. , to be paid as follows: one-third cash, balance in one and two years, with interest from date, payable annually, secured by bond and mortgage of the property sold—purchaser to pay twenty-five dollars for papers.

"C. O. Witte agrees to purchase above described property, on the terms and conditions above written, from Lowndes & Grimball, agents estate Daniel Lesesne, and to pay for the same when clear and unencumbered titles are given.

"Witness our hands and seals, 1st March, 1873. Charles O. Witte,

"Lowndes & Grimball."

On the 29th of April, 1873, the plaintiff, in pursuance of the agreement, tendered to the defendant's attorney a deed of conveyance of the lot in question, and, at the same time, offered to satisfy, with the proceeds of the sale, the only incumbrance upon the premises, namely, a mortgage to the late J. W. Gray, Master in Equity, given to secure the purchase money for the same, and assigned by the Master in Equity to Octavus Cohen, and the executor of Leon J. Herckenwrath, deceased, out of the purchase money.

A release of all their claim in the premises

was endorsed on the deed by C. T. Lowndes, Brown Manning, Edwd. L. Wells, Henry D. Lesesne and James R. Pringle, and it was accompanied by an affidavit of executrix, to

*452

the effect that the executrix had adver*tised for creditors; that none had appeared; that she knew that the persons above named, who had released their interest in the premises, were creditors, but was sure that there were not any others, except the mortgage creditors already referred to. On this mortgage there was due, on the first of March, 1873, according to statement furnished the Referee, the following amounts, to wit:

D. E. Huger, trustee.....	$1,226 56
To the estate of Herckenwrath.....	1,836 73
Total	$3,063 29

By letter, dated April 30, 1873, the conveyance thus tendered was rejected by Mr. Witte's attorney, upon the ground that the title was not "clear and unencumbered." Lesesne & Miles, on the 17th May, 1873, by a letter of that date, proposed to the defendant, Witte, to extinguish the mortgage on the property, if he would then accept the conveyance, and settle for his purchase.

On the 19th the defendant replied that when his attorney had reported to him that the titles to the East Bay property were not good, he had at once requested Lowndes & Grimball to cancel the agreement of sale, stating that he could not allow a matter of that kind to stand open, as he wished to make use of his funds, and would have to look for other investments, with all of which Mr. Lowndes had coincided; that he, accordingly, did make other investments, and had no further use for the East Bay property.

On the 16th June, 1873, Lesesne & Miles, by letter of that date, notified the defendant that they were instructed to appeal to the Court, and the complaint was filed on the 23d June, 1873.

On the first of August, 1873, an agreement was entered into between the plaintiff and defendant, by which it was stipulated that the plaintiff might collect and receive the rent accrued since the date of the agreement to purchase, and to accrue on the house and lot, and might return the same for taxation, and pay the taxes and insurance thereon without prejudice—the rent collected by the plaintiff to be duly credited on the purchase money of the premises, and the taxes and insurance paid by her to be added thereto, in case the judgment in the cause should be against the defendant.

The case was heard upon the pleadings and the evidence, as reported by the Referee.

*453

*After the hearing, and before the decree was filed, the plaintiff moved for leave to pay into Court a sum of money sufficient to satisfy the mortgage debt. The motion was refused.

On the 30th June, 1874, His Honor filed his decree, whereby he dismissed the complaint with costs, on the ground that the plaintiff had not tendered a clear and unencumbered title to the land.

The plaintiff appealed, on the grounds:

1. Because the plaintiff's tender to the defendant of a conveyance, accompanied by the offer to satisfy the only encumbrance on the property sold, out of the purchase money, was a sufficient compliance with her agreement with defendant; and the defendant having refused to accept, the plaintiff was entitled to a decree for specific performance of the agreement.

2. Because the plaintiff, having made the offer to defendant, to satisfy the only mortgage on the property, before requiring payment of the purchase money, if defendant would then accept the title, and defendant having refused to accept, the plaintiff was entitled to a decree for specific performance.

3. Because the plaintiff, before the decree was made, having offered to pay into Court an amount sufficient to pay the mortgage debt, was entitled to a decree for a specific performance of the agreement to purchase, according to the uniform practice of a Court of Equity, to allow encumbrances to be removed at any time before the decree.

4. Because plaintiff was entitled to the judgment of the Court, upon the several other grounds of objection to the title made in defendant's answer, and to the further decree, that the purchase money be paid by defendant to the Referee, or the Clerk of the Court, to be applied to the payment of the mortgage debt, or to a conditional decree, that the defendant comply with the terms of sale, upon the plaintiff's procuring and delivering to him a satisfaction of the mortgage.

Lesesne & Miles, for appellant:

1. The plaintiff having offered to pay off the one encumbrance on the property, either out of the purchase money or in advance, was entitled to a decree for specific performance.

A Court of Equity looks to the substance of the contract, and will enforce it according to the real intention of the parties, and

*454

*will grant relief to the party acting in good faith, in the spirit of the contract. It is not required that the party seeking specific performance should have performed the contract according to the very letter, as is required in an action at law for damages.—2 Story Eq. Jur., § 775.

"A Court of Equity frequently decrees specific performance where the action at law has been lost by the default of the very party seeking the specific performance, if it be, notwithstanding, conscientious that the agreement should be performed; as in cases where the terms of the agreement have not been

strictly performed on the part of the person seeking the specific performance, and to sustain an action at law, performance must be averred according to the very terms of the contract." The Courts, in all cases of contracts for estates in land, have been in the habit of relieving, where the party, from his own neglect, had suffered a lapse of time, and from that or other circumstances could not maintain an action to recover damages at law. And even where nothing exists to prevent his suing at law, so many things are necessary to enable him to recover at law, that the formalities alone render it very inconvenient and hazardous so to proceed; nor could, in many cases, the legal remedy be adequate to the demands of justice. Courts of Equity have, therefore, enforced contracts specifically, where no action at law could be maintained, for at law the party plaintiff must have strictly performed his part, and the inconvenience of insisting on that in all cases was sufficient to require the interference of Courts of Equity. They dispense with that which would make compliance with what the law requires oppressive; and, in various cases of such contracts, they are in the habit of relieving the man who has acted fairly though negligently." * *—Lord Redesdale, quoted in case of Mechanics' Bank of Alexandria v. Lynn, 1 Peters, 376; 2 Story's Eq., § 775, note 4.

The duty of Courts of Equity "is to examine the contract, not merely as a Court of law does, to ascertain what the parties have in terms expressed to be the contract, but what is in truth the real intention of the parties, and to carry that into effect."—Baron Alderson, in Hipwell v. Knight, 1 Y. & Coll, 415; Story's Eq., § 776, note 1.

2. The plaintiff was entitled to a conditional decree, that the defendant comply with the terms of sale, upon the plaintiff's procuring and delivering to him a satisfaction

*455

of the mortgage.—*Church of Macon v. Wiley, 2 Hill Ch., 584; Merchants' Bank v. Thompson et al., 55 N. Y., 7.

3. If the Judge was of opinion that plaintiff had not previously complied with her agreement, he should have allowed her to pay into Court the amount necessary for the satisfaction of said mortgage, to be so applied by the Clerk; according to the uniform custom of a Court of Equity, to allow encumbrances to be removed, and imperfections in the title cured at any time before the decree; and even to allow time to the vendor to remove encumbrances or complete his title.—Story's Eq., § 777; 2 Daniel's Ch. Practice, 1195, 1458, note on p. 1195; Thompson v. Dulles, 5 Rich. Eq., 217.

It is sufficient if the person entering into articles to sell has a good title at the time of the decree.—Langford v. Pitt, 2 P. Wms., 630; Merchants' Bank v. Thompson et al., 55 N. Y. R., 7.

"Where the Master reported that a good title could be made, except as to so much as a widow was entitled to, in respect of her dower, she refusing to join in the conveyance to the purchaser, upon further directions, the Vice Chancellor held that if, at the hearing, on further directions, the vendor was prepared to cure the objection to the title which was reported by the Master, he was in time to do so; and he accordingly, in this case, decreed a specific performance, upon an affidavit that the widow agreed to join in the conveyance, and that the seller undertook to procure her to join in such conveyance."—1 Sugd. on Vend., 478, citing Paton v. Rogers, 6 Madd., 256.

Under a reference upon the title, "it has been held that if the purchaser can show a good title, at any time before the Master's report, it will entitle him to a decree; and even after the report, if the vendor can satisfy the Court that he can make a good title, by clearing up the objections reported by the Master, the Court will make a decree in his favor."—2 Danl. Ch. Pr., 1195.

Phillips, contra:

When a title is defective, on the ground of possible claims or encumbrances, which may or may not spring up at some future period, the vendee cannot, in general, compel the vendor to give an indemnity against them.—Lord Eldon, in Paton v. Brebner, 1 Bligh., 67, § 67. That in a suit for the specific performance of a contract, if it turns out that the

*456

defendant cannot make a title to *that which he has agreed to convey, the Court will not compel him to convey something less with indemnity against the risk of eviction. The purchaser is left to seek his remedy at law, in damages for the breach of the agreement. —Atkinson on Titles, 261.

And in note O, the same authority, under Sec. 11, Seller's Title, it is laid down that the rules on this subject, with regard to lands are, first, that the buyer has an absolute right to a good title, and unless he have unequivocally discharged this right, he is not bound to take a defective title with warrandice, or wait till his right is challenged.

A purchaser, unless he stipulates for less, must have a good title to the land bought, or the plaintiff must have tendered to him a good and sufficient title to it, before he will be compelled to pay for it. This is sheer justice; it is only demanding the quid pro quo. The mortgage was one which always, until removed, made the title defective. But it is said the purchaser was told of the mortgage, and the sale was made to pay it. It was the business of the vendor to disencumber his title, and make it good and perfect to the purchaser. If this be not his business, then a purchaser would be bound to take an encumbered title, and go into equity to compel the vendor to clear off the encumbrance. —2 Rich., 363, Tharin v. Fickling.

Though in England the rule is, that the vendee shall prepare and tender the conveyance, with us it seems it is the duty of the vendor to make and tender the conveyance, as well as to remove all encumbrances.—6 Rich. Eq., 324-332, Prothro v. Smith.

The Court will not compel the specific performance of an agreement, and defendant to accept a title which complainant cannot make out clearly good, and free from encumbrance. —1 DeS., 382, Butler v. O'Hear.

In the case of Wilde v. Fort, 4 Taunt., 334, the rule is recognized, if the vendor of an estate at auction does not show clear title by the day specified, the purchaser may recover back the deposit and rescind the contract, without waiting to see whether the vendor may ultimately be able to establish a good title or not. The purchaser is not bound to accept a doubtful title.—1 Pet., 467, Bank of Columbia v. Hayner.

On bills for specific performance of contracts concerning lands—and the present case is of this character—Courts of Equity do not force the purchaser to take anything but a

*457

good title, and do not *compel them to buy lawsuits. Courts of law consider a title only in matters of fact, but Courts of Equity, in deference to the law Courts, consider a title as doubtful in law, as well as in fact, where the law is not settled. We consider the plaintiff's title as at least doubtful.—8 Rich. Eq., 247, Lowry v. Muldrow; and 1 DeS., 213, Colcock v. Butler.

Second ground: The estate is not now settled.

The devisee cannot take until the creditors are satisfied. An executor, who is also the residuary legatee, will be treated as the owner of the assets, after due provision is made for securing the payment of the debts due from the estate.—Redfield Law of Wills, 1 pt. 120, § 6.

No final discharge to executor to be granted, without public notice to be given, for the space at least of one month.—Re. Code of S. C., 175, Acts 1869.

If assets are insufficient to pay debts, real estate to be sold.—Acts 1842, 232, Rev. Code of S. C., 420.

Third ground: It is an estate in trust.

It has been established, by a series of cases, that where a bequest is accompanied by words expressing a command, recommendation, entreaty, wish or hope, on the part of the testator, that the donee will dispose of the property in favor of another, a trust will be created—1st. If the words are sufficiently imperative; 2d. If the subject be sufficiently certain; and if the object be also sufficiently certain.

1. Thus the words desire, will and desire, request, wish and request, entreat, recommend, hope, in the fullest confidence, not doubting, trusting, and wholly confiding, have been considered sufficient to raise a trust where the two other requisites, viz., certainty of the object and the subject are also complied with.—Hill on Trustees, 71.

2. For this purpose the property to which the trust is intended to apply must be clearly described.—Id. 73.

3. And as to the persons, it is by no means indispensably necessary that they should be mentioned by name.—Id. § 75. In Woods v. Woods, it was held by Lord Cottenham that a gift to a wife, for the support of herself and family, was a good bequest in favor of the children, whom his Lordship decided to be entitled under that description. Upon examination of the several authorities, therefore, it seems to be clear that a direct gift to or for the benefit of a family or families is a sufficient description of the objects, and,

*458

ac*cording to the circumstances of the property, the next of kin or the children will be held to take.—Id. 77.

A frequent case of implied trust arises where a testator uses words precatory, or recommending, or expressing a belief. Thus if he desire, will, request, will and desire, wish and request, entreat, most heartily beseech, order and direct, authorize and empower, recommend, hope, do not doubt, have the fullest confidence.—Len. Law Trus. and Trustees, 167. But such a construction will not, in general, prevail where either the objects intended to be benefited are imperfectly described, or the amount of the property to which the trust should attach is not sufficiently defined; but although vagueness in the object will furnish reason for holding no trust was intended, this may be countervailed by other considerations.—Id. 169.

The rule, as laid down by Ld. Alvanly, and since recognized as the correct principle, was this: "Whenever a testator points out the objects, the property and the way in which it shall go, that creates a trust, unless there are plain express words or necessary implication that he does not mean to take away the discretion, but leaves it to be defeated."—2 Ves., Jr., Malim v. Height. Where a testator expresses a desire as to the disposition of property, and the objects to which he refers are certain, the desire so expressed amounts to a command.—2 Scho. and Lef., 189, Cary v. Cary.

Devise to A. and her heirs forever, in the fullest confidence that after her decease she will devise the property to my family. A. has an estate for life only, with remainder in trust for the devisor's heirs, as persona designata.—17 Ves., Jr., 253, Wright v. Atkins; Id. 19, 299.

Three things are said to be indispensable to constitute a valid trust: First, sufficient words to raise it; secondly, a definite subject; and, thirdly, a cerfain or ascertained object.—2 Sto. Eq. Jur., 247, § 964.

A great deal of discussion has arisen in the Courts of Equity, in regard to the force

of words of recommendation in wills in regard to the use to which the testators might desire the persons to whom they had given legacies to put the same, and how far merely precatory words, or words of wish or desire, would have the effect to create an obligatory trust. But it seems to have been adopted as a rule of the Courts of Equity, at one time certainly, that no particular form of expression is requisite in order to create a binding and valid trust; and that words of recom-

*459

mendation, request, en*treaty, wish or expectation will impose a binding duty upon devisee, by way of trust, provided the testator has pointed out, with sufficient clearness and certainty, both the subject-matter and the object of the trust.—Red. Law of Wills, 1, 689–700, § 6.

One who purchases from a trustee, with notice of the trust, becomes himself chargeable with the equities of the trust, to the extent of his dealing, if the trustee's act, is a violation or an abuse of the trust. In this case the bank had notice, for the trust was unmistakably stamped upon the face of the certificate, and if they had followed up the indications thereby afforded, it would have led to the most complete information on the subject, and shown them the utter incapacity of Laurens to sell, much less to hypothecate for his own use the certificates of stocks which stood in his name, for the benefit of the wards of the Court.—Simons v. Bank, 5 Rich. Eq., 272.

Time is not usually of the essence of a contract, so as to avoid it, in case the exact time be not complied with; but it may be, and is, of the essence, where the other party or third persons may be seriously injured, or even exposed to injury.—Bail. Eq., 373, Doar v. Gibbes.

It is well settled in this State that a Court of Equity will not disregard time and decree a specific performance of a contract for the sale of real estate, at the suit of the party in default, unless he not only applies promptly, but has a reasonable excuse for his non-performance on the contract day.—58 Bar., 498, Hubbell v. Schaning.

Jan. 16, 1875. The opinion of the Court was delivered by

MOSES, C. J. However far the earlier decisions may have gone in construing as a trust the mere expression of a wish, entreaty or confidence, attached to a devise or legacy, the inclination of the Courts in more modern times, as Mr. Story, in the second volume of his Equity Jurisprudence, § 1069, says, "is not to extend this doctrine of recommendatory trusts." Mr. Jarman, in his work on Wills, Vol. 1, 329, expresses himself to the like effect.

Though the language used may convey the wish or desire of the testator, as to the use of the property devised, if it does not impose an obligation which can be enforced in a Court of Equity, it cannot be held to control or qualify the absolute interest which is con-

*460

*ferred by the previous disposition. Where an absolute right is given, words which are to annex a limitation to its free and uncontrollable exercise must not only be mandatory, but, in themselves, show the manner in which they are to operate, so that the purpose of the testator may clearly appear—how or in what degree he intended to affect the original gift by restrictions entirely inconsistent with its independent enjoyment.

A mere general expression of affection and favor, even in regard to the children of a testator, has never been held, where, by his will, the estate in unrestricted terms was given to the wife, to convert it into a life interest, unless such disposing intention in their favor is manifest from the words employed. If there is nothing to control the use of the property in the hands of the first taker, and he may appropriate it exclusively to his own purposes, there will be wanting that certainty which is necessary to give effect to the recommendation as a trust.

It is not urged that the will under which the appellant claims uses any mandatory words in any way limiting the absolute right of the widow to the real estate devised. It is contended, however, that the precatory expression by the testator of confidence in her judicious use of it, for the benefit of herself and children, creates such a trust as must entirely destroy the exclusive interest, which, without these superadded words, she would take in the property. It will be observed that there is no direct gift to the children, on whose behalf the trust is sought to be established by the respondent, to shield him from the relief claimed by the complaint, nor are there any words interposed directory to the wife, either as to the mode of her use of it, or at all indicating how or to what extent the children should have its enjoyment. Indeed, such appears to have been his confidence in her affection and judgment, that, though having his children at the time in his mind, instead of conferring on them any express or definite interest in his estate, he prefers to give her the unrestricted power over his whole property, in the confident belief that it would thereby be the more advantageously used for their benefit.

Is this confidence, thus reposed in his wife, which was the declared inducement to the disposition in her favor, to be controlled, unless a clear trust, which would be inconsistent with the right so plainly first conferred upon her, is shown to have been intended by the superadded words? He has, in the most sol-

*461

emn instrument a man *can execute, testified to the confidence which he had in her, and no authority has been produced to the Court which could justify it in annexing terms or qualification which would declare that he did

not intend what he said. The manner in which she might use the property was to be in entire accord with her judgment. There is no control as to the mode in which she should employ it. Its use was to be subject to her own determination. For aught that appears, she could not better exercise the discretion with which she is invested than by a sale of these very premises. Their conversion into money may be the most judicious use which she can make of them, and may fully justify the confidence which her husband had in her when he constituted her his sole devisee and legatee.

We are not disposed to extend the rule which the Courts have adopted in regard to the force and effect of devises created by mere words of recommendation. More especially should it be narrowed to the limits prescribed by the authority of decided cases, where there is no mode of ascertaining, as is the one before us, to what extent the trust is to operate. The vagueness in the direction as to the proportions which the supposed beneficiaries shall enjoy, where the benefit may be claimed by more than one, and the want of description of the manner in which the trust is to be executed, may well be urged against its existence. As observed by Mr. Lewin, in his treatise on Trusts and Trustees, 169, "the difficulty that would attend the execution of such imperfect trusts is converted by the Court into an argument that no trust was really intended. Nor will the devise be construed into a trust if it appears, from the context, that the first taker was to have a discretionary power to withdraw any part of the subject from the object of the wish or request."—Knight v. Knight, 3 Beav., 174.

The words of the will here are not as strong in favor of the children as those in Pope v. Pope, 10 Sim., 1, where the testator, after "trusting that his wife will, from the love she bears him and their dear children, so husband and take care of what property there may be, for their good, and, should she marry again, then she may convey to trustees, in the most secure manner possible, what property she may then possess, for the benefit of the children, as they may severally need or deserve, taking justice and affection for her guide." It was held that no trust was created in favor of the children, and so we are bound to hold here.

There is no branch of equity jurisdiction

*462

in which the Court is *allowed the greater exercise of a sound and reasonable discretion, "which governs itself, as far as it may be, by general rules and principles," than that which relates to the specific performance of agreements. As was said by Lord Eldon, in Radcliffe v. Wainington, 12 Ves., 331, "the jurisdiction is not compulsory upon the Court, but the subject of discretion. The question is not what the Court must do, but what it may do, under the circumstances."

"Time is not generally deemed, in equity, to be of the essence of the contract, unless the parties have expressly so treated it, or it necessarily follows, from the nature and circumstances of the contract."—Story's Eq. Juris., § 776.

The aim of the Court is to ascertain the real intention of the parties, from an examination of all the circumstances attending the contract, and to give effect to such intention, when discovered. After an examination of all the cases brought before him on the argument of Upwell v. Knight, 1 Y. and C. Exchcq., 415, (note to § 776, Story Eq. Juris.,) Mr. Baron Alderson lays down what he regards the governing principle: "It is to examine the contract, not merely as a Court of law does, to ascertain what the parties have in terms expressed to be the contract, but what is, in truth, the real intentions of the parties, and to carry them into effect." The effect of time, in regard to the specific performance of agreements, is considered and discussed in Thompson v. Dulles, 5 Rich. Eq., 370, where, although a space of eighteen months had elapsed between the contract for the sale and institution of proceedings, and the title was not perfected until nearly two years thereafter, it was held that the delay on the part of the plaintiff did not amount to such laches as deprived him of his right to a specific performance.

The agreement in the case before us was made on 1st March, 1873—one-third of the purchase money, to wit, two thousand dollars, was to be paid in cash, the balance in one and two years, interest from date—the terms to be complied with "whenever clear and unencumbered titles are given." The only incumbrance on the property was a mortgage, on which, as appears by the decree, was due a balance of $3,000, with interest from March, 1873. It is unnecessary to recite the correspondence which followed the tender of title, on 29th April, 1873, by the plaintiff, to the attorney of the defendant, with the offer to satisfy the mortgage, and apply to it the cash portion to be paid by the vendee. It is enough to say that the offer to make the application, as proposed, was a reasonable one,

*463

*often adopted, under the like circumstances, by both parties, when they are really desirous of executing their contract according to its true intent. On 30th April following the respondent, by his attorney, replies "that a clear and unencumbered title not having been tendered, the purchase is declined." The instantaneous rejection of the purchase evinces an anxiety on the part of the respondent to free himself from a contract, which he may have repented, by eagerly availing himself of what he may have considered an opportunity of avoiding it. But this was not all. On the 17th May succeeding the appellant, in writing, informed the respondent "that she proposed to extinguish the mortgage, if he would then accept her conveyance and settle for the purchase." Two days after a reply was re-

ceived, to the effect that, when the title was reported to him as not good, he requested her agent (with whom he treated for the purchase) to cancel the agreement, as he desired to use his funds and look for other investments, which he had found.

On 31st January, 1874, an order was made, referring the case to a Referee, to take the testimony, the respondent's counsel refusing to consent to an order for a reference on the title. To this either party was entitled at any time before a hearing, and, under some circumstances, after the hearing and before decree. The refusal, on the part of the Judge, to entertain the motion for such a reference was clearly erroneous. After the hearing, and before decree, the appellant moved the Court, if it should be of opinion that all that she had already done was not a sufficient compliance with her agreement of sale, that leave be granted her to pay into Court a sum sufficient to meet the full amount due on the mortgage—the application to its satisfaction to be made by the Clerk. This was resisted and refused.

While every attempt was made to remove the objection interposed by the respondent, he has not shown how, or in what way, the delay in perfecting the title has enured to his prejudice, or why he at first declined the offer of the cash payment to the discharge of the mortgage.

It is clear, beyond doubt, that if the party, though not able to make a good title at the time of bringing his bill, is in a condition to do it before the decree, he should be so permitted.—Story's Eq. Juris., § 77; Morlback v. Butler, 10 Ves., 314; Langford v. Pitt, 2 P. Wms., 630.

In 2 Daniels Ch. Pr., 634, it is said: "And.

*464

even after the report, *if the vendor can satisfy the Court that he can make a good title, by clearing up the objection reported by the Master, the Court will make a decree in his favor." There are cases, too, to show that if the vendor, at the hearing, seems to be in a condition to remove the obstacle in the way of his making a perfect title, and it so appears to the Court, he may have a decree, to take effect upon such removal.—Langford v. Pitt, 2 P. Wms., 630; Merchants' Bank v. Thompson et al., 55 N. Y. R., 7.

Ch. Walworth, in Bates v. Lyons, 7 Paige, 85, says: "It is not a matter of course, however, to dismiss a bill for specific performance merely because the title was not perfect at the commencement of the suit, although that may be a sufficient reason for giving costs to the defendant if he has not made any unreasonable objection to the title."

Much of the litigation in this case might probably have been saved if the usual and proper course of a reference on the title had been followed. The appellant might then have been allowed, before the report, to satisfy the mortgage, and thus clear her title of the only incumbrance which rested upon it. Consequences, involving delay, costs and other expenses, are apt to follow where the usual routine of practice is disregarded.

The objection that there may be creditors of the testator who may subject the said premises to the satisfaction of their demands, cannot prevail. If there are debts which can affect them, after what has been shown by the appellant to the contrary, the onus is on the respondent to disprove her averment. The testator died on 10th February, 1871. The Referee reports that she advertised, according to law, for creditors holding demands against the testator, to present attested statements thereof; that none were proved within the time prescribed by law, or subsequently; that the tender of title, on 29th April, 1873, was accompanied by her affidavit; that she was sure there were no creditors, save those who had released to the respondent all the claims which they might, in any event, have against the said property, and the creditor holding the mortgage, which was, in fact, the only incumbrance on it. Under the circumstances thus disclosed, can the respondent, with any reason, urge this further objection to the execution of his contract?

The motion to reverse the judgment below is granted.

It is ordered that the case be remanded

*465

to the Circuit Court, and *on its appearing to its satisfaction that the mortgage lien has been removed, the respondent be required specifically to perform his agreement. As the time fixed for the payment of the first instalment has expired, and it appearing that since complaint and answer filed some arrangement has been made in regard to rent and taxes, to continue pending the action, an order may be required to further the purpose proposed through it by the parties. Such order may also be applied for to the Circuit Court, and any other necessary to give effect to the judgment of the Court herein pronounced.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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5 S. C. 465

SAMPSON & WYATT v. SINGER MANUFACTURING COMPANY.

(Columbia. Nov. Term, 1874.)

[*Principal and Agent* ⇐132.]

From the mere fact that an agent, employed to sell goods, and having in his possession a horse and wagon of his principal, as also the goods offered for sale, puts up at a hotel, the law will not presume a contract by the principal to pay the hotel keeper for the board and lodging of the agent and keeping of the horse.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 459; Dec. Dig. ⇐132.]

[*Appeal and Error* ⊂⊃1175, 1177, 1178.]

Where a non-suit is improperly refused, if the nature of the demand is such that a recovery cannot be had, the Supreme Court will dismiss the complaint, but if it is merely a case of insufficiency of evidence, then, it seems, a new trial only should be granted.

[Ed. Note.—Cited in Willis v. Knox, 5 S. C. 476; Carter v. Columbia & G. R. Co., 19 S. C. 26, 30, 45 Am. Rep. 754; Carrier & Harris v. Dorrance, 19 S. C. 34; DeCamps v. Carpin, 19 S. C. 126; Townes v. City Council of Augusta, 46 S. C. 38, 23 S. E. 984; Elmore v. Davis, 48 S. C. 394, 26 S. E. 680; Lampley v. Atlantic Coast Line R. Co., 77 S. C. 322, 323, 57 S. E. 1104.

For other cases, see Appeal and Error, Cent. Dig. §§ 4577, 4609; Dec. Dig. ⊂⊃1175, 1177, 1178.]

Before Townsend, J., at Marlborough, January Term, 1874.

Action by Sampson & Wyatt against The Singer Manufacturing Company, to recover $137, for the board and lodging of one Joseph B. Hartsfield and the keeping of a horse, between the 1st January and the 1st July, 1873.

The plaintiffs gave evidence tending to show that they were hotel keepers in Marlborough County, in this State, and that the defendant is a corporation chartered by another State; that, at the time mentioned above, Joseph B. Hartsfield was in the employment of defendant, as its agent, for the sale of sewing machines; that he had in his possession a number of sewing machines, and also a horse and wagon of the defendant: that during the period mentioned he frequently put up at plaintiffs' hotel, having the horse and wagon with him; that at one

*466

time he stayed two months and a half; *that he made no contract with the plaintiffs for board; that his board and lodging, and the keeping of the horse, were worth $147, and that he had paid only $10, leaving a balance due and unpaid of $137; that he offered the machines for sale at plaintiffs' hotel, and sold some of them there; that plaintiffs did not look to Hartsfield for payment, but to the defendant.

At the close of plaintiffs' case the defendant moved for a non-suit, on the ground, inter alia, that no express contract with the defendant had been shown, and that none would be implied or inferred from the facts proved.

His Honor denied the motion, and the defendant excepted.

The defendant then introduced evidence tending to show that Hartsfield had no authority from defendant to bind it for his board and lodging and the keeping of the horse.

The case was submitted to the jury, who found for the plaintiffs.

The defendant appealed, and now renewed its motion for a nonsuit.

Hudson, for appellant.

Covington, contra.

Jan. 16, 1875. The opinion of the Court was delivered by

WILLARD, A. J. The only grounds of recovery presented by the plaintiffs' proofs are the facts that they are hotel keepers, and, as such, entertained at their hotel a person who was, at the time an agent of the defendants for the sale of goods, and, as such, entrusted with goods and other property of the defendants. It was in proof, on the part of the plaintiffs, that no express contract was made, but plaintiffs contend that a contract, binding the defendants as principals, resulted as an inference from the facts. The defendant moved for a non-suit, which was denied. They now renew this motion.

If the non-suit was improperly refused, and the nature of the plaintiffs' demand was such that no recovery could be lawfully had, this Court will grant the motion, and dismiss the plaintiffs' complaint. If, however, it was merely a case of insufficiency of proofs adduced at the trial to support a cause of action in itself of a proper legal nature, this Court will not dismiss the complaint upon appeal, but order a new trial, to afford the plaintiffs an opportunity to make better proofs.

*467

*A contract, binding the principal, cannot be presumed, from the mere fact that an agent has obtained lodging at a hotel, while prosecuting the business of his principal, and while having in charge property belonging to such principal. The authority that the law presumes from the fact of an agency is measured by the direct objects contemplated by such agency, on the principle that one having power to perform an act, and imposing its performance on another as a duty, or conferring it as a right, must be deemed, where requisite, to have communicated power so to act commensurate with the duty or rights imposed or conferred.

Supplies afforded for the personal use of an agent are not among the objects presumed to be included in the agency, but if related to it at all, are merely collateral to it. It follows that authority to procure such supplies, on the credit of the principal, is not to be presumed, nor will the law presume a contract in such a case, from the mere fact of furnishing such supplies.

Two things are necessary to enable an agent to bind his principal: first, he must have authority for that purpose; second, he must duly exercise it. Receiving entertainment at a hotel, by an agent, is not, standing by itself, an exercise of such power, even if he had it.

The fact that plaintiffs' demand includes, as a separate item, the keeping of a horse, belonging to defendant, in the custody of the agent, does not change this conclusion.

This act must be referred to the principal

contract, which, as we have seen, must be presumed to have been personal with the agent.

It will not be necessary to advert to the defendant's proofs, showing that the agent had no authority to bind his principals for such a purpose, as that fact was presumable, as matter of law, from the plaintiffs' proofs.

The complaint should be dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

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5 S. C. *468

*McCULLOUGH v. KIBLER.

(Columbia. Nov. Term, 1874.)

[*Agriculture* ⇐11.]

A mule is not an advance, within the sense of the Act to secure advances made for agricultural purposes. A lien, therefore, under the Act, to secure the payment of the price of a mule purchased, is void.

[Ed. Note.—Cited in Hankinson v. Hankinson, 61 S. C. 203, 39 S. E. 385.

For other cases, see Agriculture, Cent. Dig. § 18; Dec. Dig. ⇐11.]

Before Moses, J., at Newberry, April, 1874.

This was an action by John McCullough and William J. Duffie, against Jacob Kibler.

Under the Act to secure advances made for agricultural purposes, one Peter Mendenhall, on the 3d February, 1873, gave to Jacob Kibler, the defendant, a lien on all his crops to be made that year, to secure the payment of "an advancement," as the contract recited, "in fertilizers, moneys and all other supplies, to the value of one hundred dollars." The consideration of the lien was the price of a mule, purchased by Mendenhall from Kibler, "to aid him in making his crop."

In November of the same year Mendenhall assigned and delivered to the plaintiff, McCullough, the cotton he had made that year, with instructions to sell the same, and apply the proceeds to the payment of the following debts, due by Mendenhall: (1) A debt of $100, due to McCullough, himself, for rent; (2) a debt of $70, due to the plaintiff, Duffie, also for rent; and (3) the debt due to the defendant, for the price of the mule.

After the assignment and delivery of the cotton to McCullough, the defendant obtained from the Clerk of the Court a warrant of attachment upon his lien, and on the 5th December the Sheriff, by his direction, seized the cotton in McCullough's possession. This action was then commenced to enjoin the defendant from proceeding further under the warrant.

His Honor held that a mule was neither within the terms "fertilizers, moneys and all other supplies," used in the contract, nor was it an advance, within the terms of the Act under which the lien purported to be given, and he decreed for the plaintiffs.

The defendant appealed, on grounds which involved the questions decided by the Circuit Court, and, also, a third ground, that Mendenhall was a necessary party to the action.

Moorman & Schumpert, for appellant, cited and commented upon the Act, Gen. Stat., § 55, p. 511.

Baxter & Johnstone, contra.

*469

*The opinion of the Court was delivered by

WRIGHT, A. J. The statute of 1866, which allows a preferred lien to any person or persons making an advance or advances, either in money or other supplies, to any person or persons engaged, or about to engage, in the cultivation of the soil, is as follows: "If any person or persons shall make any advance or advances to any person or persons who are engaged, or are about to be engaged, in the cultivation of the soil, the person or persons so making such advance or advances shall be entitled to a lien on the crop which may be made during the year upon the land in the cultivation of which the advances so made have been expended, in preference of all other liens, existing or otherwise, to the extent of such advance or advances."—Gen. Stat., § 55, p. 557.

One important object of this statute is to enable those who "are engaged, or about to engage, in the cultivation of the soil," to get, upon credit, the necessary supplies to be expended in producing their crops, and, at the same time, enable the person or persons advancing money or other supplies to secure him or themselves in the payment of the thing or things advanced which were expended upon the land in producing the crop, and upon which thing or things a mortgage would be no security.

It is shown that neither money nor any thing else was advanced by the appellant to Peter Mendenhall, therefore Mendenhall was only indebted to appellant for a mule.

In no wise can a mule be considered an "advance," to be "expended" upon the soil which produces the crop. The labor of a mule might very properly be considered a necessary supply for the production of a crop, but a mule, instead of being worn-out and rendered useless in producing a crop, may be in much better condition and more valuable after the crop is made than before.

The so-called lien on the crop of Peter Mendenhall, held by the appellant, is void.

The question raised by the third ground of appeal is not necessary to a full and proper decision of this case.

The motion must be dismissed.

MOSES, C. J., and WILLARD, A. J., concurred.

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5 S. C. *470

*DE LA HOWE v. HARPER.

(Columbia. Nov. Term, 1874.)

[*Homestead* ⇐2.]

The homestead exemption, under the Constitution of 1868, cannot be allowed against a judgment for a devastavit committed by the defendant, as administrator, where the administration bond was given before the Constitution was adopted, and it makes no difference that the devastavit, as well as the judgment, was after its adoption.

[Ed. Note.—Cited in Bull v. Rowe, 13 S. C. 365; Adams v. Agnew, 15 S. C. 40; Bobo v. Vaiden, 20 S. C. 281; Rhodes v. Casey, Id., 494; Withers v. Jenkins, 21 S. C. 370, 371; McAfee v. McAfee, 28 S. C. 197, 5 S. E. 480; Gowan v. Gentry, 32 S. C. 376, 11 S. E. 82; Ex parte Goldsmith, 68 S. C. 538, 47 S. E. 984.

For other cases, see Homestead, Cent. Dig. § 2; Dec. Dig. ⇐2.]

[This case is also cited in Charles v. Charles, 13 S. C. 387, without specific application.]

Before Cooke, J., at Abbeville, June Term, 1873.

R. P. Brownlee and H. H. Harper were the administrators of J. Brownlee, deceased. Their administration bond bore date August 8, 1863. In the year 1866 they sold the personal estate, for gold or its equivalent, and on the 9th April of the same year they filed the sale bill in the office of the Judge of Probate. The sales amounted to $5,353.41. The Trustees of the Estate of Dr. John De La Howe, as creditors of the intestate, filed a bill in equity against them for an account, and on the 15th July, 1871, a compromise decree for $2,453.05, in behalf of the creditors, was rendered against the defendants, personally. Execution was issued on the decree, and a levy made by the Sheriff on the real and personal estate of Harper, and thereupon he claimed the homestead exemption of real estate of the value of $1,000, and personalty of the value of $500. The plaintiffs objected to the allowance of a homestead, but a commission to set it off was issued by the Sheriff, and on May 8th, 1873, the Commissioners made their return, wherein they certified that they had set off and assigned to Harper, as and for his homestead, a certain tract of land; and, also, that they had appraised and set off, for his use, certain articles of personal property. The plaintiffs excepted to the return, on the ground, inter alia, that the law of the State, providing for a homestead exemption, was unconstitutional, as against the creditors, for whom the decree was rendered in this case.

His Honor the presiding Judge overruled the above exception, but because of some informality in the commission, he set it aside, and ordered that a new commission be issued.

The plaintiffs appealed.

Thompson, for appellants, cited and relied upon Gunn v. Barry, 15 Wal., 610; Cochran v. Darcy, ante, p. 125.

*471

*Perrin & Cothran, contra:

The claim of homestead is good, and has not been declared unconstitutional, when the debt arose since April, 1868, when the new Constitution was adopted.

This debt was a debt against Brownlee, before the new Constitution; but, as against his administrators, it was not a debt, individually, until the account against them, as administrators, was stated and confirmed by the Court, and entered as a decree against them, July 15, 1871. "An administrator is not liable, de bonis propriis, until a devastavit is established against him, which can only be done after judgment against him, in his representative character, in which he admits assets, and, by another action, suggesting a devastavit."—Brown v. Hilligas, 2 Hill, 448. "An administrator can only be made liable, de bonis propriis, by a devastavit, established against him, according to the rule prescribed in Brown v. Hilligas, or by an account before the Ordinary, or in equity, preparatory to a suit on his bond."—Ford v. Rouse, Rice, 223.

But for the compromise of administrators, the first decree would have been "de bonis testatoris," and then a second action would have been necessary, suggesting devastavit. The decree, by consent, admitted devastavit, but there was certainly no debt by administrators, personally, until that decree was rendered.

This being a debt after the Constitution, the party is entitled to homestead, notwithstanding the last "Homestead Act was ratified February 22, 1873, which repealed all former Acts." The last Act only substituted one Act for another which existed in 1871.

Jan. 28, 1875. The opinion of the Court was delivered by

WILLARD, A. J. The plaintiffs are judgment creditors of the defendants. A homestead exemption has been allowed to the defendants, as against their judgment. The question for our consideration is whether the plaintiffs' demand to have the whole real and personal estate of the defendants applied to the satisfaction of their judgment is of such a nature as to be protected by the clause of the Constitution of the United States, forbidding the passage of laws impairing the obligation of contracts, from the operation of the Constitution and laws of this State, conferring a right of homestead on debtors, in certain cases.

The judgment was recovered in 1871; but

*472

that fact is not, in it*self, decisive of the question. If the judgment was based on a contract or voluntary undertaking of the defendants, then the date of such contract or undertaking must be taken as the test of the

applicability to it of the clauses of the Constitution of the United States in question.

The action in which the judgment was recovered against the defendants was brought for a devastavit committed by the defendants as administrators. The obligation on which such action rested originated in the acceptance of the office of administrator, and giving the bond incident to it, which was in 1863, prior to the adoption of the Constitution of 1868.

The consideration that the judgment, ascertaining the fact of a devastavit, was recovered after 1868, is unimportant. Although the liability of the administrators, personally, was not fixed until judgment was recovered, yet the right on which the judgment was founded necessarily existed antecedent to its recovery. That right embraced the original obligation assumed by the administrators, as the ground of their duty in that character, and the immediate and direct cause of action, which consisted of some specific breach of that duty. Nor does the fact that the act of administrators that constituted the devastavit occurred after 1868 control the results of the case; for the obligation of the contract necessarily preceded the act of default, and it is the obligation of the contract that is the direct subject of the Constitution in question. To find the date of origin of that obligation, we are compelled to go back to the date of the acceptance of the office and of the official bonds, and that takes us to a time anterior to the Constitution of 1868, and shows that the obligation on which the judgment was founded was in existence at the adoption of the Constitution of 1868, and was a proper subject for the protection afforded by the clause of the Constitution of the United States under consideration.

We have already passed upon the question, whether, under the provisions of our Constitution, a homestead exemption can be allowed as against an obligation incurred prior to that Constitution, and have held, in accordance with the decisions of the Supreme Court of the United States, that such an exemption cannot be claimed.—Cochran v. Darcy, ante, p. 125.

The order of the Circuit Court should be reversed.

MOSES, C. J., and WRIGHT, A. J., concurred.

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5 S. C. *473

*WINSMITH v. WALKER.

(Columbia. Nov. Term, 1874.)

[*Appeal and Error* ⇨263.]

The Supreme Court will not interfere where no exception was taken to the charge of the Judge, but only to the verdict of the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1516; Dec. Dig. ⇨263.]

Before Moses, J., at Spartanburg, ——— Term, 1873.

This was an action by John Winsmith against Joseph Walker, to recover the value of five bales of cotton converted by the defendant.

At the trial the plaintiff gave evidence tending to show that he was the owner of the five bales of cotton—they having been made on his land, in the year 1870, by one Smith, his farm laborer; and the defendant gave evidence tending to show that Smith made the cotton for himself; that he gave the defendant a lien on his crop of that year, under the "Act to secure advances for agricultural purposes;" and that he afterwards sold the cotton to defendant.

The jury found for the plaintiff $93.

The plaintiff moved for a new trial, and his motion being overruled, he appealed, on the grounds:

1. That the title of the property sued for having been proved to be in the plaintiff, in law the jury were bound to find for the plaintiff the value of the whole property sued for.

2. There was not such proof of the defendant's lien claimed under the Act of the General Assembly, passed A. D. 1866, entitled "An Act to secure advances for agricultural purposes," as would, in law, entitle the defendant to the benefit of such lien under said Act.

Duncan & Cleveland, for appellants.

Bobo & Carlisle, contra.

Jan. 28, 1875. The opinion of the Court was delivered by

WRIGHT, A. J. There were no exceptions taken to the charge of the Judge, but only to the verdict of the jury; therefore no question of law was raised by the grounds of appeal.

In such a case this Court will not interfere.—Floyd, Adm'r, v. Abney, 1 S. C., 114.

The motion must be dismissed.

MOSES, C. J., and WILLARD, A. J., concurred.

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5 S. C. *474

*WILLIS v. KNOX.

(Columbia. Nov. Term, 1874.)

[*Malicious Prosecution* ⇨28.]

In an action for maliciously, and without probable cause, charging plaintiff, by affidavit before a Trial Justice, with larceny, procuring a search warrant to be issued, and causing plaintiffs' room to be searched thereunder, express malice and actual damage must be proved.

[Ed. Note.—Cited in Hogg v. Pinckney, 16 S. C. 398; Freeland v. Southern Ry., 70 S. C. 429, 50 S. E. 11.

For other cases, see Malicious Prosecution, Cent. Dig. § 61; Dec. Dig. ⇨28.]

[*Appeal and Error* ⇨1177.]

The Supreme Court will not dismiss a complaint for error in denying a motion for

non-suit made on the ground of the insufficiency of plaintiffs, evidence to support the issues in the case, but will order a new trial.

[Ed. Note.—Cited in Carter v. Columbia & G. R. Co., 19 S. C. 26, 30, 45 Am. Rep. 754; Carrier & Harris v. Dorrance, 19 S. C. 34; Townes v. City Council of Augusta, 46 S. C. 38, 23 S. E. 984; Lewis v. Hinson, 64 S. C. 580, 43 S. E. 15; Lampley v. Atlantic Coast Line R. Co., 77 S. C. 322, 57 S. E. 1104.

For other cases, see Appeal and Error, Cent. Dig. §§ 4597–4604, 4606–4610; Dec. Dig. ⇦ 1177.]

Before Graham, J., at Charleston, February Term, 1874.

This was an action by George Willis, and Caroline, his wife, against Alexander K. Knox.

The complaint alleged:

1. That on the 11th day of September, 1871, whilst residing in the Parish of Christ Church, in the County of Charleston, the defendant, maliciously intending to injure the plaintiffs in their good reputation, appeared before Trial Justice George F. Kinloch, one of the Justices for Charleston County, exercising his jurisdiction in the Parish of Christ Church, and, without any probable cause whatever, charged Caroline, the wife of the complainant, before the said Trial Justice, with having feloniously stolen twenty-five cotton sheets, the property of said defendant and one ——— Wheelock, his copartner, and with having the said stolen articles concealed in the house where said complainants dwelt. That he, the said Alexander K. Knox, maliciously, and without probable cause, procured said Justice to grant a warrant to search the house of complainants.

2. That said Justice issued said warrant accordingly, and the house of complainants was searched, by one R. C. Jervey, said to be the Bailiff of said Justice, assisted in this rude service by the said Alexander K. Knox, the defendant.

3. That after said diligent search had been fully made, and none of the said goods searched for found, the said Alexander K. Knox, the defendant, signified to the said R. C. Jervey, the Bailiff, that he was satisfied, and since said time the defendant has not further prosecuted his said complaint, but he has abandoned the same, and in no wise made reparation for the wrong and injury done complainants.

*475

*4. That, by means of the premises, the plaintiffs have been injured in their persons, to their damage, five thousand dollars, &c.

The answer denied the charges of maliciously, and with out probable cause, procuring the search warrant to be issued, and of maliciously intending to injure the plaintiffs in their reputation.

At the trial the plaintiffs proved an affidavit, made by defendant before a Trial Justice, and dated September 11, 1871, as follows:

"Alexander K. Knox, one of the firm of Knox and Wheelock, being duly sworn, doth depose and say: That on or about the first day of August, 1871, at their plantation in Christ Church Parish, in the said County, was stolen and embezzled from the said firm of Knox and Wheelock, (of which firm he is a full partner, and now the only representative of the said firm,) some twenty-five cotton sheets, and other articles not now known, but which will be easily recognized by this deponent when seen, the personal property of Knox and Wheelock; and this deponent suspects that the said property has been stolen or embezzled by Caroline Willis; and that the same, or part thereof, is now concealed in her house on the said plantation, in Christ Church Parish, in the said County; wherefore process is applied for to search the same articles above mentioned."

And also a search warrant issued by the Trial Justice, and bearing the same date, directing the Constable to search the place where the property is suspected to be concealed.

They also introduced evidence to the effect that, in August and September, 1871, the plaintiffs were in the employment of the defendant, on his plantation in Christ Church Parish; that they occupied a room in his dwelling house; that he owned a large number of cotton sheets, which were kept in a house called "the cotton house;" that there were two keys to this house, one of which the plaintiffs kept; and that, for several days in August, they had used the cotton house as a sleeping apartment; that one Sam Rainey was employed on the place, and that he, also, had access to the cotton house; that a short time before the warrant was issued the plaintiff, Caroline, delivered three of the sheets to a clerk of the defendant—afterwards stating that they had been stolen by Rainey; that the sheets in the cotton house were then counted, and it was found that some twenty-five were missing; that the defendants suspected they had been stolen by the plaintiff, Caroline; that the plaintiffs then made preparations to leave the place,

*476

and, on the morning that they *left, one Jervey, a Constable, in whose hands the search warrant had been placed, searched the room occupied by the plaintiffs, and their bedding, trunks, &c., the defendant assisting him; that none of the sheets were found; that the defendant then said he was satisfied, and that the matter was prosecuted no further.

At the close of plaintiffs' case the defendant moved for a non-suit, on the ground that plaintiffs had not proved want of probable cause. The motion was denied, and defendants excepted.

The case was submitted to the jury, who found for the plaintiffs $2,500.

The defendant appealed.

Corbin & Stone, for appellants.
Brown, contra.

Feb. 5, 1875. The opinion of the Court was delivered by

WILLARD, A. J. The issue in this action must be disposed of under the rule governing the former action of case in the nature of malicious prosecution. In actions of that class it was necessary to prove express malice and actual damage.—Frierson v. Hewitt, 2 Hill, 499. In this respect they differed from the technical action of malicious prosecution, in which the plaintiff was bound merely to prove want of probable cause, and the law presumed both malice and damages from such fact of want of probable cause.—Frierson v. Hewitt.

The plaintiffs should have been non-suited. The evidence not only does not tend to show malice, but goes far to show that the defendant had probable ground for suspecting the existence of the facts that constituted the substance of the charge on which the search warrant issued.

As the ground of non-suit was the insufficiency of the evidence adduced to support the issues made by the pleadings, this Court will not dismiss the complaint, but order a new trial.—Wyatt v. Manufacturing Co., ante [5 S. C. 465].

WRIGHT, A. J., concurred.

MOSES, C. J. I concur in the order of the Court. In my judgment, however, the motion for a non-suit should have prevailed. This is admitted in the opinion, which declares that

*477

the plaintiffs *should have been non-suited. If the testimony was not sufficient to go to the jury, in my view of the case, the appellant had a right to claim a non-suit.

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5 S. C. 477

RUSSELL v. CANTWELL.

(Columbia. Nov. Term, 1874.)

[*Malicious Prosecution* ⇐41.]

For a wrong committed in July, 1864, at Columbia, in this State, no action lies by one who was then a slave.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 82; Dec. Dig. ⇐41.]

Before GRAHAM, J., at Charleston, November Term, 1873.

This was an action, for malicious prosecution, by George Russell against James Cantwell.

On the 1st July, 1864, at Columbia, in this State, the defendant commenced a prosecution against the plaintiff, before the Mayor of Columbia, acting as Magistrate, for stealing some gold and silver coin. A preliminary examination was held, and the evidence being very slight, the plaintiff was discharged.

At the time of the prosecution, the plaintiff, as he himself and others testified, was the slave of one Thomas B. Gordon.

At the close of plaintiff's evidence the defendant moved for a non-suit, on the ground, inter alia, that the plaintiff had no cause of action against the defendant, because he was a slave when the act complained of was committed, and the injuries, if any were done, was to the master.

The motion was denied, and the defendant excepted.

The jury found for the plaintiff $800.

The defendant appealed, and now renewed his motion for a non-suit.

Simonton & Barker, for appellant.
Corbin & Stone, contra.

Feb. 16, 1875. The opinion of the Court was delivered by

WRIGHT, A. J. The injury complained of by respondent is alleged to have been done to him by the appellant on the first day of July, 1864, at which time it is claimed by appellant that he (respondent) was a slave, and respondent so testifies.

*478

*If the respondent was a slave at the time the act complained of was committed, under the then existing laws of this State he could not have brought this action, as he was "incapable of holding property in his own right, and the possession and title must be referred to his master."—Fable v. Brown, 2 Hill, Eq., 378.

As to the personal protection of a slave, the right devolved upon the master.—Tennant v. Dendy, Dud., 85.

During the progress of the war, whether before or after the proclamation of emancipation, slaves were only made free by the force of arms, as the proclamation, being a military order only, could not change the civil status of persons residing in those States, and parts of States, where it was not made of practical force.—Ferdinand v. State, 39 Ala., N. S., 706; Doris v. Grace, 24 Ark., 326; Brothers v. State, 2 Cold., 201; McMath v. Johnson, 41 Miss., 439.

To permit those who were slaves and are now free to bring actions and carry on prosecutions against persons who were or were not slaves, for wrongs and injuries committed against them during the existence of slavery, would open the door to a flood of litigation that would prove disastrous to all classes of persons in the State.

The motion is granted.

MOSES, C. J., and WILLARD, A. J., concurred.

5 S. C. 478

BENNETT v. MATHEWES.

(Columbia. Nov. Term, 1874.)

[*Evidence* ⟸197, 561.]

Where the question is, whether a certain paper was written by B., and the direct evidence thereon is conflicting, other papers, proved or admitted to have been written by B., and also the opinion of experts, wholly founded upon a comparison of the papers in question with such other papers, are admissible as evidence.

[Ed. Note.—Cited in Benedict, Hall & Co. v. Flanigan, 18 S. C. 508, 510, 44 Am. Rep. 583; Du Pont v. Du Bos, 52 S. C. 269, 29 S. E. 665; Du Pont v. Du Bos, 52 S. C. Append. 609.

For other cases, see Evidence, Cent. Dig. §§ 681, 2381; Dec. Dig. ⟸197, 561.]

[*Trial* ⟸260.]

Where the issue is as to the validity of a paper propounded for probate as the last will and testament of a decedent, by one who is named therein as a devisee, and also as the executor thereof, and the Judge instructs the jury that the proponent "takes a considerable interest under the will," it is not error for him to decline to instruct them that the decedent "died intestate, as to any real estate not devised, which would descend to her next of kin."

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 655; Dec. Dig. ⟸260.]

Before Graham, J., at Charleston, March Term, 1873.

On the 6th day of January, 1872, Samuel L. Bennett proved, in common form, before the Judge of Probate for the County of

*479

*Charleston, a paper, purporting to be the last will and testament of Hannah Vesey, deceased, bearing date the 17th day of March, 1870, and on the same day qualified as executor thereof.

The paper had three subscribing witnesses, and was signed by the decedent with her mark. It recited that she was a widow, of the city of Charleston, of the age of seventy-five years, and of sound mind and memory, and then, after directing that her just debts and funeral expenses be paid, it purported, by the first ten disposing clauses thereof, to devise and bequeath to Anne Mathewes, Betsy Price, and several other persons, by name, certain interests in two houses and lots on Ashley Street, her household, kitchen and bedroom furniture, clothing and wearing apparel, and the sum of twenty dollars. In some of the devises the limitation to the devisee was "during her life, and to the heirs of her body, if any, and should she die leaving no heirs, as aforesaid," then to be rented and the rents divided. The 12th and 13th clauses were as follows:

"I give and bequeath to my friend, Samuel L. Bennett, his heirs and assigns, forever, my house and lot on Spring Street, north side, east of Ashley Street, and known as No. 56, and all the rest, residue and remainder of my personal estate, goods, chattels, of any kind, forever.

"Lastly, I hereby appoint Samuel L. Bennett my executor of this my last will and testament, hereby revoking former wills by me at any time made."

Anne Mathewes and others, as heirs of the decedent, filed their petition in the Court of Probate, demanding probate of the paper in solemn form, and on the 14th June, 1872, it was decreed, by the Judge of that Court, "to be the true legal last will and testament" of the decedent.

The contestants appealed to the Court of Common Pleas, and, at the hearing, the proponent called, among others, the subscribing witnesses, who testified to the execution of the paper with the formalities required by law. They further testified that the decedent could neither read nor write, and that the will was not read over to her in their presence. To prove that she knew its contents, the proponent was examined. He testified that he did not write the paper, and knew nothing of its contents until after the death of Hannah Vesey. He also testified to certain acts and declarations of hers which tended to show that she knew the paper was her will, and also knew its contents.

*480

On his cross-examination certain let*ters of his were produced, which he admitted had been written by him. They were submitted by the contestants, for the purpose, as their counsel said, of comparison with the handwriting of the will. Their introduction for that purpose was objected to, and the objection being overruled, the proponent excepted.

For the contestants Anne Mathewes was first examined as a witness. She testified that she had seen Bennett write—was well acquainted with his handwriting—and that she recognized the handwriting of the paper to be his. E. H. Sparkman, book-keeper of a bank, Wm. B. Heriot, a Notary Public and insurance agent, were then examined for the contestants, as experts. Each testified that he was unacquainted with Bennett's handwriting, but by comparing the handwriting of the letters with that of the paper propounded as a will, his opinion was that the latter was written by the same person who wrote the former.

The testimony of the experts was objected to on behalf of the proponent. The objection was overruled, and the proponent excepted.

His Honor charged the jury, amongst other points, that Bennett took a considerable interest under the will, and, that being the case, if they should find that the decedent could neither read nor write, and that Bennett drew the will, then it was necessary for him to show, besides the act of signing, that she knew the contents of the paper. The proponent's counsel requested him to charge—

That, by the provisions of the will, the

devisee takes absolute interests upon the birth of issue, and that Hannah Vesey died intestate, as to any real estate not devised, and which descends to her next of kin.

This request was denied, and the proponent excepted.

The jury found for the contestants, and the proponent appealed, on the grounds:

1. Because His Honor, it is respectfully submitted, erred in permitting Messrs. W. B. Heriot and E. H. Sparkman, who had no previous knowledge of the handwriting of Samuel L. Bennett, to testify merely from a comparison of hands, to which testimony the proponent then and there excepted.

2. Because is Honor, it is respectfully submitted, erred in admitting in evidence the opinion of witnesses as to whether the will was or was not in the handwriting of Samuel

*481

L. Bennett, by com*paring specimens of handwriting with each other, to which testimony the proponent then and there excepted.

3. Because His Honor, it is respectfully submitted, erred in refusing to instruct the jury as to any realty not specifically devised would revert to the next of kin of Hannah Vesey, to which refusal so to charge the proponent then and there excepted.

Whaley & Mitchell, Simons & Segling, for appellant.

Whaley & Minot, contra.

Feb. 18, 1875. The opinion of the Court was delivered by

MOSES, C. J. This was an issue of devisavit vel non. The testatrix, an old and uneducated woman, had affixed her mark, in the presence of three subscribing witnesses, to a paper which was propounded as her last will and testament. Not having been read over in the presence of either of the subscribing witnesses, and neither of them affording any proof of her knowledge of its contents, it became necessary, in view of her doubtful capacity—not being able to read or write—to ascertain whether she had such knowledge through direct proof, or a presumption arising from the circumstances in evidence. Bennett, who took an interest under the will, and was nominated the sole executor, was introduced as a witness on the part of the proponent, and testified to declarations of the decedent, which, if his testimony had not been assailed and contradicted, would have been conclusive as to her knowledge of the contents. He swore that he did not write the will. In the course of his cross-examination several letters, admitted to have been written by him, were produced, and to the enquiry, by the appellant's counsel, as to the object of their introduction, it was answered: that they were submitted for the purpose of comparison with the handwriting of the will. Exception was taken and overruled.

Anne Mathewes, (one of the respondents,) a witness offered by the contestants, swore that she had seen Bennett write—was well acquainted with his handwriting—and that she recognized the writing in the will to be his. Two witnesses were then presented who were unacquainted with his handwriting, and through them it was proposed to show, by a comparison of the admitted letters with the will, that the latter had been written by him. This was objected to, and the Circuit Judge overruling the exception, the first

*482

error assigned by *the motion now before us raises the question of the competency of the opinion of a witness unacquainted with the handwriting of a party and derived alone from comparison.

The genuineness of a writing may be directly proved by one who was present and saw it executed. This establishes it as a fact by the highest evidence, and, if it is credible, puts it beyond dispute.

Cases, however, arise where such express proof is not attainable, and then a resort must be had to such circumstances as may afford a presumption from which the fact may be legitimately inferred. Where the "presumptio ex visu scriptionis," (as the writers term it,) arises, it is founded on a knowledge of the handwriting, obtained by having seen the person write. But the presumption is not limited to a knowledge thus acquired, but is extended to the "presumptio ex scriptis olim visis," which is not restricted to a capacity to judge from having witnessed the actual execution of any writing by the party, but is extended to impressions derived from a familiarity with the handwriting, attained through letters or documents accepted and acted upon as genuine, with the recognition of those by whom they are alleged to have been written. Testimony of the character referred to has never been questioned, because, in both the distinct instances stated, an impression has been made on the mind of the witness, from the character of the writing, which enables him to bring to his recollection the similitude between what he before saw and that now submitted for his opinion. It is, at least, but a belief, founded on memory. It is not a certain knowledge of that which is acquired by actual vision of something passing, or the positive bearing of something that is expressed.

It would be a task, rather of interest than profit, to examine the various cases in which the subject has been treated by the English Courts. Whether a comparison, even by experts, should be permitted, has been, from time to time, differently ruled. While it may be said that the preponderating weight of authority there is against evidence, by comparison of handwriting, the cases have been

vacillating and fluctuating. So far back as 1718, "where the will was writ blindly, and hardly legible, and the legacies in figures," the Master of the Rolls "referred it to a Master to examine what the legacies were, he to be assisted by such as were skilled in the art of writing."—Masters v. Masters, 1 P. Wms., 425.

Later decisions entirely excluded all evidence by comparison; and yet some of them so holding still subjected the rule which they

*483

*laid down to such exceptions as, in a great degree, to effect the very principle upon which it was claimed to have been founded—for instance, Griffith v. Williams, 1 C. & P., 47; Allport v. Meek, 4 C. & P., 276; and many other cases which may be cited.

Parliament, however, prevented any further want of conformity in the English Courts upon the question, by the Stat. of 28 and 29, Victoria, § 8, C. 18, which permitted a comparison, by jury and witnesses, of the disputed writing with papers satisfactory to the Judge. It appears, however, to be confined to civil cases.

In the several States of our Union different rules in regard to the question seem to prevail. In many of them the testimony is excluded, while in others it is admitted to the fullest extent. In Massachusetts, Maine, Connecticut, North Carolina, Ohio, Pennsylvania, and Vermont, it is allowed; while in New York, New Hampshire, Virginia, New Jersey, and some of the other States, the Courts exclude it.

It remains to consider what is the existing rule in this State, to be gathered from the practice and decisions of its Courts. We are probably not mistaken in saying that the rule, as generally accepted by the profession and observed by the Courts, is, that comparison, as the original means of ascertaining the genuineness of handwriting, is not permitted, but, in aid of doubtful proof, it is allowed; and that the question to be decided by the jury, as one of fact, may be affected, the one way or the other, by the preponderating character of the evidence. The testimony, however, it is agreed everywhere, even by the Courts in which it is admitted, is not entitled to any very high respect or consideration. Its relative weight must be determined by the rules which are applied to testimony of every kind, and its efficacy will be judged and estimated by the proportionate effect of its impression.

In Boman v. Plunkett, 2 McC., 518, comparison of handwriting was admitted as a circumstance in aid of doubtful proof. It is contended, against the force of this case, as an authority of weight in the one before us, that it was therein held the comparison must be made by the jury, independent of any extrinsic evidence by witnesses. While the reasoning of the Court does not sustain such a construction, it would be difficult to reconcile it with any accepted theory or principle of evidence. If it is admitted that the jury may make the comparison, can it, with reason, be contended that, in their examination, the aid of light from those who, by their

*484

*peculiar vocation in life, have acquired a skill in deciphering, tracing and distinguishing handwriting, is to be withheld? When the right, on the part of the jury, is admitted, it should be exercised according to the general and accepted rules of evidence. Are they less likely to reach a correct conclusion, when the difficulties which may surround them in the execution of their duty might be satisfactorily explained and removed by testimony bearing on the very comparison they are to pass upon?

In Bird v. Millar, 1 McM., 125, Mr. Justice Evans, delivering the opinion of the Court, treating of the inadmissibility of mere comparison of handwriting by juxtaposition, says: "Admitting the principle to be correct, that such evidence is inadmissible in the first instance, yet, in a case of conflicting evidence, this kind of evidence was admitted, in the case of Plunkett ads. Boman, not as original, but as confirmatory evidence, to enable the jury to decide upon which of the witnesses they could most confide. In a practice of many years I have not known the admissibility of this kind of evidence, for the purpose stated, questioned."

It would be difficult to explain why knowledge, which is derived from a recollection of handwriting only, from the observation of admitted letters, or other papers which the witnesses had before seen, can be claimed as of a higher degree than that obtained by a comparison of handwriting. They both depend on the same faculty—that of bringing into actual application impressions made on the mind, in the one case, weakened by time, and, in the other, more vivid and lively, because of more recent existence. One recollects because he has seen the admitted writing before, and can, therefore, now speak of its similarity with the one in question; the other because, by examining the admitted writing, he has a present impression which he at once makes the standard of his comparison.

Error is alleged on the part of the Circuit Judge in refusing to charge the jury that any realty, not specifically devised by the will, would revert to the next of kin of the said Hannah Vesey. The purpose proposed by this request was to show that Bennett took no interest, under any of the clauses of the will, save that which devised the Spring Street property to him. It is true that, "where a person prepares a will with a legacy to himself, it is, at most, a suspicious circumstance, of more or less weight, according to the facts of each particular case—in some of no weight at all—varying according to the circumstances; for instance, the quantum of

*485

the *legacy, and the proportion it bears to the property disposed of, and various other circumstances."—1 Williams on Ex'rs, 94. We think he fulfilled all the requirements of the rule when he said to the jury "that Bennett took a considerable interest under the will." If he was entitled, even, to no more than the Spring Street property, looking at its relative value to the whole estate devised, the language employed conveyed to the jury the proper meaning and import of the rule by which, in the application of the testimony, they were to be governed. It was not incumbent upon him to give construction to every section of the will, to ascertain the exact value of the interest to which the said devisee was entitled. Such a requisition would devolve a duty not demanded by the general principle which he fully brought to the attention of the jury.

The motion is dismissed.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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5 S. C. 485

PARKER v. WILSON.

(Columbia. Nov. Term, 1874.)

[*Payment* ⇐12.]

Where a debt was contracted with reference to Confederate currency as a basis of value, its amount should be determined by the value such currency bore to lawful money of the United States at the time of the contract.

[Ed. Note.—Cited in Chalmers v. Jones, 23 S. C. 471.

For other cases, see Payment, Cent. Dig. § 52; Dec. Dig. ⇐12.]

[*Trial* ⇐194.]

The question is one of fact, and it is error to instruct the jury what amount to find.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439–441, 446–454, 456–466; Dec. Dig. ⇐194.]

[*Payment* ⇐70.]

In such a case the value of the consideration may be shown as evidence upon the point whether the contract was made with reference to Confederate currency, as a basis of value, but not to authorize the jury to adopt the value of the consideration as the amount of the debt.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 203, 204, 206–218; Dec. Dig. ⇐70.]

Before Orr, J., at Abbeville, October Term, 1872.

This was an action by Wm. H. Parker, late Commissioner in Equity of Abbeville County, against Frances L. Wilson, executrix of John M. Wilson, deceased.

The action was on a bond, dated 1st February, 1864, and conditioned for the payment of $12,200, in two equal annual instalments, with interest from date, payable annually.

On behalf of plaintiff evidence was given tending to show that the consideration of the bond was a tract of land sold by the plaintiff to the testator of defendant at the date of

*486

the bond; what was *the value of the land in good money at the time of the sale; and what was the purchasing value of Confederate currency at the time and place of sale.

The defendant offered no evidence.

The jury found for the plaintiff a verdict of $4,074.

The defendant appealed.

The charge of His Honor the Circuit Judge, and the questions made by the appeal, appear in the opinion of the Court.

Burt, for appellant:

The principles of law involved in this case have been so maturely considered, so authoritatively determined, and so emphatically announced by this Court, as to preclude misapprehension and to forbid discussion.

On the former hearing of this case an undivided Court held that where it appears on the face of the contract, or it is conceded by the parties, or it is ascertained by the jury, that the contract was made with reference to Confederate States notes, or their equivalent, "and there is no evidence to show the value of the contract in lawful money of the United States, then it is the duty of the jury, as a rule of evidence, to determine the value according to the Act of 1869," (3 S. C., 296.)

In the judgment the Court further say, "the rule has been fully settled in the cases of Neely v. McFadden, 2 S. C., 169; Harmon v. Wallace, 2 S. C., 208; and McKeegan v. McSwinney, 2 S. C., 191." See, also, Thorington v. Smith, 8 Wallace, 1.

It is submitted that the only questions to be considered are the following:

First. Was the rule for estimating the value of the contract so precisely and so gravely announced by this Court distinctly and authoritatively submitted to the jury by the Circuit Judge?

Second. Was the verdict of the jury a departure from the rule? If the rule was not so stated to the jury by the Judge below, and the verdict did not conform to the rule, the non-conformity of the verdict to the rule must be ascribed to error in the instruction of the Judge, and a new trial must be the consequence.

McGowan, contra:

First. This verdict ought to stand, because it is in accordance with the law, the intention of the parties and the justice of the case.

*487

*1. The face of the bond calls for..	$12,200	00
2. By scale according to Act 1869	990	00
3. True value of land.....	4,060	00
4. Verdict of the jury.....	4,074	00

Second. There was no error in the charge of the Judge, who read to the jury the former decision of the Supreme Court in this case, and ruled in favor of defendant every point

made by her counsel in writing, except as to the tender, about which no question is made.

1. It was not error to admit evidence of the true value of the land, with a view to ascertain what was the contract of the parties. —Rutland v. Copes, 15 Rich., 84; Bobo v. Goss, 1 S. C., 263; Harmon v. Wallace, 2 S. C., 212; Parker v. Wilson, 3 S. C.

In the last case on the subject, Halfacre v. Wharley, (not yet reported,) it is said the intention of the parties is to prevail as to the character of the currency, in which payment of the notes was to be made, and this may be ascertained by evidence as to their understanding at the time, and, in its absence, evidence of any circumstances may be introduced to show the currency to which they looked for payment. The parties are also entitled to the benefit of the Ordinance of the 27th September, 1865, referred to by this Court in the case of Bobo v. Goss, 1 S. C., 262, and Harmon v. Wallace, already cited.

2. It was not error to instruct the jury that, if they found the parties contracted "to be paid in good and lawful money," they should find the amount due on the bond and interest thereon; that was in precise accordance with all the cases.

3. It was not error to instruct the jury that, if they found the parties contracted to be paid in Confederate money, the plaintiff was entitled to recover but one dollar for every $12.24 of the amount of the bond, the defendant certainly had no right to complain of that charge.

4. The jury were instructed "that, if they should reject both the foregoing conclusions, they might inquire whether the contract between the parties was made with reference to the real and true value of the property, and find according to that view. That was certainly not error.

Third. The principle established in regard to these contracts made during the war is to ascertain the intention of the parties, and to enforce the contract according to that inten-

*488

tion—that is, if *the contract can be ascertained, to enforce such contract and not make a new contract for the parties.

1. In this case, under the charge, the jury found for the plaintiff $4,074, the true value of the land as proved, which shows that, in their judgment, the parties did not contract with a view to payment in Confederate money; that was a question of fact left to them, and they have decided in the negative. That being decided, the Act of 1869 has no application to the case.

When the contract was not made with reference to Confederate money, the Court will not enforce the scale of the Act of 1869; especially when the enforcement of it would work a greater injustice to the vendor than the enforcement of the bond, according to its terms, would work to the vendee. The land in the last fifty years has not, at any time, been worth less than seven dollars per acre; the defendant is struggling to get it for less than two dollars per acre, by the application of the scale of relative values in the Act of 1869. The sale was made by a public officer, under orders of the Court, and there was no agreement to take payment in Confederate money.

No such agreement has been shown, or ever will be. No matter what the Court may decide to be the proper standard of recovery, it is perfectly certain that there never was an agreement to receive payment in Confederate money. The Court takes no pleasure in forcing such a monstrous result, and, the proof not requiring it, will not do so.

2. In this case the finding of the jury also negatives the idea that the parties contracted to pay, according "to the terms of the bond," in good and lawful money, and, in behalf of defendant, they reduce the bond, although she offered no evidence at all.

3. The jury, under the charge, may have found that the parties contracted with reference to the real and true value of the property. They say, upon the evidence in the case, that was the contract of the parties, and they fixed their verdict accordingly. In this view the verdict is right, according to the intention of the parties.

Fourth. The jury may have found that the bond was to be paid in Confederate money, not as valued in the Act, but according to its purchasing value in the community at that time. The witnesses, Parker, Hawthorn, Bonner, Mattison and Robert Pratt, proved that the Act is not correct as to "the true state of relative values." They all stated that, by common use in Abbeville County at the time, the value of Confederate money

*489

was at least four times greater *than was ascribed to it in the Act—three for one, instead of twelve for one; so that even if the bond was referred to the purchasing value of Confederate money at the time and place of the contract, the verdict is right.

1. Evidence of true purchasing value of Confederate money admissible. "Evidence contradictory to the Act may be resorted to in reference to the value of Confederate money."—Neely v. McFadden, 2 S. C., 169.

"The inquiry is what, at the time and place of contract, was the standard, according to common understanding and usage, (page 176.)

The question then arises, when the commercial standard differs from the legal, which is to control," (176.)

"We, therefore, conclude that it is competent to go into proof of existing facts and circumstances of what, at the time of the contract, was commonly used and dealt in, in order to show the intent of the parties," (same, 177.)

If the intention of the parties is to be considered at all, the purchasing value of Confederate money, at the time of the contract,

and in that community, is the only value to which reference can be made, in interpreting the contract. Nothing short of the gift of prophecy could enable the parties, in 1864, during the war, to foresee what would be the value fixed by the Act in 1869, five years after.

Fifth. The same result follows, and the verdict is right, if the evidence failed to show whether the parties made any agreement as to "the money in which the bond was to be paid, or, if any, what that agreement was." If the parties made no contract on the subject, or if it cannot be shown what the contract was, the contract being executed by putting the defendant into possession, there still must be a recovery, and the measure of the recovery is the value of the property sold.

1. When property is sold and delivered to one, at his request, and there is no agreement as to its price, or the agreement is unintelligible or rescinded, the law implies a promise to pay the value of the property, which may be recovered under what was formerly called the indebitatus count.—1 Chit., 288.

2. "If a contract under seal be invalid or rescinded, and there be evidence upon which an implied contract may be raised, an action for the value may be supported."—1 Chitty

*490

on Contract, 104 and *note; Hill v. Greene, 4 Pick., 114; Watchman v. Crook, 5 Gill & John, 240.

3. Action lies to recover the consideration money for land sold, when contract executed. —Shepherd v. Little, 14 John, 162; Wilkinson v. Scott, 17 Mass., 249; Butler v. Lee, 11 Ala., 885; 1 Comyn on Contracts, 80; Davenport v. Mason, 15 Mass., 83.

When we leave the terms of the bond, all is in doubt. It cannot be shown that the minds of the parties met upon any distinct agreement outside of the bond. Under these circumstances what should be the recovery? Undoubtedly the bond or the value of the property. This is just; this is the rule of law, unless it can be shown that the contract was in reference to Confederate money, which cannot be shown.

1. The verdict is right, if the jury were allowed to find that it was the contract of the parties to pay the true value.

2. The verdict is right, if the jury found that the contract was to pay in Confederate money, according to its purchasing value in Abbeville at that time.

3. The verdict is right, if the jury found that the parties made no contract on the subject.

4. The verdict is right, if the Ordinance of 1865 has any application.

5. The verdict is right upon every possible view, except the one that the parties must have contracted to pay in Confederate money, and that money must be valued as set down in the Act, both of which facts are disproved in this case.

Jan. 28, 1875. The opinion of the Court was delivered by

WILLARD, A. J. This action is upon a bond given to the Commissioner in Equity, in 1864, upon the purchase of land. The principal question at issue was as to the amount of plaintiff's recovery. Testimony was given on the question whether the contract, at the time it was made, was intended to have reference to Confederate money. Testimony was also given as to the relative value of Confederate money and lawful money at that time, and also as to the value, at that time, of the land to which the bond related.

The Court instructed the jury as follows:

First. That if the debt in this case was created or contracted in Confederate States notes, or with reference to Confederate

*491

States *notes, as a basis of value, issued by the so-called Confederate States Government, or in or by any bills, bonds or notes, assimilated or made equivalent to Confederate States notes, by any law or custom of trade, during the years 1861, 1862, 1863, 1864 and 1865, that they should be determined by the value of said Confederate notes in the lawful money of the United States at the time such debts or obligations were created or contracted.

Second. That if the jury found that the above liability or obligation was contracted with reference to Confederate States or in Confederate States notes, as a basis of value, that the plaintiff was entitled to recover but one dollar for every twelve dollars and twenty-four cents of the amount of the bond sued on.

Third. That if the contract was not made in Confederate States notes, or their basis, as a value, they might inquire and determine whether the bond was to be paid according to the contract in good and lawful money. If so, they should find the amount due on the bond and interest thereon.

Fourth. That if they should reject both the foregoing conclusions they might inquire whether the contract between the parties was made with reference to the real and true value of the property, and find according to that value.

The first proposition thus charged was correct. It submitted to the jury the question whether the parties contracted with reference to a standard of value which, at the time of making the contract, prevailed at the place where the contract was made, and, in the event they should find that such was the intention of the parties, that their verdict should be based upon the relation that such local standard bore to the legal standard of money values.

The second proposition charged was erroneous. It took from the jury, in the event of their finding that the contract was based on the value of Confederate notes, the right

to determine, as matter of fact, the relative values of such notes and lawful money. This was a question of fact for the jury, and, in determining it, they were bound to take into consideration the evidence adduced as to the purchasing value of Confederate States notes at the time and place of the contract, and if, in their judgment, such evidence establishes a different ratio of values from that declared in the Act commonly known as the Scaling Act, they were not bound by the declaration of values contained in that Act.

This misdirection may have misled the

*492

jury, for, although it *would appear that their verdict did not follow this instruction, yet it is possible that, finding themselves shut out from looking to the real value of Confederate currency, and compelled to abide by a standard which, in their judgment, may have appeared unreal and unjust, they were induced to adopt the alternative presented in the fourth proposition charged, by holding the contract to be one to pay what the land was reasonably worth at the time and place of contract.

The third proposition is free from error.

The fourth proposition is erroneous. It virtually authorized the jury to disregard the terms of the bond in suit, and to substitute in their place a contract to pay for land what it was reasonably worth.

Neither Court nor jury can take a liberty of that character with the contracts of parties. The contract in suit was not a contract for the sale of lands, but a bond for the payment of a fixed sum of money upon an executed consideration. A sale of land was its consideration, it is true, but the obligation called for a sum of money alone. As was held by us, in Neely v. McFadden, 2 S. C., 169, and the cases following, that the jury may inquire what was meant by the parties in the use of the terms employed to describe the medium for its discharge, and, for the purpose of settling the meaning of these terms and fixing the pecuniary value called for by the obligation, have a right to proof of the real value of the property that was the subject-matter of the sale out of which the obligation arose, but cannot convert an obligation of one kind into another of a different kind, in order to carry out an arbitrary idea of substantial justice that may have become fixed in their minds, independently of the rules and principles of law affording the correct standard in the case.

The solution given to the questions already considered disposes, substantially, of all matters involved in the exceptions to the refusal of the Court to charge propositions that were brought to its attention by the appellants.

There should be a new trial.

MOSES, C. J. I concur in granting a new trial, because the Circuit Judge took from the jury a question of fact and passed upon it as one of law. If the jury concluded, from the testimony, that the contract had reference to Confederate money, it should

*493

have been *left to them to ascertain its relative value to national currency, by the application of the Act of 1869, aided, controlled or qualified by the evidence as to such value.

For fear of misapprehension, I consider it proper to say that I still adhere to and recognize what was said in Harmon v. Wallace, 2 S. C., 212, as to the competency of the parties to show the value of the land, at the date of the transaction, as contributing to develop the real character of the consideration, as allowed by the Ordinance of 1865. This right has been recognized by the Court in more than one case, and, in Halfacre v. Whaley, [4 S. C. 173] as late as November Term, 1872.

WRIGHT, A. J., concurred with MOSES, C. J.

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5 S. C. 493

GARATY & ARMSTRONG v. DUBOSE.

(Columbia. Nov. Term, 1874.)

[*Homestead* ⇐81.]

One who holds land under a contract to purchase is not entitled to a homestead exemption therein against an execution creditor—he having no interest which is subject to levy and sale.

[Ed. Note.—Cited in Charles v. Charles, 13 S. C. 387; Myers v. Ham, 20 S. C. 527; Rollings v. Evans, 23 S. C. 326, 327; Moyer v. Drummond, 32 S. C. 168, 10 S. E. 952, 7 L. R. A. 747, 17 Am. St. Rep. 850; McNair v. Moore, 64 S. C. 90, 41 S. E. 829.

For other cases, see Homestead, Cent. Dig. § 116; Dec. Dig. ⇐81.]

[*Homestead* ⇐192.]

It is only where a party owns real estate, subject to levy and sale, that he can claim the homestead exemption allowed by the Constitution.

[Ed. Note.—Cited in Munro v. Jeter, 24 S. C. 29, 31, 33, 37.

For other cases, see Homestead, Cent. Dig. § 363; Dec. Dig. ⇐192.]

[*Homestead* ⇐17.]

A bachelor having no persons dependent upon him, and none residing with him except servants and employees, is not the "head of a family" in the sense of the term as used in the constitutional provision with reference to homestead exemption.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 21; Dec. Dig. ⇐17.]

[*Exemptions* ⇐4.]

[Cited in Norton v. Bradham, 21 S. C. 380, to the point that statutes exempting property from liability to debts are in derogation of the common law and must be strictly construed.]

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 4; Dec. Dig. ⇐4.]

[This case is also cited in Norton v. Bradham, 21 S. C. 375, and a dictum therein disputed.]

Before Cooke, J., at Abbeville, January term, 1874.

Garaty & Armstrong were judgment creditors of Robert M. DuBose, and this was a rule against L. P. Guffin, Sheriff of the County, to show cause why he should not be attached for a contempt for failing to make and pay over the money on plaintiffs' execution.

The Sheriff made a return as follows:

"The respondent levied the execution and advertised the following property for sale on salesday of January instant, viz: One tract of land, 810 acres, more or less, bounded by lands of ——— Cade, F. Mitchell, S. S. Martin, and others—one wagon, four mules, two bales of cotton, and a lot of cotton seed.

"On the 20th of December, 1873, a notice

*494

was served on me, by *the defendant, R. M. DuBose, claiming homestead and exemption of the articles of personal property advertised, and that the defendant had no such legal interest in the land as that the land could be levied and sold.

"Under this notice and affidavit of the defendant, that he claimed to be 'the head of a family,' and in view of the penalties denounced by the law against Sheriffs who sell property without regard to the claims for homestead and constitutional exemptions, this respondent was advised by his counsel not to sell the said property until the question of exemption was settled.

"The plaintiffs insisted that the defendant was not the head of a family, in the sense of the Act, and, therefore, not entitled to any homestead or exemption, and appealed to this Court, that the defendant, R. M. DuBose, is not entitled to homestead or exemption, upon the following state of facts:

"'The defendant, R. M. DuBose, is not a married man, but he is a householder, having the use, control and occupation of a farm or plantation, in Abbeville County; that he lives in a dwelling house on said tract of land, with furniture, &c., suited to his condition usual in housekeeping; that he had employees and laborers hired, and has carried on farming operations during the year 1873, and was engaged in attending to his business on said farm at the time the execution above named was levied on his property; that he has paid two-thirds of the purchase money of the farm on which he lives, but has not received any deed of conveyance of said farm; that he was never married and has no children of his own in his house.'"

His Honor held that DuBose was the "head of a family," in the sense of the Constitution and homestead laws of the State, and entitled to a homestead, and he discharged the rule.

The plaintiffs in the execution appealed, on the grounds:

1. Because the said Robert M. DuBose is not the head of a family, within the intent and meaning of the Constitution and laws of this State, and is not entitled to homestead and exemption of personal property, under the Constitution and laws.

2. Because the real estate in which homestead is claimed by the said DuBose is not, and never was, his family homestead, it having been bought, in 1870 by him, and the purchase money not having been paid, nor titles thereto received by him.

*495

*Baxter, for appellants:

Section 32 of Article 2 of the Constitution exempts from attachment, levy or sale, the family homestead of the head of each family residing in this State, and, "to secure the full enjoyment of said homestead exemption to the person entitled thereto, or the head of any family," it exempts, likewise, certain personal property.

This Section imposes the duty on the "General Assembly, at their first session, to enforce its provisions by suitable legislation."

Amongst the needful legislative regulations to this end, it should seem that the designation of the persons to take the homestead was one of the most obvious and indispensable. The duty to assign the homestead involved the right and necessity of determining what persons constitute the family entitled to demand and receive the exemption.

The Constitution not having designated those who constitute the family, and not having designated the head of the family, it was competent to the General Assembly to do either or both.

This has been done in language that is explicit and unmistakable, by the following statutes:

Act of 1868, § 4, p. 22, is in the words following: "The estate or right of homestead of the head of any family, existing at his death, shall continue for the benefit of his widow and minor children, and be held and enjoyed by them, until the youngest child is twenty-one years of age, and until the marriage or death of the widow, and be limited to that period.

Section 4 of the Act is as follows: "When a widow or minor children are entitled to an estate, or right of homestead, as provided in the preceding Section, the same may be set off to the parties entitled," &c.

Act of 1869, p. 172–73, directs the Sheriff, in enforcing executions, to proceed in the manner prescribed by Sections 1 and 2 of the Act of 1868, and provides that "should any officer sell any real estate, without complying with Section 1 of said Act, or sell or remove any personal property of the head of any family, whether the head of such family be a freeholder or not, without his or her consent, or first deducting the amount exempted by the Constitution, he shall be deemed guilty of malfeasance in office."

The Act of 1870, p. 380, provides the mode of laying off to the "head of any family" the personal property exempted by the Constitution and Act of 1868.

*496

*The Act of 1872, p. 230, in § 4, provides "that the homestead, when assigned as herein prescribed, shall vest in the heads of the family, in fee simple," &c.

The words "head" or "heads" of every family are repeated in Sections 5 and 6 of same Act.

Section 8 is in these words: "The widow and minor children of any deceased father or husband shall be entitled to the right of the homestead."

These Acts use the words "father," "husband," as synonymous with "head of the family," and designate the wife and children, and, in the absence of the children, the widow, and, in the absence of the widow, the minor children, as the persons entitled to the exemption, and of necessity, as composing the family intended by the Constitution.

The plain implication, no less than the express language of these statutes, manifest that the exemption is not a personal privilege of the head of the family, of the father or husband, but is the estate through him, but not from him, of his widow and minor children, one or both.

Statutes exempting a debtor's property from liability for his debts are not remedial, and are not entitled to a peculiarly liberal construction.—Kere v. Alten, 5 Denio, 119.

One claiming the exemption of his property from execution must show the facts entitling him to it under the statute.—Griffin v. Southerland, 14 Barber, 456.

If, however, misconstruction of the legislative intent, as to the words, "family," "head of a family," if it were possible, the uniform and emphatic language of this Court would preclude all doubt.

In Re Kennedy, 2 S. C., 216, this Court said:

"The exemption is not to the debtor, as such, but as the head of a family. The head of a family is one peculiarly charged with responsibility for the protection of such family. The subject of protection is the family. The head of the family being referred to as its representative, its natural protector."

In this case the family consisted of infant children, and the exemption was allowed them.

In Bradley v. Rodelsperger, 3 S. C., Mr. Chief Justice, speaking for the Court, said: "In Re Kennedy we held that the object of the protection afforded by the homestead clause of the Constitution was the family, the head of the family standing as its representative."

*497

*"The Constitution has not given any definition of the term family. The term must, therefore, be taken in its ordinary sense. In this sense it is not essential that it should include children."

In this case, and upon this reasoning, the homestead was allowed to a childless widow.

In Howze v. Howze, 2 S. C., 229, the Court say: "We have already held, in the case of Kennedy, if there was a family and a family homestead existing at the adoption of the Constitution, that instrument immediately acted upon such family, through its proper head, by way of conferring the right of exemption."

"The purport of Section 4 (Act of 1868) is to provide for the continuance of the right in the family of one possessed of such right at the time of his death."

"There is a difficulty in the way of affirming the order, arising from the fact that it does not appear to have been established that the premises have been held by a family as a family homestead, since the provisions of the Constitution have become operative. Nor does it appear that S. C. Howze is the head of any family, so as to authorize the homestead to be laid out to him directly and in name. Assuming that any member of a family has a right to demand, for the benefit of the family, the exemption, still the order for its assignment should conform to the Constitution and the Act, by allowing or establishing such exemption through the head of the family for the time being."

S. C. Howze was a minor, and it did not appear that he was the head of a family.

These judgments and this reason are in harmony with the cases in New York.

In Woodward v. Murray, 18 John's Rep., 400, the Court held: That the head of a family is the synonym of father, husband, and describes one who owes maintenance and protection to a wife and children, or to one, or both.

In Smith v. Brackett, 36 Barbour, 571, it was held that the homestead exemption enures, after the death of the debtor, to his widow and children.

From the judicial determinations, and the legislative enactments on the subject of homestead, the following deductions are the logical results:

1. That the premises, in which homestead is claimed, must have been held by a family, as a family homestead.

*498

*2. That the exemption is not the personal privilege of the debtor, or head of a family, but is the estate of the family.

3. That the family consists of wife and minor children, or widow and minor children, or widow, or minor children.

4. That the homestead can be claimed only by the head of a family, or, at least, of a family "for the time being."

5. That neither the character nor the value of the exempt property, under the Constitution and laws, nor the class of persons who are to take the exemption, can be enlarged by judicial construction.

6. That the respondent is not the head of a family, which is the object of the protection, nor have the premises been held by a family as a family homestead.

7. That the order of the Circuit Court must be reversed.

McGowan & Parker, contra:

First. The defendant, R. M. DuBose, has only an equitable interest in the land, arising from part payment of the purchase money. He has no title to the land, and, therefore, his interest is not the subject of levy and sale under execution.—Harrison v. Hollis, 2 N. & McC., 578; Bauskett v. Holsomback, 2 Rich., 144-629; Deen v. Kemp, 3 Hill, 261; 1 Rich., 373; 8 Rich., 358; 1 McM., 357; Voorhies' Code, 451, and authorities, note 4; Howard's Code, 454; Brighton v. Bank of Orleans, 2 Bar., 458; Griffin v. Spencer, 6 Hill, 525, and other authorities.

Second. But if the mere equity is liable, then the defendant is "the head of a family," in the sense of the Constitution and laws, and is entitled to homestead.

1. Homestead Acts are to be liberally construed.—Voorhies' Code, 457; 25 Wendall, 370; 14 Barb., 457; 19 Wend. 475.

2. The word "family," Article XI, Section 32, of the Constitution, is to be taken in its ordinary sense, and does not necessarily include children.—Bradley v. Rodelsperger, 3 S. C., 226.

This case decides that a childless widow is the head of a family. Why not a childless widower? And if a childless widower, why not a bachelor?

3. In New York the word "householder" includes a man without a wife, who kept a house and hired a woman as housekeeper.—Ensign v. Sherman, 14 Bar., 439.

The word "householder," as defined by Webster, is synonymous with "head of a family"—"Family," [Celtic, from famul,

*499

which *means servant,] "the collective body of persons who live in one house, and under one head or manager; a household, including parents, children, or servants, and, as the case may be, lodgers or boarders." "Householder," "the master or chief of a family; one who keeps house with his family;" and, for illustration, refers to Matthew, 13th chapter, 27th verse: "So the servants of the householder came and said unto him, Sir, didst not thou sow good seed in thy field? from whence then hath it tares?"

Feb. 26, 1875. The opinion of the Court was delivered by

MOSES, C. J. If the claim to a homestead by the respondent, DuBose, was founded only on his interest in the land of which he is the occupant, it would be enough to say that he does not hold it by any legal title, and only to such does the homestead provision apply. The Constitution (Art. II, Sec. 32,) expressly refers to the real estate of the head of a family, subject to sale "under mesne or final process issued from any Court." It presupposes a title, capable of transfer by such a sale. The respondent here has no legal title to the real estate. He is only in possession under a contract to purchase, and there yet remains due one-third of the purchase money. He has but an equitable interest. It can never ripen into a legal title until the full consideration agreed to be paid has been satisfied. The Constitution, and the several Acts of the Legislature, in their various provisions in regard to the homestead exemption, all look to an interest in the land which can be transferred by a judicial sale. The mere equitable interest which the claimant holds in the real estate, described in the return of the Sheriff, does not entitle him to its benefit.

In the personal property he has an absolute right. If he is the "head of a family," within the contemplation of the homestead law, he may claim its interposition, so far as it extends to such property.

The exemption was intended, not alone as a benefit to the head of the family, but to those whose relations to the head demand, on the one hand, support and protection, and, on the other, require a contribution, by the aid of their labor, to the maintenance and conduct of the general establishment to which they belong. This would naturally be the case between parent and minor children who are in terms embraced within the exemption. It would not follow that, although the head of a family might not be a parent, the one

*500

sub*stituted as the head would lose the favor of the provision, for it would extend to one having under his roof those so connected with him, by ties of residence and association, as to become part and parcel of his household, changing their domicile with him, and having no residence but that which they enjoy under his favor. It is not necessary, to constitute a family, that the relation of parent and child must exist. One of the definitions which Mr. Webster gives of it is, "the collective body of persons who live in one house, and under one head or manager." The respondent here is a single man—no person under the same roof with him, and no one on his premises, save servants and employees. Their continuance with him is but temporary. He may change them from time to time, and they, at their own will, may depart his service. There is absent that peculiar feature, which can be better understood than described, which distinguishes the family even from those who may dwell within the limits of the same curtilage.

The language of the 7th Article of the Constitution of Georgia, in regard to "homestead exemption," is in terms very similar to those of our own. It declares that "each head of a family" is entitled to an exemption of a certain amount, both of real and personal property, against which no judgment of any Court within the State shall be enforced. In Calhoun v. McLendon, 2 Geo., 406, the Supreme Court re-affirmed a decision which it had before made, to wit: "That a single man,

having no person dependent on him for a support or maintenance, in the meaning of the Constitution, was not the head of a family, and the servants proven to be in his employ in this case does not change the rule."

Statutes exempting property from liability to debts are in derogation of the common law, and not entitled to such a liberal construction as would extend them to those who are not in the spirit or letter of the policy of their enactment. The object of the protection afforded by the Constitution "was the family, the head of it standing as its representative."—In Re Kennedy et al., 2 S. C., 216; Bradley v. Rodelsperger, 3 S. C., 226; Howze v. Howze, 2 S. C., 229.

The motion to reverse the order appealed from is granted.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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5 S. C. *501

*CHANDLER v. GERATY.

(Columbia. Nov. Term, 1874.)

[*Vendor and Purchaser* ⇐⇒176.]

Where a plantation, consisting, in part, of high land, and, in part, of marsh land, and having a valuable place for business, was sold for a gross sum, and described as containing 1,200 acres, more or less, and in a bond given for two-thirds of the purchase money, it was stipulated that the bond is "subject to an apportionment, if, on a survey, there proves a deficiency of the land," and it afterwards, by actual survey, appeared that the plantation contained less than 500 acres: *Held*, in an action on the bond, that it was error to instruct the jury to make the apportionment by a mere arithmetical calculation, based on the number of acres and the price, and to reduce the contract price in the ratio of the diminution of quantity, according to the actual measurement, without regard to the character and value of the land as to which the failure had occurred.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 340; Dec. Dig. ⇐⇒176.]

Before Graham, J., at Charleston, December Term, 1873.

Action by A. C. Chandler against Wm. C. Geraty, Daniel H. Towles and Francis W. Towles.

The plaintiff sued on a bond executed and delivered to him by the defendant on the first day of January, 1872, and conditioned for the payment of $3,333.33, in three equal annual instalments, with interest thereon at ten per cent. per annum, payable annually, until the whole amount of principal and interest shall be fully paid.

The plaintiff filed his complaint April 26, 1873, demanding judgment against the defendants for the first instalment, payable on said bond, January 1, 1873, to wit, the sum of $1,144.44, with interest thereon at ten per cent. per annum, from January 1, 1873.

On the 23d of May, 1873, the defendants answered, alleging that on the 1st day of January, 1872, the plaintiff, in consideration of $5,000, sold and conveyed to the defendants, as tenants in common, "all that plantation or tract of land situate, lying and being on Wadmalaw Island, in the County of Charleston, and State aforesaid, and known as the Point of Pines, or Martin's Point, containing twelve hundred acres, more or less, abutting and bounding north and west on Wadmalaw Sound, east on lands of R. E. Jenkins, and south on lands of Benjamin Bailey."

That the deed of conveyance contained a clause of general warranty, in the usual words, and was duly recorded. That the cash portion of the purchase money, to wit, $1,-66666/100, was paid by the defendants to the plaintiff, and that, for the credit portion of the purchase money, the defendants executed and delivered to the plaintiff their bond, described in the complaint, and which bond con-

*502

*tained, as a part of the condition, these words: "This bond subject to an apportionment, if, on a survey, there proves a deficiency of the land for purchase of which this bond is given." That on January 1, 1873, the defendants were ready to pay the first instalment of their bond, but that the plaintiff had neglected or delayed to have a survey made, although requested so to do by the defendants.

That, some time thereafter, Wm. Hume, surveyor, made a survey and plat of said lands, and on said plat certified: "Plat of a tract of land known as Martin's Point, situated on Wadmalaw Island, Charleston County, State of South Carolina, containing 189 acres of highland, and 257 75/100 acres of marsh land—total 446 75/100 acres."

That, from the survey, there appeared a deficiency of more than one-half of the quantity of land sold and conveyed by the plaintiff to the defendants, and warranted.

The defendants then offered to the plaintiff to deduct one thousand dollars from the whole amount of the purchase money, and estimated, at such, to pay the instalment which should, upon such estimate, appear to be due.

This offer of defendants, made "in a desire to avoid litigation," was rejected by plaintiff, and the defendants then prayed that the deficiency in the quantity of the land might be estimated by a jury, and claimed costs.

All the facts above narrated were either proved or admitted at the trial.

The evidence tended to show that there was a wharf, store and steamboat landing at Martin's Point, which made it a valuable place, and that the rest of the plantation was worth very little, and that the marsh land, especially, was of very little, if any, value.

His Honor Judge Graham charged the jury as follows:

"Gentlemen of the Jury—I shall instruct you to 'hold these parties to the bond and the deed.' You are to decide this case accord-

ing to the 'bond and the deed.' The deed conveys twelve hundred acres of land; the bond says 'if, upon a survey, there prove to be a deficiency, there shall be an apportionment;' you are to make that apportionment. If you should conclude to apportion 'the land according to the deficiency,' your problem would be this: If you pay $5,000 for 1,200 acres of land, how much would you pay for 446? If that be your calculation, then you must find for the defendants, because they have already overpaid the portion that is due

*503

—they *have paid $1,666, when the agreement was to pay one-third cash, the balance in one and two years. You cannot find for the defendants so much money, because they have paid their money, and cannot claim it back.

"In case you conclude that the value of the Bluff is something greater than the rest of the land, you must regulate that according to the testimony, and what was meant by that clause in the bond 'if, upon a survey, there proves to be a deficiency of land, there shall be an apportionment.'"

Here plaintiff's counsel asked that the jury be instructed, in making the apportionment, to discriminate between the value of the different lands. This was refused, and exception taken to such refusal.

The jury found for the defendants.

A motion for a new trial was made and overruled, and the plaintiff appealed.

[For subsequent opinion, see 10 S. C. 304.]

Campbell & Whaley, for appellant.

DeSaussure & Son, Mitchell, contra.

Feb. 26, 1875. The opinion of the Court was delivered by

WILLARD, A. J. This case is distinguishable from the class of cases that have received so much consideration in the courts of this State on the question of the right of a purchaser to rescind, wholly or in part, the contract of purchase, when there has been a material failure in value, as it regards the quantity or quality of the property sold, as in the present case the bond for the purchase money of the land sold contained a clause designed to cover the very case made by the defendants. The clause in question is as follows: "this bond, subject to an apportionment, if, on a survey, there proves a deficiency of the land for the purchase of which this bond is given."

It is clear that a Court of Equity could take jurisdiction of the specific enforcement of this contract to the extent of making such apportionment on just and equitable principles. The defendant's answer was such as to entitle him to claim the interposition of the equitable powers of the Court, where the most complete relief would result from the application of the principles and rules of equity.

The question then remains to be con-

*504

sidered whether the rule of *apportionment submitted by the Court to the jury was conformable to the rules of equity. It clearly was not.

The contract of sale was for a tract of land of an assumed number of acres, valued at a gross sum. The required number of acres failed. The tract consisted, in part, of land fitted for cultivation, and, in part, of land unfit for that use. The tract was sold as a "plantation," and, of course, fitness for culture was a chief element of value. The rule of apportionment, as laid down by the Court, omitted the consideration of the two descriptions of land embraced in this tract. It submitted to the jury a mere arithmetical calculation, based on the number of acres and the price called for by the deed, and required the reduction of the contract price in the ratio of the diminution of quantity, according to actual measurement, without regard to the character of the land as to which the failure had occurred, whether of the class of the most valuable or of the least valuable land.

No illustration is required to make clear the practical defect of the rule applied by the Court. It certainly is not justified by the terms of the contract which the Court was called upon to enforce. The object and intent of that contract was to conform the sum paid to the actual value of the property sold, taking for the elements of that value the gross price agreed upon, the total quantity of land in acres assumed at the making of the contract, and the relative quantities of the two kinds of land assumed at that time.

A new trial should be ordered.

MOSES, C. J., and WRIGHT, A. J., concurred.

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5 S. C. 504

BRATTON v. ANDERSON.

(Columbia. Nov. Term, 1874.)

[*Bankruptcy* ⇐391; *Courts* ⇐504.]

Under the 21st Section of the Bankrupt Act of the United States it is the duty of the State Court, in ordinary actions and proceedings pending in such Court against the bankrupt, to stay such actions or proceedings, on the demand of the defendant, as in said Section is directed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 651; Dec. Dig. ⇐391; Courts, Cent. Dig. § 1399; Dec. Dig. ⇐504.]

[*Bankruptcy* ⇐391; *Courts* ⇐504.]

A proceeding under the 14th Section of the Act of this State, of 25th November, 1873, to obtain a lien on real estate under a judgment, is such a proceeding as the State Court is bound to stay under the said 21st Section of the Bankrupt Act.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 651; Dec. Dig. ⇐391; Courts, Cent. Dig. § 1399; Dec. Dig. ⇐504.]

*505

*Before Mackey, J., at York, July, 1874.

On the 2d July, 1874, the plaintiffs served a summons on the defendant to appear at the term of the Circuit Court to be held for York County, on the day of 187 , and show cause, if any he had, why a judgment of the plaintiffs against the defendant, obtained on the 9th of February, 1872, should not be revived and become a lien on all the real property of the defendant in York County, in accordance with the Act of the General Assembly of this State, approved 25th November, 1873.

On 10th July, 1874, the defendant filed his answer with the Clerk of the said Court, and also served a copy on plaintiffs' attorneys. For cause why the relief asked for in the summons should not be granted, the defendant stated that on the 21st of November, 1872, he had filed his petition in the office of the Clerk of the District Court of the United States, for the District of South Carolina, praying for himself the benefits of the Bankrupt Act, and that he had thereupon been duly adjudged a bankrupt; that the assignee in bankruptcy of the defendant had sold a portion of the defendant's real estate, and that the balance thereof had been set off and exempted to the defendant as a family homestead; that the assignee's report of said exemptions had been filed with the Register in Bankruptcy, on the 7th day of May, 1873, and that there being no exceptions thereto, the Hon. George S. Bryan, Judge of said District Court, had made an order on the 15th day of January, 1874, confirming said exemptions; that the homestead referred to was all the real estate owned by the defendant; and that the debt of the plaintiffs had been contracted previous to the bankruptcy of the defendant.

It was admitted that the plaintiff had not proved his claim in bankruptcy; that defendant had not been discharged in bankruptcy; that he had filed his petition for discharge; and that a hearing had been appointed for the 1st August, 1874.

On the 23d July, 1874, after the argument, His Honor overruled the answer, holding that the defenses therein set forth were insufficient, and granted an order making said judgment a lien, for ten years, on all the real property of the defendant in York County.

The defendant appealed, on the following grounds:

1. That the Circuit Court did not have ju-

*506

risdiction to hear the *motion while the defendant was in bankruptcy, the debt having been contracted before said bankruptcy.

2. That the plaintiffs were barred from making the motion, by their own laches, in not objecting to the homestead exemption, within the time required by law.

3. That the order of His Honor George S. Bryan, confirming the exemptions to the defendant, could not be abridged by an order of this Court.

4. That the rights of all parties were fixed on the 21st of November, 1872, when the defendant filed his petition in bankruptcy, and that the plaintiffs cannot now acquire additional rights over defendant's property.

5. That the said decree is in violation of the provisions of the Act of Congress, entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, and the Acts amendatory thereto.

6. That the decree is, in other respects, contrary to the law and the facts alleged and admitted in the summons and answer.

J. R. S. Thompson, for appellant:

In support of the appeal in this case, the following points and authorities are respectfully submitted to the Court—

I. That by the Bankrupt Act the respondents were made parties to the proceedings in bankruptcy; that those proceedings were in the nature of a suit between the parties; and that the State Court had no right to assume jurisdiction of the motion.

The 1st Section of the present Bankrupt Act constitutes the several District Courts of the United States, Courts of Bankruptcy, and enacts that the jurisdiction thereof shall extend—

"To all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy;

"To the collection of all the assets of the bankrupt;

"To the ascertainment and liquidation of the liens and other specific claims thereon;

"To the adjustment of the various priorities and conflicting interests of all parties;

"And to the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties, and due distribution of the assets among all the creditors;

*507

*"And to all acts, matters and things to be done under and by virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy."

Section 21 of said Act enacts—

"And no creditor whose debt is provable under this Act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt until the question of the debtor's discharge shall have been determined;

"And any suit or proceeding shall, upon the application of the bankrupt, be stayed, to await the determination of the Court in bankruptcy on the question of discharge: Provided, There be no unreasonable delay on the part of the bankrupt in endeavoring to

obtain his discharge: And provided, also, That if the amount due the creditor is in dispute, the suit, by leave of the Court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed as aforesaid."

The 11th Section of the Act requires that the creditors shall be notified by mail and publication that a warrant has been issued against the estate of the debtor; that the payment of any debts and the delivery of any property belonging to such debtor, to him or for his use, and the transfer of any property by him, are forbidden by law, and that a meeting of the creditors of the debtor to prove their debts and choose an assignee will be held at a designated place and time.

From the record in the proceedings below, nothing appearing to the contrary, we must presume that the proceedings in the Bankrupt Court were regular and legal, and that the respondents were notified by mail and by publication, as required by the 11th Section of the Act. Upon that assumption, and the facts stated in the brief, we submit the following authorities in support of the first point stated above:

In Re Farrell, 5 B. R., 125, Judge Nixon says: "A proceeding in bankruptcy is in the nature of a suit in which the bankrupt appears as plaintiff, and the creditors as defendants; the plaintiff asking the Court for a judgment against all and each of the defendants, discharging him from his indebtedness to them."

In Bump on Bankruptcy, (6th ed., p. 28,) it is said: "The mode of obtaining jurisdiction over the creditor is prescribed by

*508

*the Act, and consists in a proper service of the process upon him. This service consists of two parts—the publication and the mailing of the notices."

In Markson v. Heaney, 4 B. R., 165, (Dillon, C. J.,) it is said: "The Bankrupt Court is invested with this jurisdiction over the bankrupt and his estate and over creditors who are brought involuntarily into it, in order to administer the estate for the benefit of all the creditors, according to their respective rights."

In Re York v. Hoover, 4 B. R., 156, (Woods, J.): "The proceeding in bankruptcy from the filing of the petition to the discharge of the bankrupt and the final dividend, is a single statutory case or proceeding." And to the same effect is the case of Alabama Railroad Co. v. Jones, (5 B. R., 97, Woods, J.)

In Re Barrow, 1 B. R., 125: "The jurisdiction of a District Court of the United States, sitting as a Court in Bankruptcy, is superior and exclusive in all matters arising under the statute. The estate surrendered is placed in the custody of the Court so sitting in bankruptcy, and the officer appointed to manage it is accountable to the Court appointing him, and to that Court alone. No Court of an independent State jurisdiction can withdraw the property surrendered, or determine in any degree the manner of its disposition." To same effect, In Re Schnepf, B. R. Sup., 41, (Benedict, J.,) and In Re Bowie, 1 B. R., 185, (Giles, J.)

Jones v. Leach, 1 B. R., 165, (Hill, J.): "The commencement of proceedings in bankruptcy transfers to the District Court the jurisdiction over the bankrupt, his estate, and all parties and questions connected therewith, and operates as a supersedeas of the process in the hands of the Sheriff, and an injunction against all other proceedings than such as may thereupon be had under the authority of the District Court, until the question of bankruptcy shall be disposed of." To the same effect see Pennington v. Sale and Phelan, 1 B. R., 167, (Hill, J.)

In Re Vogel, 2 B. R., 138, (Blatchford, J.): "As soon as the petition in bankruptcy is filed, the property of the insolvent, so far as any interference therewith is concerned, is thereby brought eo instante into the Bankrupt Court, and placed in its custody and under its protection as fully as if actually brought into the visible presence of the Court. Being in the custody of the Bankrupt Court, no other Court, and no person acting under any process from any other Court, can, with-

*509

out the permission of the Bankrupt *Court, interfere with it; and to so interfere is a contempt of the Bankrupt Court." To same effect see In Re People's Mail Steamship Co., 2 B. R., 170, (Blatchford, J.); In Re Kerosene Oil Co., 2 B. R., 164, (Benedict, J.); Brock v. Terrel, 2 B. R., 190, (Hill, J.); and In Re Wallace, 2 B. R., 52, (Deady, J.)

In the case of Shawhan v. Wherritt, Assignee, 7 How., 627, a case arising under the Bankrupt Act of 1841, (which Act did not require notification by mail, but simply by publication,) the Supreme Court of the United States says: "The public notice required by the Act having been given, the creditors must be treated as having notice of the proceedings, and an opportunity to make their objection to them; and having neglected or refused so to do, they ought not to be allowed to impeach them collaterally, as they are in the nature of a proceeding in rem, before a Court of record having jurisdiction."

And in Gibson v. Green, 45 Miss., 209, it is said: "The suggestion of the pendency of the proceedings in bankruptcy suspends the cause until the final action of the Bankrupt Court granting or denying a discharge."

How far the Act prevents lien creditors from enforcing their liens in the State Courts has been much discussed, and the decisions are conflicting; but that creditors not holding liens, (as in the case now before the Court,) must seek their remedies in the Bankrupt Court alone, I think borne out by an overwhelming weight of authority. Especial-

ly was the action of these creditors wrong when they made their motion after the bankrupt had filed his petition for discharge, and before the day appointed by the United States District Court for hearing the petition had arrived.

II. The plaintiffs were barred from making their motion by their own laches.

The object of the plaintiffs is to obtain a lien upon the homestead set off to the defendant in bankruptcy, and then to enforce this lien, either through the process of the State or United States Courts. We must presume, as before, until the contrary is shown, that the proceedings setting off that homestead were regular and legal. It was set off under the Act of Congress and confirmed by the order of the United States Court. If this allowance of homestead to the bankrupt violates the rights of these creditors, they must pursue their remedy as provided in the Bankrupt Act. But the 19th rule of the Supreme

*510

Court of the United States, made in *pursuance of the provisions of that Act, allow only twenty days within which to file exceptions to the assignee's report of exempted property. That report was filed on the 7th of May, 1873, and the plaintiffs have taken no steps to interfere with it until the service of the summons in this case on the 2d of July, 1874.

"Non-compliance with a rule of the Supreme Court is sufficient ground to decline to hear a case and to affirm the judgment of the Court below."—Sanborn v. Robinson, 22 Mich., 92, 3 U. S. Dig., 66.

"Appeal dismissed on the ground that the appellants had not brought up their appeal within the legal time."—Richmond v. Mann, 23 La., 373, 3 U. S. Dig., 63.

And in Bump on Bankruptcy, p. 143, it is said: "In the absence of fraud, accident or mistake, the exceptions must be filed within the required time." But in this case neither fraud, accident nor mistake has been alleged.

The respondents might have made this question in the United States District Court when the assignee filed his report of exempted property. Under the law they were parties to the proceeding. They have delayed until the recent decisions by Chief Justice Waite and Judge Bond, which, perhaps, satisfy them that, as an abstract proposition of law, it is erroneous to set off a homestead in bankruptcy as against old debts; though when this debt was contracted does not appear from the record; and they now seek in this way to review and reverse the order of the District Judge. In a case involving this point—Ex Parte Monteith, 1 S. C. Rep. 232—this Court says: "Where one loses a suit by his own neglect, he cannot be aided by a bill of review. This is founded on a well recognized principle. A party must not stand off, risk the chance of litigation, and if, perchance, the result be against him, seek a review of the judgment to which his laches has contributed, and which a regular course of defense might have averted."

And in the late case of Penny v. Taylor, 10 B. R., 204, in the United States District Court for the Southern District of Mississippi, the circumstances were somewhat similar to those of the present case. The debt due to Taylor was contracted in 1859. In 1868 Penny filed his petition in bankruptcy. In 1869, notwithstanding the bankruptcy, Taylor obtained judgment for his debt. The assignee set off a homestead to Penny; his report thereof was not excepted to, and was confirmed. In March, 1870, Penny obtained

*511

*his discharge. In November, 1872, Taylor caused to be issued an alias execution upon his judgment, and levied the same upon the homestead. Penny filed his bill praying for an injunction. In his decree, Judge Hill says: "It is also claimed as ground of demurrer, that neither the land nor defendant's judgment were before the Bankrupt Court, or passed upon by it. This is also a mistake; the bankrupt did bring his claim to the land before the Court, and it was set off to him as a homestead. The bankrupt also, by his schedule, brought his claim before the Court, and if the defendant did not choose to prove it, it was his own neglect, and he must suffer the consequences."

III. The order of the U. S. District Court, made on the 15th of January, 1874, confirming the assignee's report of exempted property, cannot be set aside or made of no effect by the order of the State Court.

In Peck v. Jenness, 7 How., 625, the U. S. Supreme Court say: "It is a doctrine of law too long established to require a citation of authorities, that where a Court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other Court; and that where the jurisdiction of a Court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another Court." To the same effect, see, also, the case of Shawhan v. Wherritt, 7 How., 627, quoted above, on page 4. And in the late case of Morris v. Swartz, decided by the Supreme Court of Texas, (reported in 10 B. R., p. 305,) the Court say: "We know officially that there was a general bankrupt law passed on the 2d of March, 1867. This law provides for the office of assignee in every case of bankruptcy, and the acts of such officer cannot be collaterally impeached in the State Courts."

IV. The rights of all parties were fixed on the 21st of November, 1872, when the appellant filed his petition in bankruptcy, and the respondents cannot now acquire a lien upon the property.

It will doubtless be strongly contended for,

on the part of the respondents, that the United States Court erred in making the order that was made confirming the assignee's report of exempted property, and that the bankrupt has no right to his homestead exemption. For the reasons above stated, I

*512

submit that the credi*tors are barred from making the exception now, and that, in no event, could they bring the question up in the tribunal they have selected. But admitting, for the sake of argument, that they had the right to make the question, what would be the result? Clearly, that if the bankrupt had no right to the homestead, and the order of the United States Court is a nullity, then, under the 14th Section of the Bankrupt Act, the homestead property would vest in the assignee, for the benefit of all the creditors. That Section of the Act provides that the register shall convey to the assignee all the real and personal estate of the debtor, except such as is exempt. It further enacts that the "assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee." The title to the homestead, then, being in the assignee, and the creditors proposing to create a lien on the homestead, the assignee would be a necessary party to such proceeding, and it would be a wrong on the other creditors to permit the respondents to obtain a priority over them in the distribution of the bankrupt estate.

In the recent case In Re George W. Dillard, decided in the United States Fourth Judicial Circuit, Judge Bond says: "In our opinion the relation of the bankrupt to his property is fixed the moment he files his petition in voluntary bankruptcy; and in involuntary bankruptcy, so soon as he is adjudicated a bankrupt. The rights of his creditors to his estate are determined at the same time. What the homestead exemptions are at these times, both the bankrupt and his creditors are presumed to know. He petitions, and they resist in the Bankrupt Court, with a full knowledge of the then existing law."

In In Re Mosely and Wells, 8 B. R., 212, (Erskine, J.,) it is said: "A lien, to have any standing in the Bankrupt Court, must be a lien at the time the party becomes a bankrupt."

In Penny v. Taylor, 10 B. R., 204, Judge Hill says: "If the conveyance made by the bankrupt to his son was void, and the bankrupt had no interest in it as a homestead, then it should be sold for the benefit of all the creditors, no lien having attached to it at the time of the commencement of the proceedings in bankruptcy."

The case before mentioned, of Shawhan v. Wherritt, 7 How. 645, is also in point. In

*513

that case Shawhan obtained a lien by *proceedings in the State Court after Brandon had become a bankrupt. The United States Supreme Court say: "If notice of this fact to the creditor makes a payment by the debtor void, it is obvious that a security or priority gained by suit in a State Court after such notice could have no better claim to protection; for notice of the act of bankruptcy to the creditor is the test of the mala fides, which vitiates the transaction. * * * We are of opinion, therefore, that the lien obtained by Shawhan upon the property of Brandon, by his proceedings in the State Court, after the notice of the act of bankruptcy, was not saved or protected by the proviso of the second Section of the Act, and that he and the other appellants who had appropriated the assets of the bankrupt to their own use are liable to refund the same to the assignee in this suit."

The rule here set forth is similar to that adopted in our own Courts, (see Hutchinson v. Bates, Exr., 1 Bail., 111,) where the debts of an insolvent estate take rank according to the footing on which they stood at the death of the debtor, although some of the debts, since that time, may have passed into judgments.

Wilson & Wilson, contra:

1. The provisions of the Bankrupt Act do not apply to a creditor who has not proved his debt or claim in bankruptcy.—Rice's Manual, p. 56, general clause 99, § 21.

2. They do not apply to a creditor whose debt has been previously "prosecuted to final judgment." Judgment was obtained 9th of February, 1872, before defendant filed his petition.—Ib., § 21.

3. The order of the Circuit Judge was in accordance with the provisions of the Act of the Legislature of 25th November, 1873, and the matter within its jurisdiction.

4. There is no provision of the Bankrupt Act with which the order of the Circuit Judge conflicts. The Act must be construed strictly.

5. The legal effect of the order is a question solely for the United States Court. There is no conflict of jurisdiction involved.

6. The rights of parties were fixed when defendant's petition was filed, only so far as the provisions of the Bankrupt Act extend. Respondent's case is not within the prohibitions of the Act.

7. The judgment was obtained upon a note, dated October 3, 1859. The United States Court would enforce the claim against the homestead exemption.

*514

*March 10, 1875. The opinion of the Court was delivered by

WILLARD, A. J. It will not be necessary to consider the question, whether the pend-

ency of proceedings in bankruptcy in the District Court of the United States destroys or impairs the jurisdiction of the State Courts over an action commenced prior to the filing of the petition in bankruptcy, either for or against the bankrupt. The Act of Congress, under which such an interference with the ordinary jurisdiction of the State Courts is alleged to exist, should admit of no other reasonable construction before that conclusion is arrived at. It is doubtful whether such is the intent of the bankrupt law. The very clause of that Act, hereafter recited as controlling the results of the present appeal, impliedly admits the continuance of that jurisdiction after the commencement and during the pendency of proceedings of that nature. Section 21 of the Bankrupt Act of 1867 bears upon the question now to be considered, and contains the following clause: "And no creditor, whose debt is provable under this Act, shall be allowed to prosecute to final judgment any suit at law or in equity therefor, against the bankrupt, until the question of the debtor's discharge shall have been determined, and any such suit or proceeding shall, upon the application of the bankrupt, be stayed to await the determination of the Court in bankruptcy, on the question of the discharge." Then follows a proviso, intended to secure due diligence in the prosecution of the bankruptcy proceedings, and also to enable the District Court to authorize the parties to the suit in the State Courts to proceed for a specific purpose, notwithstanding the provisions of the Section already recited. As no question is made here, under the terms of this proviso, it need not be further considered at this time.

The object of the above recited clause is apparent, and needs no resort to implications. That object is to harmonize the respective jurisdictions of the District and State Courts, and not to destroy that of the latter.

It is manifestly proper that provision should be made for suspending, temporarily, proceedings based upon provable debts of the bankrupt, or affecting his assets in jurisdictions independent of the Court proceeding in bankruptcy, unless such extrinsic jurisdiction can be brought to act in aid of that Court. Between the filing of the petition in bankruptcy and the final discharge, proceed-

*515

ings in *the State Courts will ordinarily be useless, if not detrimental, to the mutual interests of the bankrupt and his creditors. The status of the liabilities of the bankrupt is fixed with reference to the commencement of bankrupt proceedings, and it is not within the power of the State Courts to alter the state of relations, as affecting the liabilities or estate of the bankrupt, after the jurisdiction in bankruptcy has attached, so as to modify, in any way, the mode of distribution or the effect of a discharge.

We must regard, then, the proper effect of the clause of Section 21, above quoted, to be to make it the duty of the State Courts, in which the action or other proceeding is pending, to grant, on the demand of the defendant, a stay of all proceedings before judgment, or until the determination of the proceeding in bankruptcy, where it appears that there is a proceeding in bankruptcy pending against the defendant, and that the demand on which such action or proceeding is brought is capable of being proved against the bankrupt in such proceeding in bankruptcy.

In the present case, the plaintiffs had a judgment in the Circuit Court prior to the commencement of the proceedings in bankruptcy; but under the law, as it then stood, such judgment did not, in itself, and independently of the issue of an execution thereunder, operate as a lien on the real estate of the judgment debtor. Subsequently the plaintiffs proceeded, in accordance with Section 14 of the Act of November 25, 1873, (15 Stat., 498,) by summons, to make such judgment a lien on the real estate of the judgment debtor. The defendant objected to this proceeding, on the ground that proceedings in bankruptcy were pending against him. The Court refused to allow the objection of the defendant, and proceeded to set up the judgment as a lien against the defendant's estate.

The question to be considered is, whether the case is one contemplated by the above cited clause of Section 21 of the Act of Congress.

Section 14 of the Act of November 25, 1873, after providing that future judgments should be a lien upon real estate, provided as follows: "And in cases where judgments have been obtained since the first day of March, A. D. 1870, a like lien may be obtained by the service of the summons upon the judgment debtor, or, if he be dead, upon his heirs, executors or administrators, to show cause, if any he or they may have, why said judgment should not be and become a lien, in accordance with the provisions of the Act;

*516

and *if no sufficient cause can be shown to the contrary, said judgment shall be and become a lien on all the real property of the judgment debtor in the County where entered, for ten years from the date of the filing of such summons, with proof of service thereof, in the office of the Clerk of the Court of Common Pleas of the County where such judgment has been entered."

The proper effect of this proceeding is to give that which is precisely equivalent to a judgment entered originally, as of the day when the original judgment is revived. The revived judgment has, in two respects, characteristics substantially differing from that which is the foundation of the proceeding. It constitutes a lien on real estate in the

County, and it runs for ten years from its entry. The proceeding is, then, one based upon an existing judgment, and having for its end the obtaining of a judgment having certain attributes distinct from that on which the proceeding is founded, including a more efficient means of procuring satisfaction and a longer duration of its efficiency. It must, therefore, be considered, as within the intent and meaning of the Act of Congress, a final judgment, and the proceedings to obtain such judgment are subject to be stayed, on the application of the debtor. That application having been duly made, it was the duty of the Court to stay the proceedings on the part of the plaintiff to renew the judgment, until the question of discharge is finally adjudicated.

It is ordered and adjudged that the order of the Circuit Court, and the judgment entered thereon, be set aside, and that the proceedings of the plaintiffs to renew the judgment be stayed until the District Court shall have finally adjudicated the right of the defendant to a discharge in bankruptcy, or shall authorize the parties to such proceeding to further prosecute the same.

MOSES, C. J., and WRIGHT, A. J., concurred.

[End of Volume 5 S. Car.]

REPORTS OF CASES

HEARD AND DETERMINED BY

THE SUPREME COURT

OF

SOUTH CAROLINA

VOLUME VI

FROM NOVEMBER, 1874, TO NOVEMBER, 1875, INCLUSIVE

BY J. S. G. RICHARDSON

STATE REPORTER

COLUMBIA, S. C.
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JUDGES AND OTHER LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS VOLUME

JUSTICES OF THE SUPREME COURT.

Hon. F. J. MOSES, Chief Justice.
Hon. J. J. WRIGHT, Associate Justice.
Hon. A. J. WILLARD, Associate Justice.

JUDGES OF THE CIRCUIT COURTS.

1st	Circuit—	Hon.	R. F. GRAHAM.
2d	"	"	JOHN J. MAHER.
3d	"	"	JOHN T. GREEN.
4th	"	"	C. P. TOWNSEND.
5th	"	"	R. B. CARPENTER.
6th	"	"	T. J. MACKEY.
7th	"	"	M. MOSES.
8th	"	"	T. H. COOKE.

ATTORNEY GENERAL.

S. W. MELTON, Esq.

CLERK OF SUPREME COURT.

A. M. BOOZER, Esq.

TABLE OF CASES REPORTED

	Page
Allen v. Fagan	206
Billings v. Clinton	90
Billings v. Perry	106
Billings v. Williamson	119
Bollmann v. Bollmann	29
Boykin v. Watts	76
Bradley v. Rodelsperger	290
Charles v. Jacobs	69
Chicora Exporting & Importing Co. of South Carolina v. Crews	243
Clarke v. Swearingen	291
Conway v. Cunningham	351
Corwin v. Comptroller General	390
Creighton v. Clifford	188
Daniel v. Swearengen	297
De Saussure v. McClenaghan	83
De Saussure v. Zeigler	12
Dewitt v. Atkinson	140
Dunn, Ex parte	307
Eakin v. Knox	14
Edwards v. Sanders	316
Flinn v. Brown	209
Frazee v. Cardozo	315
Gilliland v. Gasque	406
Glenn v. York County Com'rs	412
Gower v. Thomson	313
Green v. Charlotte, C. & A. R. Co.	342
Hammond v. North Eastern R. Co.	130
Hand v. Savannah & C. R. Co.	307
Haynsworth v. Bischoff	159
Heyward v. Walker	449
Hunter v. Wardlaw	74
Hutton v. Edgerton	485
Jacobs v. Woodside	490
Johnson v. Harrelson	336
Lynch v. Goodwin	144
McKelvay v. South Carolina R. Co.	446
McLarin v. Knox	23
Manufacturing Co. v. Price	278
Mobley v. Cureton	49
Monaghan v. Small	177
Parker, Ex parte	472
Perry v. Sullivan Mfg. Co.	310
Reeder v. Flinn	216
Rhodes v. Wilmington, C. & A. R. Co.	385
Richardson v. Chappell	146
Rogers v. Huggins	356
Runion v. Latimer	126
Sanders v. Hartzog	479
Smalls v. Wilder	402
Smith v. Walker	169
Southern v. Fisher	345
State v. City of Columbia	1
State v. Coleman	185
State v. Dent	383
State v. Harper	464
State v. Kilcrease	444
Sullivan v. Hellams	184
Sullivan v. Thomas	201
Tharin v. Seabrook	113
Thompson v. Thompson	279
Trotter v. Robinson	410
Van Wyck v. Norris	305
Walker v. Veno	459
Withers v. Jenkins	122
Wolf v. Hamberg	448
Zimmerman v. Autley	379

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF SOUTH CAROLINA

JUSTICES PRESENT.

HON. F. J. MOSES, CHIEF JUSTICE.
HON. J. J. WRIGHT, ASSOCIATE JUSTICE.
HON. A. J. WILLARD, ASSOCIATE JUSTICE.

6 S. C. *1

*STATE v. COLUMBIA.

(Columbia. April Term, 1874.)

[*Licenses* ⇐7.]

An ordinance of the city of Columbia imposing by way of license fees a tax on business and avocations, and discriminating as to the amounts to be paid for licenses by the different classes of persons subject to the tax: *Held* to be conformable to an Act of the Legislature authorizing the city to require all persons, companies and corporations engaged in business or avocations to take out licenses, and to impose a reasonable charge or tax for the same; and: *Held*, further, that neither the Act nor the ordinance was inhibited by any provision of the Constitution of the State.

[Ed. Note.—Cited in Charleston v. Oliver, 16 S. C. 47, 51; Information against Oliver, 21 S. C. 326, 53 Am. Rep. 681; Utsey v. Hiott, 30 S. C. 366, 9 S. E. 338, 14 Am. St. Rep. 910; Thomas v. Town of Moultrieville, 52 S. C. 185, 29 S. E. 647; Florida C. & P. R. Co. v. City of Columbia, 54 S. C. 276, 32 S. E. 408.

For other cases, see Licenses, Cent. Dig. §§ 7–15, 19; Dec. Dig. ⇐7.]

[*Licenses* ⇐6.]

A license fee for carrying on a lawful business or avocation—as, for instance, that of an incorporated bank—imposed by an ordinance of a city, is a tax, within the sense of Section 8, Article IX, of the Constitution of the State, providing that "the corporate authorities of * * * cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property."

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 5, 6, 19; Dec. Dig. ⇐6.]

[*Licenses* ⇐5½.]

Though, strictly speaking, license of a trade or calling is referable to the police power of municipal bodies, yet the granting of licenses has long been used for the purpose, and has become one of the customary modes of raising revenue.

[Ed. Note.—Cited in Hill v. City Council of Abbeville, 59 S. C. 426, 38 S. E. 11.

For other cases, see Licenses, Dec. Dig. ⇐5½.]

[*Licenses* ⇐6.]

The Legislature is not forbidden by the Constitution from empowering municipal corporations to impose taxes on business and avocations, and to fix a different rate for each distinct class of persons subject to the tax.

[Ed. Note.—Cited in Information against Oliver, 21 S. C. 325, 53 Am. Rep. 681; Information against Jager, 29 S. C. 443, 7 S. E. 605.

For other cases, see Licenses, Cent. Dig. §§ 5, 6, 19; Dec. Dig. ⇐6.]

[*Licenses* ⇐7.]

A tax on business and avocations fixing a different rate of taxation for each distinct business or avocation is not in conflict with the provision of the Constitution requiring all taxes to be "uniform with respect to persons and property."

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 8; Dec. Dig. ⇐7.]

*2

[*Taxation* ⇐40.]

*The sense of the term "uniform with respect to persons or property," as used in Section 8, Article IX, of the Constitution, stated and explained.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 68–89; Dec. Dig. ⇐40.]

[*Banks and Banking* ⇐12.]

The business of a bank incorporated by the State is not exempt from municipal taxation.

[Ed. Note.—Cited in Florida C. & P. R. R. Co. v. City of Columbia, 54 S. C. 281, 32 S. E. 408.

For other cases, see Banks and Banking, Cent. Dig. § 10; Dec. Dig. ⇐12.]

[*Banks and Banking* ⟸12; *Licenses* ⟸7.]
That the bank has paid a license fee imposed as a tax by the State for its own purposes does not exempt it from liability for municipal taxation imposed in the same way.

[Ed. Note.—Cited in Mauldin v. City Council of Greenville, 42 S. C. 300, 301, 20 S. E. 842, 27 L. R. A. 284, 46 Am. St. Rep. 723.

For other cases, see Banks and Banking, Cent. Dig. § 10; Dec. Dig. ⟸12; Licenses, Cent. Dig. § 14; Dec. Dig. ⟸7.]

[*Banks and Banking* ⟸12.]
A tax of $200 on the business of banks imposed by the city of Columbia: *Held* not to be unreasonable within the sense of an Act of the Legislature authorizing the city to impose a "reasonable charge or tax."

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 10; Dec. Dig. ⟸12.]

[*Taxation* ⟸651.]
A power to "assess and collect taxes" implies, in this State, the power to enforce collection by execution.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1319–1323; Dec. Dig. ⟸651.]

[This case is also cited in State v. Parler, 52 S. C. 218, 29 S. E. 651, without specific application.]

Before Cooke, J., at Columbia, August, 1873.

This was a suggestion by the Citizens' Savings Bank and the South Carolina Bank and Trust Company, as relators, against the city of Columbia and Jesse E. Dent, Sheriff of Richland County, praying for a writ of prohibition to restrain the enforcement of certain executions issued by the city against the relators for the collection of license fees.

The case was this: By an Act of the Legislature, approved March 2, 1871, (14 Stat., 572.) the Mayor and Aldermen of the city of Columbia are "empowered to require all persons, companies and corporations now engaged, or who may hereafter become engaged, in business or avocations of any kind whatever, within the limits of the city of Columbia, to take out a license from the Mayor and Aldermen of the said city, who are hereby authorized to impose a reasonable charge or tax for the conduct of the same." And under the power thus conferred, the city of Columbia, on the 23d December, 1872, passed an ordinance entitled "An ordinance to regulate licenses for the year 1873," whereby it was declared "that every person, firm, company or corporation engaged in, or intending to be engaged in, any trade, business or profession hereinafter mentioned shall obtain a license therefor in manner provided;" and then, after declaring that every such person, firm, &c., shall register his or her name or style, imposing a penalty of $40 for failure to register, and prescribing the manner of obtaining licenses, it proceeded to fix the rates to be paid for the different classes of licenses in manner following: "Astrologers and clairvoyants, $100; apothecaries, retail, $25; architects or surveyors, $25; auctioneers, $100; * * * attorneys at law, $25; banks and bankers, $200; billiard, bagatelle or other gaming tables, for the first table, $50, and for every additional table in the same establishment, $25," and so on, naming some eighty or

*3

ninety *trades, professions and avocations, and fixing the sum to be paid for each distinct class,—"dealers, retail, in goods, wares and merchandise" being classified according to the amounts of their annual sales, and "boarding houses" and "hotels" according to the number of boarders or guests they could accommodate.

The relators are banks chartered by the State and doing business within the limits of the city of Columbia. They alleged that they had not paid the license fees of $200 prescribed by the ordinance for "banks and bankers;" that executions therefor had been issued and placed in the hands of the Sheriff, who threatens to levy the amounts thereof by distress and sale of relators' goods and chattels. The grounds of the application for a writ of prohibition are stated in the judgment of this Court.

The case was heard by His Honor Judge Cooke, (the Judge of the Circuit being absent from the State,) who made an order that a writ of prohibition do issue in accordance with the prayer of the suggestion.

The city of Columbia appealed.

Tradewell, City Attorney, with whom was C. D. Melton, for appellant, cited Fletcher v. Peck, 6 Cr., 87; Ex Parte McCullom, 1 Cowen, 564; Morris v. People, 3 Denis, 381; Cohen v. Hoff, 1 Tr., 637; License Cases, 5 Wall. 471; Hodgson v. New Orleans, 21 La. Ann., 301; Meriam v. New Orleans, 14 La. Ann., 318; Fletcher v. Oliver, 25 Ark., 289; Bruce v. Hodges, 14 Rich., 256; State v. Hayne, 4 S. C., 403; Dillon on Mun. Corp., §§ 291, 587, 594, 651, 653, 656; Cooley on Con. Lim., 479, 390; Mason v. Trustees, 4 Bush, Ky., 406; Gilkeson v. Justices, 13 Grat., 577; Gilman v. Sheboygan, 2 Black., 510; Nashville v. Althorp, 5 Cold., 554; Slaughter v. Commonwealth, 13 Grat., 767; Knowlton v. Supervisors, 9 Wis., 410; Con., Art. IX, § 8, and other parts of the Constitution.

Bachman & Youmans, contra, cited 3 Kent, 360; Pope v. Commissioners, 12 Rich., 410; Dillon on Mun. Corp., §§ 610, 284, 302, 605, 291, 609; Cooley on Con. Lim., 198, 200, 203, 211, 514, 518, 502; 9 Pick., 414; 4 Mass., 145, 473; 3 Story, 69; Savannah v. Hartridge, 8 Ga., 23; Kyle v. Malin, 8 Ind., 34, 37; Richmond v. Daniel, 14 Grat., 387; Railroad v. Alexander, 17 Grat., 176; Abb. Dig. Law of Corp., 492; Thorpe v. Railroad, 27

*4

Vt., 149; *Bank v. Hines, 3 Ohio, 1; Weeks v. Milwaukie, 10 Wis., 282; Sanderson v. Cross, 10 Wis., 282; Ang. & A. on Corp., §§ 377, 378; Savannah v. Charleton, 36 Ga., 460; Ex Parte Garland, 4 Wall, 379; Paxon

v. Sweet, 1 Green., 196; Commissioners v. Gas Company, 12 Penn., 318; Kip v. Patterson, 2 Dutch, 298; Broom's Leg. Max., 278; 23 N. H., 430; Ashville v. Means, 7 Ired., 406; Mays v. Cincinnati, 10 Ohio, 273; Covington v. Southgate, 15 B. Mon., 498; Baker v. Cincinnati, 11 Ohio, 504; McCullough v. Daniel, Harp. Eq., 255; Walker v. Pinson, 12 Rich. Eq., 452, and other cases, and the Articles and Sections of the Constitution and Acts of Assembly relating to the case.

Sept. 23, 1874. The opinion of the Court was delivered by

WILLARD, A. J. The relators allege that the ordinance of the city of Columbia imposing upon them, as bankers, payment of a sum of money by way of a license is invalid, and they ask that the respondents be restrained from enforcing such ordinance by a writ of prohibition issued out of this Court. The propositions advanced by the relators in support of this position resolve themselves into the following:

1. That, as an incorporated company, transacting banking business under a charter from the Legislature, they are not liable to pay any corporate tax for carrying on such business.

2. That they have paid the tax imposed by the Act entitled "An Act to provide for a general license law," approved March 13, 1872.

3. That the ordinance, considered as a means of raising revenue, is not "taxation" in the sense of the enactment conferring power to tax on the city corporation.

4. That, considered as a means of imposing a tax, such tax is not equal and uniform in respect to persons and property.

5. That the charge imposed is not a reasonable charge or tax.

In order to determine the force of these various propositions, it is requisite to inquire: First. Whether the enactment of the ordinance in question is to be regarded as the exercise of the power of imposing taxes; and, Second. Whether the charges imposed on the relators by the ordinance is equal and uniform in respect of persons and property.

*5

*The authority under which the respondents acted in the passage of the ordinance in question is contained in Section 8, Article IX, of the Constitution, which is as follows: "The corporate authorities of Counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes, such tax to be uniform in respect to persons and property within the jurisdiction of the body imposing the same;" and in Section 8 of an Act amending the charter of Columbia, approved March 2, 1871, (14 Stat., 572,) as follows: "That the said Mayor and Aldermen are hereby empowered to require all persons, companies and corporations now engaged, or who hereafter may be engaged, in business or avocations of any kind whatever, within the limits of the city of Columbia, to take out a license from the Mayor and Aldermen of the said city, who are hereby authorized to impose a reasonable charge or tax for the conduct of the same."

It is evident that the ordinance in question imposing a tax by way of license upon the relators on account of their business as bankers is in pursuance of the authority conferred by the statute just quoted, unless the relators establish their proposition that it is not reasonable. This proposition will be hereafter examined; and, in the meantime, the reasonableness of the charge will be assumed for the purpose of examining the other branches of the argument.

The question before us, then, is one of conflict between the grant of authority by the Act and the provisions of the Constitution already quoted.

We come now to the question whether the enactment of the ordinance is to be regarded as the exercise of the power of imposing taxes. The constitutional authority extends, in terms, to power "to assess and collect taxes for corporate purposes." If the charge imposed cannot be regarded as a tax in the sense in which that term is employed in the Constitution, then the respondents would have to look to some other source of authority for their action than this Section of the Constitution.

The relators allege that the charge imposed upon them cannot be considered a tax in the sense of the Constitution. They contend that power to enact a license and impose a license fee necessarily implies a right to control the business in respect of which the license fee is demanded, either by prohibiting its exercise or permitting such exercise only upon conditions imposed according to the discretion of the city authorities.

*6

*Their proposition that the authority under which they conduct their business is derived directly from the Legislature through their charter of incorporation depends for its force upon the idea just presented of the nature of licenses and license fees.

Strictly speaking, a license of a trade or calling by a municipal corporation is referable to the police power possessed by such bodies, and implies authority to prohibit the exercise of such business, except upon conditions having reference to some end of police regulation. In its simplest form of exercise, as where employed solely for the purpose of regulating avocations of a class tending to disturb public order, health or morality, it is a power totally distinct from that of imposing taxes for the purpose of raising revenue.

It has, however, been long employed for the purpose of imposing, on a class of avo-

cations to which the exercise of that power particularly relates, embracing places of public entertainment and amusement, taxation for the purpose of revenue of an extraordinary character, based upon the idea that avocations of that class should contribute specially to the support of the government in excess of the burdens borne by the productive industries. In this way it became one of the customary modes of raising revenue. The extension of this mode of raising revenue beyond the sphere of avocations to which the power of police regulation properly related, where circumstances of a peculiar nature rendered it requisite that each particular avocation should have its own rate of taxation, was natural where taxation had divided itself into two methods, the one embracing those subjects of taxation that are capable of being reached by means of an uniform rate, and the other such as could be treated in no other way than by subdivision into distinct classes and imposing a separate rate on each of such classes. Avocations of the class to which the power of public regulation properly relates naturally fall within the class of subjects of taxation last named, and the license, as a form of collecting special taxes, has been frequently extended to embrace all subjects of taxation calling for special rates of taxation.

The law, always looking rather to substance than to names in fixing the nature of an imposition by way of license, looks directly to the end in view. If it finds that end to be a regulation tending to preserve public order, health or morality, it adjudges accordingly, applying the rules governing the exercise of the police power of the community; if, on the other hand, it finds that the ob-

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ject in view is *the requisition of revenue exclusively, it applies the rules intended to regulate the taxing power.

Under this view, we must look into the ordinance and the statute on which it is founded in order to ascertain whether the end and object was the imposition of taxation, or of some different character.

The views just presented will be found fully carried out in United States v. Vassar, (5 Wallace, 462 [18 L. Ed. 497],) Pervear v. Massachusetts, (5 Wallace, 475 [18 L. Ed. 608],) and New York v. Railroad, (32 N. Y., 261.)

The statute under which the ordinance in question was passed uses the words "charge" or "tax" as descriptive of the nature of the imposition which the city government was authorized to make on the various trades and avocations carried on within its corporate limits. This expression, coupled with the fact that no other end than that of raising revenue for the support of the city government is disclosed in the statute, leads to the conclusion that the power intended to be conferred on the corporation was that of taxation.

The ordinance is equally clear on the subject. It does not subject the persons engaged in the various avocations to the performance of any other duty than that of paying the license fee fixed by the ordinance, nor does it impose any penalty or restriction whatever in respect of such avocation other than such as relates to the collection of such license fee. This view makes it clear that the ordinance intended exclusively the exercise of the taxing power.

It appears that the ordinance is to be regarded as an exercise of the taxing power, and as such its validity is to be determined by the rules and regulations governing the exercise of the power of imposing taxes.

In the case of State v. Hayne, (4 S. C., 403,) this Court held that a tax upon business and avocations was a legitimate mode of exercising the taxing power, and that in the absence of constitutional limitations the Legislature could properly fix a separate rate for each description of avocation embraced. We also held that the Constitution of this State permitted taxation of that class. It must be held, therefore, that the Legislature had power to authorize the imposition of a tax on avocations and business by a municipal corporation, and to confer on such bodies power to fix a separate rate for each distinct class of the subjects of taxation embraced within it, unless the language of the Constitution, quoted above, is to be construed as rendering it imperative, that a single rate should be applied to all such subjects of taxation equally.

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*We come, at this point, to the examination of the second question suggested above, namely: Whether the charge imposed on the relators, by the ordinance, is "uniform in respect of persons and property."

This question arises under the clause of the Constitution already quoted, and is specially applied to local and municipal taxation. The provisions of the Constitution that such taxes shall be "uniform in respect to persons and property within the jurisdiction of the body imposing the same" is clearly a limitation on all kinds and modes of taxation that may be resorted to by local and municipal bodies, and as such is the test of the validity of the tax under consideration.

It may be observed that the contrary would be the conclusion if the provision was to be so construed as to apply only to taxes strictly personal and taxes upon property. That such was not the intention is deducible from the fact that a strictly personal tax is identical with a poll tax, which municipal bodies are excluded from imposing.--Const., Art. 9, § 2. The direct sense of the provision is that all taxes shall have an uniform operation as affecting the persons and property to

which they relate. In this sense, taxes upon avocations and business would be equally included and would be compelled to conform to the general rule. There is no sound reason to be derived either from the language of the Constitution or from the nature of the subject matter of which it treats for departing from this direct interpretation of the terms used. If equality and uniformity as the rule of taxation are desirable in the case of a poll tax, or a tax on property as such, it is equally desirable that it should apply to taxation on avocations and business.

The true operation and effect, therefore, of the provision under examination is to prevent discrimination among individuals liable to taxation on personal grounds, or as it regards the right to have all visible and tangible property taxed according to its value.

Every tax imposed under our tax laws involves a person by whom the burden is to be borne, a subject of taxation, and a sum or rate to be paid by such person in respect of such subject of taxation.

It is, therefore, to be considered whether the tax in question makes an improper discrimination as it regards the different individuals or classes of individuals affected by

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it, or whether it in *effect taxes property without regard to the principle of applying an uniform rate according to value.

An improper discrimination as it regards the persons upon whom the tax is imposed, is one that does not arise from the nature of the subject matter in respect of which he is taxed, but from something that characterizes the individual as such, apart from all consideration of the nature and situation of the thing in respect of which the taxation is imposed. Where such a discrimination exists, it would be possible that two persons taxed in respect of the same subject matter might be subjected to the payment of unequal sums. Where, however, the law is so framed that the amount of taxation imposed on account of a particular subject of taxation cannot vary by whomsoever it is to be paid, the law cannot be said to be unequal and without uniformity as it respects persons.

The ordinance in question does not make any personal distinctions.

It divides the various avocations and business into separate classes and descriptions and affixes a rate to each; but all persons within the territorial jurisdiction following such avocations or business are subjected to like taxation.

Nor does the ordinance violate the principle of taxing property according to value according to an uniform rate. Had it increased or decreased the amount of taxation due from any person on account of his avocation or business according to the quantity or value of property held by such person or employed in his business when the amount of property was not the proper standard for the measure of the value of such business, it might be proper to inquire whether such taxation did not cover a kind of taxation on property not permitted by our Constitution. But such does not appear to be the case. The tax imposed upon the relators is not of that character, nor does it appear that they are subjected to any increased sum or rate of taxation by reason of any improper discrimination allowed by the ordinance to any person or corporation other than the relators.

The foregoing views are abundantly sustained by numerous well-considered and harmonious authorities. In Mirriam v. New Orleans, (14 La. Ann., 318,) it was held that a requirement that all taxes should be equal and uniform was not violated by an ordinance taxing keepers of billiard saloons according to the number of tables employed in such business.

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*A similar feature exists in the ordinance in question. The number of billiard tables employed is not an improper measure of the amount and value of the business done, and it cannot be regarded as virtually a tax on the tables considered as property.

So in Hodgson v. New Orleans, (21 La. Ann., 301,) the number of warehouses employed by a warehouseman being the measure of the tax imposed, it was held to be uniform and equal. This, too, was a legitimate mode of measuring the extent and value of the business as such.

Fletcher v. Oliver (25 Ark., 289,) affords an instance of the violation of the rule of equality and uniformity, where a discrimination was made between resident and non-resident property holders.

Mason v. Trustees (4 Bush Ky., 406,) and Nashville v. Althorpe (5 Cold. Tenn., 354,) also illustrate the nature of personal discriminations in accordance with the view just advanced.

In Attorney General v. Plank Road, (11 Wis., 35,) Judge Paine discussed with great clearness the sense of the terms "equal" and "uniform" as applied to taxation and throws much light upon the subject.

In Bank v. Hines, (3 Ohio, 1,) Chief Justice Bartley gives a full and clear definition of the terms "equal" and "uniform," as applied to property taxation.

An examination of the principles upon which the foregoing cases rest will show that the conclusions stated above are in harmony with the views that have been elicited in the various States where questions involving these principles have arisen for adjudication.

We must therefore conclude that the tax imposed by the ordinance in question is not obnoxious to the clause of the Constitution imposing limits upon municipal taxation.

The points of objection made to the ordi-

nance will next be separately considered. The objection that because the relators are a chartered corporation they are not subject to this form of taxation depends on the idea that the license intended by the ordinance is an attempt to control their general right of transacting banking business, and therefore in conflict with their charter conferring that right. This, as we have seen, is not the correct view of the ordinance. As a measure of taxation, the relators are equally subject to its provisions with all other persons, natural or artificial.

Nor does the payment of the license tax imposed by the government of the State relieve them from the necessity of paying local taxes.

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*The only objection not already disposed of is that the tax in question is unreasonable. No ground appears for holding either that the ordinance as a whole is an unreasonable exercise of the taxing power conferred upon the city corporation or that the particular sum imposed, in respect of the business carried on by the relators is unreasonable. The mode of taxation adopted in this case, including the fixing of a separate rate for each distinct avocation and kind of business, is not in itself unreasonable, as we have already seen. Nor can we say, from anything disclosed by the ordinance or pleadings, either that the aggregate sum or rate imposed by the ordinance is in excess of what is reasonably needed for the support of the city government or that it is in excess of what should be borne by the class of subjects of taxation to which the ordinance applies; nor can we say, from anything that appears, that any rule or principle of uniformity has been violated in fixing the proportionate part of the whole sum or rate that should be borne by the relators as bankers. It is not therefore necessary to define what was intended by limiting the corporation to a reasonable exercise of the powers conferred, there being nothing in the case putting the question of reasonableness at issue.

The remaining ground advanced by the relators for the granting of the prohibition is an alleged want of power on the part of the respondents to issue process for the collection of taxes.

The power conferred on the respondents, as we have seen, is to assess and collect taxes. This implies more than the power to sue for such taxes, and includes the right to use and employ whatever remedies have been usually employed for that purpose.

The practice of issuing tax executions for the collection of taxes existed at the adoption of the Constitution, and had long existed prior to that time, (State v. Hodges, 14 Rich., 256,) and must be deemed embraced by the authority to "collect" conferred by that instrument.

The motion of the relators should be denied.

MOSES, C. J., and WRIGHT, A. J., concurred.

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6 S. C. *12

*DeSAUSSURE v. ZEIGLER.

(Columbia, Nov. Term, 1874.)

[*Customs and Usages* ⇦10.]

The law gives priority of lien to the first judgment entered in the Clerk's office, and a usage of the bar that all judgments lodged with the Clerk for entry within a certain time after the rising of the Court shall be entered as of the same date cannot override the law of the case.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 20; Dec. Dig. ⇦10.]

[*Judgment* ⇦766.]

It is not the interlocutory order for judgment, but the entry of the judgment itself in the Clerk's office, which gives the lien.

[Ed. Note.—Cited in Reid v. McGowan, 28 S. C. 79, 5 S. E. 215.

For other cases, see Judgment, Cent. Dig. § 1323; Dec. Dig. ⇦766.]

Before Carpenter, J., at Richland, May Term, 1874.

At March Term, 1867, of the Court of Common Pleas for Richland County, D. B. DeSaussure, the appellant, obtained an order for judgment against one Joseph A. Reese, and on the 21st March of the same year, after the rising of the Court, he entered his judgment in the Clerk's office, issued execution thereon and lodged the same with the Sheriff. At the same term, D. Zeigler, the respondent, also obtained an order for judgment against the same defendant, and his judgment was entered in the Clerk's office one day later than that of the appellant.

The Sheriff sold property of the defendant, and, the proceeds of the sale being in the Sheriff's hands, His Honor, on motion of Zeigler's attorney, made an order that the date of the entry of Zeigler's judgment be amended so as to make it bear date the 21st March, 1867, and that the funds in the Sheriff's hands be applied pro rata to both judgments.

It was said that there was a usage of the bar for all judgments carried to the Clerk within thirty days after the rising of the Court to be entered as of the term, but this was denied by the counsel for the appellant, and Mr. Hutson, who was Zeigler's attorney when his judgment was entered, admitted by affidavit that he had no knowledge of the usage.

An appeal was taken on behalf of D. B. DeSaussure to this Court.

————, for appellant.

Hutson & Hutson, contra.

January 20, 1875. The opinion of the Court was delivered by

MOSES, C. J. It is not necessary to consider whether the understanding and agree-

ment of the bar, referred to in the brief, can

*13

*defeat the lien of the judgment of the appellant, which was created by its entry. Mr. Hutson, in his affidavit, does not ascribe the delay on his part to the knowledge of such agreement. If he had deferred the entry of his judgment by reason of even a misapprehension of its terms, he could not avail himself of its benefits, because, in fact, he did not come within its provisions as to the time to which it was to extend. He did not offer his judgment to the Clerk for entry until March 22, 1867.

In his affidavit he disclaims all knowledge of the said agreement, and therefore stood, so far as he was concerned, as if none had existed. His condition was, in fact, better than that of the attorney of the respondent, who may have felt himself bound by professional honor to regard the understanding to which he was a party. Mr. Hutson excuses himself for the delay by an impression "that the usage was for the judgments carried to the Clerk at any time within thirty days to be entered by him as of the term." No such practice, even if it had been proved to exist among the Richland bar, could override the law, which gave the lien to the judgment first entered up, without priority as to the order of time where two or more were entered on the same day. The fact that the order for judgment in the two cases were taken at the same term does not change the rights of the parties. The lien is only created by the entry itself. The interlocutory order for judgment created in neither case any lien on the land of the defendant Reese. It conferred on the respective plaintiffs the right to enter a binding judgment at any time after the adjournment of the Court until the next term without leave, but in themselves established no lien.—10th Rule of Court, then of force; Dibble v. Taylor, 2 Sp., 308 [42 Am. Dec. 368]; McIntosh v. Wright, Rich. Eq. Cases, 385.

The motion is granted, and the order of the Circuit Court set aside.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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6 S. C. *14

*EAKIN v. KNOX.

(Columbia. Nov. Term, 1874.)

[*Partnership* ⇐311.]

Settlements made between plaintiff and defendant, late copartners: *Held*, upon the evidence, to have been partial only, and, therefore, to constitute no bar to an action for account without charge of fraud, accident or mistake.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 718–725; Dec. Dig. ⇐311.]

[*Appeal and Error* ⇐1022.]

A Referee's conclusions of fact drawn from testimony of a somewhat vague and uncertain character, concurred in by the Circuit Court, will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015–4018; Dec. Dig. ⇐ 1022.]

[*Partnership* ⇐109.]

Where, after division of the assets of a late firm, one partner is compelled to pay outstanding debts, he may sue for contribution.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 171; Dec. Dig. ⇐109.]

[*Partnership* ⇐109.]

A party suing his late copartner for contribution will not be compelled to accept the same kind of money he paid. He will only be limited in his recovery to the value of that money and interest thereon.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 156, 171, 187; Dec. Dig. ⇐ 109.]

[*Parties* ⇐51.]

Where a defendant thinks he may be prejudiced because a third person has not been made a party to the action, he should take the necessary steps to bring him before the Court.

[Ed. Note.—Cited in State v. Port Royal & A. Ry. Co., 45 S. C. 437, 23 S. E. 363.

For other cases, see Parties, Cent. Dig. §§ 77–82; Dec. Dig. ⇐51.]

Before Cooke, J., at Abbeville, June Term, 1874.

Action by Thomas Eakin, plaintiff, against John Knox, defendant.

The case was referred to Edward Noble, Esq., as Referee, from whose report it will be fully understood.

The report is as follows:

The case made is briefly this:

In 1861, Thomas Eakin, Ben. H. Eakin and John Knox, as partners, bought a tract of land, hired laborers, provided themselves with animals, and put under way a cotton plantation in the County of Abbeville. They, in August, 1861, bought at Commissioner's sale sundry slaves, and gave for the purchase money their bond to the Commissioner for $3,980, payable in two instalments, each for $1,990, and running on interest from date, the first payable 5th August, 1862, and the second 5th August, 1863. They sold the land in December, 1861, to Joel Smith for over $7,000, which was divided among them, as appears by partial settlement, dated 12th February, 1862. They worked the plantation but one year; made that year (1861) forty-five bales of cotton, and then discontinued the planting partnership. In 1863, the plaintiff, Eakin, paid up the bond to the Commissioner, and now sues the defendant, Knox, for his one-third part thereof. The negroes, by agreement, went into the possession of plaintiff, who kept them during the war as partnership property, and were emancipated in his possession. Three partial settlements were proved and produced in writing—first dated 12th February, 1862; second, 10th December, 1864; third, 19th July, 1865.

*15

*The plaintiff demands of the defendant as follows:

1. One-third of the amount he paid on the bond, viz.: Costs, &c., August 5, 1861, $168.50; reduced by cash on account, $153. Paid February 12, 1863, $2,319.83; reduced by cash on account, $1,195.78. Paid August 28, 1863, $1,480; reduced by cash on account, $123.30. Paid October 17, 1863, $498.86; reduced by cash on account, $61.50.

2. One-third of $30 for hauling forty-six bales of cotton. February 1, 1862, $5.35.

3. One-third of $11 for same cotton. December 1, 1864, $1.37.

4. One-third of $62 paid J. T. Moore for hire of slaves and mules in 1861, $20.62.

Credited.

Net proceeds of five bales of cotton attached as belonging to McKay, with interest to date of complaint, one-third to Knox, $88.30.

The defense, so far as regards a counter claim and discount, is for the value in Confederate currency of eighty-three bunches of thread, at $30 a bunch	$2,490 00	
Deduct therefrom as in settlement July 19, 1865, which is claimed as due defendant, with interest from 19th July, 1865		667 52
		$1,822 48

The defense relies on the aforesaid settlement as showing a winding up and final adjustment of the amounts between the partners which ought not to be opened, but should be held conclusive against plaintiff's claims. The second and fourth of plaintiff's claims will be first considered. The settlement of 12th February, 1862, was after the sale of the land and after the date of the two claims under consideration. Thomas Eakin here presents claims against the partnership for expenses amounting to $696.32. No items are given, but it is fairly to be presumed that the second and fourth claims entered into these expenses.

The settlement of 10th December, 1864, signed only by the two Eakins, has a long list of expenses paid by the plaintiff of large and petty amounts, but no trace of the second and fourth claims appears. For these reasons they are disallowed. An additional reason ought to be mentioned for disallow-

*16

ing the fourth claim. *The settlement of 12th February, 1862, excepts therefrom an amount against J. T. Moore, and as the plaintiff was the active partner of the firm, it is presumed this amount was or should have been set off against Moore's demand upon the firm for hire. The third claim is for a petty amount, but is disallowed for the following reason: The settlement of 10th December, 1864, was subsequent to date of claim; if valid, or intended to be charged, it should have been put into that settlement between plaintiff and his brother, B. H. Eakin; not being there, it is ruled out as a matter originally not meant to be a claim.

This leaves the claim for reimbursement for payments made by plaintiff on the bond to the Commissioner for consideration.

It is to be observed that the three settlements before referred to are each for a specific object—the first to ascertain expenses and to divide the proceeds of the land sale, the second and third to adjust expenses and divide the proceeds of sale of the forty-five or forty-six bales of partnership cotton raised in 1861.

The first settlement, speaking of the forty-five bales, concludes, "when sold is to be distributed among said parties." The cotton was sold by the plaintiff on the 16th November, 1864, to one J. W. McKay, for estimated sum of $24,065, of which $12,000 was to be paid in currency and $12,000 by four hundred bunches of cotton thread put at $30 per bunch. The currency was paid and two hundred bunches only. By the settlement of July 19, 1865, it will be seen that Knox had previously, and I suppose in Confederate times, before end of the war, received $7,000 of the $7,682.48, computed as his share in the sale in currency. But the parties seemed to hold on to the original terms requiring two hundred additional bunches to be delivered. Of the first two hundred, Knox, by this settlement, acknowledges to have received forty-five, his share being one-third—sixty-six and one-half. By referring to exhibit "O," under date 30th November, 1865, it will be seen that the plaintiff paid the defendant the value of eighteen and one-half bunches—$55.50. If number of bunches were to be the basis of settlement, the plaintiff did not deliver to him, Knox, the whole number.

Received	45
Paid for	18½
	63½
One-third of two hundred due Knox	66½
Remains due Knox	3

*17

*The testimony discloses the fact that at the instance of plaintiff and defendant, in the latter part of 1864, five bales of cotton were attached by this attorney, as the property of J. W. McKay, for the express purpose of obtaining payment for the two hundred bunches which he failed to deliver. This suit is mentioned in the settlement of 19th July, 1865, as follows: "The matter of the cotton is now in litigation, and the settlement of amount between Eakin & Knox cannot be closed until the result is known."

The testimony and the settlements fairly make out the adjustment of the cotton sale, including the fair division of both currency and bunches of thread, excepting three still due Knox.

It is disclosed in the testimony that two other settlements were had by plaintiff and defendant since that of 19th July, 1865. Some time in 1867, Mr. DuPre says he made a settlement for them, adjusting between them and a third party the losses incurred in shipping to Liverpool some cotton purchased on speculation by them. This was a set-

tlement of a special character, and had no connection with or relation to the planting partnership or the adjustment of the accounts of that firm.

The last settlement was in 1869, about the date of the note sued on in first suit. Eakin & Knox, in 1867 and 1868, or in one of those years, were partners in a grocery business conducted at Abbeville, and in winding up and dissolving the firm got Mr. DuPre and Matthew McDonald, the Clerk of Court, to make the settlement for them. They did so, and the note in the first case against Knox and Cunningham was given in liquidation of a balance against Knox on the adjustment of the accounts. This settlement had no connection with or relation to the accounts of the planting partnership.

The plaintiff, it seems by the proof, never brought to the attention of Knox the fact that he had paid off the bond to the Commissioner and held him responsible for one-third of it. During 1868 and 1869, and until a short time before this suit was commenced, (August, 1870,) it had been agreed, on several occasions, to meet and adjust their differences; but when plaintiff would come to the village for the proposed meeting, the defendant was never ready and put him off. It appears that the claim against Knox for his third of the bond was never specially alluded to. The parties spoke only of meeting to settle their accounts. Unless the bond of indebtedness was the matter to be adjusted in

*18

1869-70, it is difficult *to perceive any necessity for a settlement. The attachment money was in plaintiff's hands, and part of it was Knox's. If this was the matter for the settlement, it might have been adjusted in a few moments. For some time after the war, in 1867, and perhaps, a part of 1868, debts or contracts made during the war were interdicted, and suits could not be brought. However, the Referee is satisfied, from the proof, that the plaintiff paid the bond, and the defendant has never refunded any part thereof to the plaintiff.

The Statute of Limitations was suspended till December, 1866, or January, 1867. The suit was commenced in August, 1870, and four years had not elapsed to constitute a bar.

The conclusions of law arrived at by the Referee are:

1. That the Statute of Limitations is not a bar to the action.

2. That the plaintiff's right to an account from the defendant is not concluded by the partial settlements heretofore referred to.

The conclusions of fact are:

1. That plaintiff paid off the bond to Commissioner Parker, as set forth in the complaint, and paid the sums set down therein on the dates stated.

2. That the defendant, as partner in the planting firm composed of the plaintiff, defendant and B. H. Eakin, is liable to plaintiff for one-third of such payments on the bond. [Here follows a statement of the accounts, showing a balance due plaintiff on 1st November, 1872, of $750.11, and an alternative statement taking off one-half of said amount, and thereby reducing it to $375.05.]

The defendant excepted to the report on the grounds:

1. That a settlement of the partnership accounts was made; one as late as 19th July, A. D. 1865, and all matters pertaining to the partnership were settled, except the matters therein expressly excepted; and that the Referee erred in not holding these settlements final and conclusive as to all matters contained therein.

2. That there is no statement in the complaint of fraud, error or mistake in the settlement; and that the Referee erred in opening the accounts without such allegation or proof.

3. That the Referee erred in charging the defendant with the third part of the sum paid by the plaintiff on the bond to the Commissioner; that such sum would, in fidelity to his partnership obligations, be held to be paid.

*19

*4. That the Referee should have found as a fact that plaintiff, without the knowledge of the defendant, purposely withheld the settlement of the sum he paid on the bond, with the intent of holding it and afterwards claiming it, which was a fraud on his partner.

5. That the Referee erred in not holding the Statute of Limitations and lapse of time a bar to plaintiff's suit.

6. That the Referee erred in not giving credit for eighty-three bunches of thread, at $30 per bunch, Confederate money, which, according to settlement of July, A. D. 1865, was agreed to be paid him, (the defendant,) but was not.

7. Because the Referee rejected the claim of defendant for money paid William Wharton on loss on partnership cotton received from Eakin & Knox.

The decree of His Honor the Circuit Judge is as follows:

Cooke, J. By an order of this Court, bearing date the 27th day of June, 1872, it was ordered: "That all questions of law and all questions of fact in said cases be referred to Edward Noble, Esq., as Special Referee; that he take testimony in said cases, and report in said cases his findings of fact and conclusions of law to the Court at its next sitting in October, with leave to the parties to amend their pleadings by presenting new matter or otherwise as they may be advised."

In pursuance of the order, the said Referee took testimony, and filed his report on 2d November, 1872, setting forth his findings of law and of fact, with a statement of the ac-

counts between the parties. Exceptions to the report were filed by the defendant, and argument of counsel was heard thereon. The Referee submitted an alternative view of the accounts, based upon the rule heretofore adopted in this County by juries in scaling debts at the close of the war. This rule the Court does not recognize or adopt. It is therefore ordered and adjudged that the exceptions of the defendant to the Referee's report be overruled; that the said report, finding that the defendant is indebted to the plaintiff in the sum of $750.11, be confirmed and made the judgment of this Court; and that the said plaintiff have leave to enforce the payment of the same, with interest from 2d November, 1872, by execution or other process, with costs of suit.

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*The defendant appealed upon the following grounds:

1. That a settlement of the partnership affairs was made, one as late as 19th July, 1865, and all matters pertaining to the partnership were settled, except such as were mentioned therein as excluded.

2. That plaintiff had exclusive control of and sold the partnership property—land and negroes; took notes payable to himself—was the collector thereof; had the money at all times in sufficient amount for payment of the debts of the partnership, including his own claim, and will be held to have paid himself.

3. That before any division of partnership property is made, it will be conclusively presumed that all demands against the partnership have been paid.

4. That the plaintiff knew the indebtedness of the partnership and of the defendant as a member of the firm to himself, and should have retained before division the amount which the firm owed him, and in justice and fidelity to his partners he will be presumed to have paid himself.

5. That plaintiff was bound to receive the same kind of money which he paid upon the bond.

6. That several settlements between the parties, some as late as A. D. 1869, have been made, and the claim insisted on by the plaintiff in this case never was presented.

7. That the lapse of time, laches of plaintiff and Statute of Limitations should be held a bar to the suit.

8. That, by agreement, plaintiff was bound to deliver defendant a quantity of thread, eighty-three bunches of which, valued at thirty dollars per bunch, were not delivered or the equivalent paid.

9. That, upon a fair calculation, the defendant protesting the settlements already made cannot be reopened except as provided for, the plaintiff is indebted to defendant.

10. That there is not in the complaint any allegation of mistake, accident or fraud which is a ground for opening the settlements made; indeed the reverse, the plaintiff stating that he knew of this debt, and that it was a partnership debt.

11. That no suit can be maintained by one partner against another partner which does not involve a settlement of all the partnership matters and accounts and embrace all the partners.

12. That a discharge of one partner is a discharge of both. That Benjamin H. Eakin was discharged by plaintiff.

*21

*13. That for want of jurisdiction and equity the complaint should be dismissed.

Thomson, for appellant.
Burt, contra.

Jan. 27, 1875. The opinion of the Court was delivered by

WILLARD, A. J. The principal matters in dispute were as to the effect of certain settlements made between the partners of the mercantile firm of which plaintiff and defendant were members. The defendant contended that, taken together, they were a full and final settlement of all partnership accounts, and, as such, could only be opened upon the equitable principles governing the opening of settled accounts, and that the pleadings did not lay the ground work for the application of those principles. On the other hand, the plaintiff contended that these settlements were partial only, and did not embrace the subject of the present suit, which was the only unsettled matter left of the copartnership transactions.

The question was examined by the Referee upon testimony offered by both parties as explanatory of the force and effect of those settlements according to the mutual intention of the parties. He concluded, as matter of fact, that the settlements, as intended by the parties, were partial only and did not embrace certain of the demands made by the plaintiff which were allowed by his report. The report was confirmed by the Circuit Judge. The conclusions of fact on this point arrived at by the Referee's report rested upon inferences arising on testimony of a somewhat vague and uncertain character. A conclusion of fact drawn from sources of this nature, supported by the concurring opinion of the Circuit Judge, will not be disturbed by this Court. For the reasons just stated, the remaining conclusions of fact, relating to particular items entering into the account passed upon, will not be disturbed by this Court.

It remains only to notice the points of law raised, which will be considered with reference to facts, as found by the Referee and conclusively settled between the parties.

The first, second, fourth, sixth, eighth, ninth and tenth grounds of appeal assume a state of facts inconsistent with the conclu-

sions of fact by which the rights of the parties must be tested, and are disposed of by the disposition already made of the question affecting the findings of fact.

*22

*The third ground of appeal is unsound. It, in effect, holds that after a division of partnership property, a partner subsequently compelled to pay outstanding debts of the firm cannot look to his copartners for contribution. An inference working such manifest injustice cannot arise under the principles and rules of equity.

The fifth ground, to wit: "That plaintiff was bound to receive the same kind of money which he paid upon the bond," cannot be supported as it stands. If the plaintiff paid out value for the payment of copartnership debts, while he is limited to that value and interest upon it in demanding contribution, he has a right to demand lawful money, even though the value parted with on the partnership account was of some other nature than that of lawful money.

This Court concurs with the Circuit Court that the Statute of Limitations is inapplicable to this case. It does not appear that the plaintiff is chargeable with laches tending to place the defendant in a worse position than he would have occupied had plaintiff's demand been pressed at an earlier day; there is, therefore, nothing to impair the plaintiff's equity.

The proposition that no suit can be maintained by one partner against another partner which does not involve a settlement of all partnership matters and accounts and embrace all the partners is inapplicable to the present case as it stands under the Circuit decree. It appears that the decree leaves nothing unsettled between any of the partners appertaining to the partnership affairs, and therefore this action must be regarded as in substance and effect a full and final accounting as it regards all the partners.

It does not appear that the discharge of Benjamin H. Eakin has in any way affected prejudicially the adjustment as between the parties to the present suit. If, for any reason, it was necessary that B. H. Eakin should be represented in this suit with a view to a conclusive settlement of all outstanding partnership matters, the defendant was at liberty to take steps which would have resulted in the appearance of all proper parties in the action; not having done so, he cannot claim any advantage from that fact. In no respect can the settlement with B. H. Eakin, as to his proportionate liability, prejudice the right of plaintiff to an account of what was due from the defendant.

The appeal should be dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

6 S. C. *23

*McLARIN v. KNOX & CUNNINGHAM.

(Columbia. Nov. Term, 1874.)

[*Vendor and Purchaser* ⇐231.]

Where a will is on record in the proper probate office, a purchaser of real estate of the testator is affected with notice of its contents.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 43, 55, 487, 513–539; Dec. Dig. ⇐231.]

[*Wills* ⇐821.]

An annuity given by the will of testator: *Held* to be a charge upon his real estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2114–2119; Dec. Dig. ⇐821.]

[*Annuities* ⇐3.]

J. M., being the owner of property held subject to an annuity to his sister for life, devised and bequeathed his whole estate to her for life, and appointed her executrix. She qualified as executrix and took possession of and enjoyed the estate: *Held*, That the annuity had merged in the devised and bequeathed estate.

[Ed. Note.—For other cases, see Annuities, Cent. Dig. § 8; Dec. Dig. ⇐3.]

Before Cooke, J., at Abbeville, June Term, 1874.

This was an action by Janet H. McLarin against Knox & Cunningham to subject certain real estate to an annuity bequeathed to the plaintiff by John McLarin, Sr., deceased, whose will is as follows:

"I devise and bequeath my whole estate, real and personal, to Agnes McLarin, widow of my brother, during her lifetime, and at her death to my nephew, John McLarin, Jr., his heirs and assigns forever, in fee simple.

"It is further my will and testament that my nephew, John McLarin, Jr., shall pay, out of the estate hereby given to him, to my niece, Janet McLarin, the sum of $200 annually during the lifetime of the said Janet McLarin, which annuity shall not be charged on the estate hereby given to the said John McLarin, Jr., nor the said Janet H. McLarin be entitled to the same until after the death of the said Agnes McLarin and the termination thereby of her life estate in the property above devised and bequeathed."

The will was the only paper found in the probate office of Abbeville County connected with the estate of John McLarin, Sr. There was no mark of probate upon it, but in the record book of wills it was copied, and at the foot of the copy were these words: "Proved by the oath of James H. Cobb, 19th June, 1837." James H. Cobb was one of the attesting witnesses.

The rest of the case is stated in the judgment of the Circuit Court, which is as follows:

Cooke, J. John McLarin, Sr., executed his last will, bearing the date of the 6th of June, 1837, and soon thereafter departed this life. The testator omitted to nominate an executor of his will, but the will was proved

in common form by one of the attesting witnesses.

*24

*Letters of administration with the will annexed were never granted, and it did not appear they had ever been applied for.

At the time his will was made, and at his death, the testator was seized and possessed of two lots in the town of Abbeville and a tract of thirty-one acres contiguous to the town, besides a few slaves and other personal property, all of which he devised and bequeathed to his sister-in-law, Agnes McLarin, during her life, and at her death to his nephew, John McLarin Jr., in fee simple.

The will of the testator required that his nephew, John McLarin, should pay out of the estate given to him two hundred dollars annually to the plaintiff, a niece of the testator, during her life, but provided that that legacy should not be a charge on the estate given to his nephew, John McLarin, until the death of Agnes McLarin, and that the plaintiff should not be entitled to the same until that event.

Agnes McLarin, the life tenant, died the first day of January, 1851, and the estate of the testator, real and personal, passed immediately into the possession of John McLarin, Jr., with whom the plaintiff resided until his death, the 24th of April, 1864.

A short time before his death, John McLarin, Jr., executed his will and gave to the plaintiff his whole estate, real and personal, during her natural life, charged with large pecuniary legacies to some of his other relatives, and nominated the plaintiff executrix, and John McBryde and Robert J. McBryde executors of his will, all of whom qualified, returned inventories and made sales of most of the personal estate of their testator, and paid debts and pecuniary legacies.

On the 9th of March, 1861, James Wilde, Jr., & Co. obtained judgment for the sum of $2,104.26 against John McLarin, Jr., which, after his death and about the time of the sale of the homestead lot devised to John McLarin, Jr., was assigned to the defendant, John Knox, for the sum of $3,500.

On sale day in April, 1867, the house and lot were sold by the Sheriff of Abbeville, and bid off by John H. Wilson, Esq., attorney of James Wilde, Jr., & Co., under the execution of the latter, at the price of $2,535, but the deed of conveyance was made by the Sheriff to the defendant, John Knox.

In August, 1869, John Knox conveyed to his co-defendant, Joel J. Cunningham, a moiety of the house and lot.

*25

*At a sale subsequently made by the Sheriff of Abbeville, the defendants became the purchasers jointly of the remainder of the real estate devised by John McLarin, Sr., to John McLarin, Jr., which was sold under the judgment and execution of James Wilde, Jr., & Co. against John McLarin, Jr., which had been assigned to the defendant, John Knox, all of which real estate was in the possession of the defendants at the commencement of the plaintiff's action on the 19th of September, 1870.

The plaintiff's action seeks to recover the legacy of two hundred dollars annually, with interest, from the 1st of January, 1851, the time of the death of the life tenant, Agnes McLarin.

To the counter claim of the defendants the plaintiff demurred, and the demurrer was sustained by my predecessor, Judge Orr.

I am of opinion that the legacy to the plaintiff, under the will of John McLarin, Sr., is a charge upon the real estate devised to John McLarin, Jr., and which was in the possession of the defendants at the commencement of this action, but that her right to receive is limited to the four years next preceding the commencement of her action and the years subsequent thereto.

It is therefore adjudged and decreed that the defendants do pay to the plaintiff the sum of $1,782.20, being the amount of the legacy of $200 annually given to her by the will of John McLarin, Sr., and of the interest thereon, commencing the 1st of October, 1866, and including the year 1873, with interest on the legacy of each year, from the end of the year to the 1st of July, 1874, and that the said sum of money and the legacy of $200 which shall become due at the end of each year, from the 1st of January, 1874, are a charge on, and to be paid out of, the real estate in Abbeville County which was devised by John McLarin, Sr., to John McLarin, Jr.

It is further adjudged and decreed that the defendants pay the costs and disbursements of this action.

The defendants appealed on the grounds:

1. That the demurrer to defendants' counter claim should not have been overruled by His Honor Judge Orr, and that there should be no decree against the defendants until the plaintiff shall have accounted for her administration of her testator's estate.

2. That His Honor Judge Cooke erred in deciding there was due probate of the paper

*26

purporting to be the will of John *McLarin, Sr., which would authorize it to be given in evidence in proof of a devise or as notice to a purchaser.

3. That under a proper construction of the will of John McLarin, Sr., the legacy or annuity of $200 was no charge upon the real estate and did not run with the land.

1. That if, under the will of John McLarin, Sr., there were a charge for the annuity, it fell wholly on the personalty, and in any case could not have been greater than a charge upon the realty and personalty in equal proportions.

5. That His Honor erred in not sustaining the plea of purchase for valuable consideration without notice.

6. That Janet McLarin qualified as executrix of the will of John McLarin, Jr., accepted its provisions giving her a life estate in all his property, and that such estate being more than enough to pay her legacy must be held a satisfaction of her annuity.

7. That plaintiff's claim, if anything, was a debt against the estate of John McLarin, Jr., and that payment of debts and legacies, not retaining for her own debt, was a devastavit for which she is responsible and for which defendants should not suffer.

8. That the circumstances of the case, the lapse of time, laches of plaintiff, and Statute of Limitations should bar the plaintiff's claim.

9. That no interest is allowed by law on arrears of annuity.

Thomson, for appellants.

Burt, contra.

Feb. 18, 1875. The opinion of the Court was delivered by

MOSES, C. J. The plea of purchase for valuable consideration without notice cannot protect the appellants. The will of John McLarin, Sr., which conveyed his whole estate to John McLarin, Jr., after the life estate therein, to Agnes McLarin, was found in the office of the Judge of Probate for the County in which he lived and died. It was the proper office for the deposit of instruments of that character. A copy of it was entered in the record book of wills, with an entry in these words: "Proven by the oath of James H. Cobb, 19th June, 1837." He was one of the subscribing witnesses. As an ancient writing, it was admissible without any evidence of probate. Every circumstance necessary to establish its authority after such a lapse of time will be presumed. But

*27

when* to this is added a possession under it, commencing with the death of the testator, and continuing for over twenty years, any proof which may have been wanting to give it legal effect is supplied by inference of law, which recognizes it as what it purports to be.—Riddlehoover et al. v. Kinard et al., 1 Hill Eq., 378. Even when this presumption of law cannot apply, another principle intervenes, founded on the supposition that an officer charged with a duty has performed it. —Dawkins & Littlejohn v. Smith, 1 Hill Eq., 369.

In the absence of any direction to the contrary, a charge for the payment of legacies (and in these annuities are embraced) must be met and borne by the personal property. But a testator may, by words showing his intention, exonerate his personalty entirely from such burthen and subject his real estate alone to its operation. It is always a question of intention, to be determined by the language of the instrument.—Lupton v. Lupton, 2 John. Ch., 623. The personal estate is the primary fund for the payment of debts and legacies; but by words of express direction, or raising a strong implication that the burthen was to be shifted and sustained by the realty, equity will execute the proposed object according to the purpose of the party when so ascertained.

Under the will of John McLarin, Sr., the nephew, John McLarin, Jr., took the whole estate, subject to the life interest of Agnes McLarin. On her death, in 1851, the annuity to Janet became a charge on the entire property which was then to vest in him, and the words are too clear to admit of a construction confining it to the personalty. Where, however, both the real and personal estate are charged by the testator, and there are no words expressing the proportions in which they are relatively to apply to the satisfaction of the charge, the personal estate must be the first fund to respond, and the real will be held only auxiliary thereto.

Sir William Grant, in Turner v. Lord Rous, 18 Ves., 138, states the rule as follows: "The personal estate being the proper and primary fund for the payment of debts and legacies, can be exempted only by express declaration or plain and unequivocal manifestation of intention. The question generally is whether there is sufficient evidence of that intention. It is agreed that neither a charge on the land nor a direction to sell nor the creation of a term for payment will exempt the personal estate."

*28

*Janet McLarin being the legatee and devisee for life of all the estate of the testator, John McLarin, Jr., subject to several pecuniary legacies, to some of which a condition was annexed, and also executrix of his will, became at his death the owner of the whole property on which, under the will of John McLarin, Sr., her annuity was to attach. The entire rents and profits out of which it was to be raised vested in her for her lifetime—the enjoyment of both was of equal duration. The whole interest in the estate vesting in her under the will of John McLarin, Jr., any separate interest which she previously had in any portion of the property derived from a different source was extinguished—the lesser must sink in the greater. "The question is upon the intention, actual or presumed, of the person in whom the interests united. In most instances it is, with reference to the party himself, of no sort of use to have a charge on his estate, and where that is the case it will be held to sink unless something shall have been done by him to keep it on foot."—2 Spence Eq., 246, and the cases there cited.

Chancellor Kent, in Starr v. Ellis, 6 John, 396, cites what was said by the Master of the Rolls in Forbes v. Moffatt, 18 Ves., 389: "It is very clear that a person becoming entitled to an estate subject to a charge for his own benefit may, if he chooses, at once take the estate and keep up the charge. A Court of

equity will sometimes hold a charge extinguished where it would subsist at law, and sometimes preserve it where at law it would be merged. The question is upon the intention, actual or presumed, of the person in whom the interests are united. In most instances it is, with reference to the party himself, of no sort of use to have a charge on his own estate, and where this is the case it will be held to sink unless something shall have been done by him to keep it on foot. If it be perfectly indifferent to the party whether the charge should or should not subsist, it sinks."

It the principle rests on the intention of the party, while there is everything in this case to show that Janet McLarin accepted the legal title discharged of the trust, there is nothing to induce a contrary conclusion. She qualified as executrix of the will, and to this day no sale of any portion of the personal property has been made. The slaves were emancipated, but, for aught that is shown, the rest of it, not consumable by use, may still be in her possession. It appears from the statement in the brief that she continued, with her nephews, (the executors,) to occupy the premises where the

*29

testator *resided in his lifetime, and no change was made in their mode and manner of living.

In 186 , after the sale of the real estate, under the judgment against John McLarin, Jr., she removed to Virginia, taking with her a portion of the property, and has not returned. Her whole course in regard to the estate, treating it exclusively as her own, clearly manifests her intention to extinguish the subordinate right to the annuity through the land by the larger enjoyment of the whole income. What has been shown in the case, from which her intention "to keep it on foot," could even be presumed?

The view which the Court takes of the case renders it unnecessary to consider that portion of the appeal which seeks to reverse the judgment of the Circuit Court on the demurrer to so much of the answer as relates to the counter claim preferred by the defendants. It will not, however, be out of place, on this question of practice, briefly to refer to it. Where the equitable jurisdiction of the Court is invoked, anything arising out of the defense which shows that the plaintiff is not entitled to the relief he seeks will preclude his recovery. Its effect will not be lost because the defendant interposes it by way of counter claim. He cannot be deprived of its weight because he offers it as a "counter claim," if it is involved in his general defense and can operate to defeat the complaint against him. The objection that it is not within the statutory provision cannot prevail where it is incidental to the general defense and properly arises out of it.

The motion is granted, and the judgment of the Circuit Court reversed.

WRIGHT, A. J., and WILLARD, A. J., concurred.

6 S. C. 29

BOLLMANN v. BOLLMANN.

(Columbia. Nov. Term, 1874.)

[*Arbitration and Award* ⇐1; *Reference* ⇐1.]

An order, by consent, referring a case, "with all the issues of law and fact," to three persons "as Special Referees," their decision to be certified to the "Court by report," and to be final and "stand as the judgment of the Court, not subject to appeal:" *Held* not to be a reference under the Code, but a submission to arbitration.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 6; Dec. Dig. ⇐1; Reference, Cent. Dig. § 1; Dec. Dig. ⇐1.]

[*Arbitration and Award* ⇐13.]

The Court has power, inherent at common law, and which is not impaired by the Code of Procedure or other law of the State, to refer, with the consent of parties, a pending case to arbitration and make the award the judgment of the Court.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 52–56; Dec. Dig. ⇐13.]

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[*Arbitration and Award* ⇐63, 64.]

*To avoid an award, the contestant must show either corruption, misbehavior amounting to partiality, excess of authority, such palpable mistake of facts as satisfies the Court that, if not made, the decision would have been different, or, it may be, that the arbitrators meant to proceed strictly according to law, but mistook it.

[Ed. Note.—Cited in County of Greenville v. County of Spartanburg, 62 S. C. 125, 40 S. E. 147.

For other cases, see Arbitration and Award, Cent. Dig. §§ 316, 323; Dec. Dig. ⇐63, 64.]

[*Arbitration and Award* ⇐52.]

The direction in § 296 of the Code of Procedure that the report of Referees "must state the facts found and the conclusions of law separately" is not mandatory, but directory merely; and objection cannot, it seems, be made to the report for want of conformity to the direction, unless the Referees were requested to find upon the issues, and refused to do so, one way or the other.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 266; Dec. Dig. ⇐52.]

[*Arbitration and Award* ⇐45.]

The party objecting must show that he was prejudiced by the failure to conform to the direction; and the objection cannot be taken by exception, but by motion to recommit the report.

[Ed. Note.—Cited in Chapman v. Lipscomb, 18 S. C. 230; City Council of Charleston v. Caulfield, 19 S. C. 201; Stack v. Haigler, 90 S. C. 322, 73 S. E. 354.

For other cases, see Arbitration and Award, Cent. Dig. § 229; Dec. Dig. ⇐45.]

[*Arbitration and Award* ⇐46.]

Where no objection is made before Referees to the examination of a party as a witness, it cannot be made by exception to their report.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 231; Dec. Dig. ⇐46.]

[*Witnesses* ⇐84.]
The provisions of § 415 of the Code do not apply where the witness is not a party to the record, has no interest in the event of the suit, and cannot be affected by the decision.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 221; Dec. Dig. ⇐84.]

[*Arbitration and Award* ⇐34.]
The examination of a witness in the absence of counsel, though irregular: *Held*, under the circumstances, to be no ground of exception to the report. So, also, an exception that two of the Referees were used as witnesses was not allowed to prevail.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 180; Dec. Dig. ⇐34.]

[*Appeal and Error* ⇐167.]
The course pursued by a party and her attorneys of record in the Court below: *Held* to amount to a waiver of her right of appeal to the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1018–1034; Dec. Dig. ⇐167.]

[*Appeal and Error* ⇐167.]
Where by the terms of a submission to arbitration under rule of Court the award is to be final and to "stand as the judgment of the Court, not subject to appeal," the right of appeal is barred.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1008–1014; Dec. Dig. ⇐167; Arbitration and Award, Cent. Dig. § 382.]

[*Evidence* ⇐90.]
Where a party induces or encourages another to do an act, he cannot afterwards assert his legal right in opposition thereto if by so doing the other will be pecuniarily prejudiced.

[Ed. Note.—Cited in Evans v. McLucas, 15 S. C. 71; In re Covin's Estate, 20 S. C. 475.

For other cases, see Evidence, Cent. Dig. § 112; Dec. Dig. ⇐90.]

[*Appeal and Error* ⇐1076; *Attorney and Client* ⇐86.]
Assistant counsel employed after a report is made cannot file exceptions to the report which the attorney of record was precluded from taking by his course and admissions made during the trial by the Referees.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4255; Dec. Dig. ⇐1076; Attorney and Client, Cent. Dig. § 158; Dec. Dig. ⇐86.]

[*Arbitration and Award* ⇐68, 82.]
After final judgment of the Circuit Court sustaining an award, a petition alleging that certain evidence was improperly laid before the arbitrators cannot be considered.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 343, 450; Dec. Dig. ⇐68, 82.]

[*Arbitration and Award* ⇐42; *Costs* ⇐9.]
Where a submission to arbitration of a pending cause refers all issues of law and fact to the arbitrators, they have power to award as to who shall pay the costs.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 218; Dec. Dig. ⇐42; Costs, Cent. Dig. § 12; Dec. Dig. ⇐9.]

Before Graham, J., at Charleston, June Term, 1874.

This was an action by Caroline A. Bollmann, administratrix of Henry Bollmann, deceased, against Behrend Bollmann for an account of partnership property and effects of the firm of Bollmann Brothers.

The complaint alleged that a partnership between the deceased and the defendant, for the purpose of a general grocery business, existed from January 1, 1857, up to 23d day of February, 1870, when the said Henry Bollmann died intestate; that on the 21st July, 1870, letters of administration upon the estate of the intestate were granted by the Judge of Probate to the plaintiff; that the interests of the partners were equal participation in the profits; that there had been no settlement up to the time of the death of Henry Bollmann of the partnership affairs; that the defendant

*31

is in possession of *the books and papers of the firm of Bollmann Brothers, including their books of account, and that the defendant has been called upon to exhibit the same or submit a statement thereof, and in reply to said demand has submitted an incorrect statement thereof; that plaintiff being dissatisfied with the first statement submitted by defendant, the defendant submitted a second statement, different from the first, but that also is incorrect; that a balance sheet of Bollmann Brothers shows the profits of the concern to have been $257,594.75. Said balance sheet was attached to the complaint.

The complaint prayed an account of said copartnership transaction from the commencement to the close thereof, and that the defendant be decreed to pay to plaintiff the amount found to be due.

The defendant answered and admitted a copartnership existed as stated, but denied that the interest of the copartners were equal. Said there were no written articles of copartnership, but that the defendant was to receive two-thirds, and plaintiff's intestate was to receive one-third, of the net profits of the business, and that this division was to be subject to an interest account on the capital contributed by the partners respectively.

The defendant denied the correctness of the balance sheet showing profits of the concern, and falsified the same. Defendant offered to settle on certain terms stated, and denied that complainant is entitled to any such claim as set up in the complaint.

The defendant also said the terms of the copartnership were changed on 7th January, 1870, and that Diedrich Bollmann was taken in as a partner in the concern, and was to receive a certain interest therein, and that said Diedrich Bollmann is a necessary party to this action.

On the 17th of May, 1873, by consent of the attorneys, it was ordered by the Circuit Court "that this case, with all the issues of law and fact, be referred to James D. Mitchell, Christopher J. Matthews and C. Wulbern, as Special Referees, to hear all the extrinsic evidence upon all questions raised by the complaint and answer, and to examine the books of Bollmann Brothers, and to determine all questions connected with the co-

partnership of Bollmann Brothers, as well as those relating to the copartnership assets or that of the proportions of the partners, and to certify their decision to this Court by re-

*32

port. It is further ordered that the *decision of said Referees, or a majority of them, shall be final, and shall stand as the judgment of the Court, not subject to appeal."(a)

The trial commenced before said Referees under said order on the 9th June, 1873, and continued from time to time till the 8th June, 1874.

On June 11th, 1874, the Referees filed their report as follows:

"By an order of your Honor, this case was referred to us in these words: [Here follows a copy of the order.]

"In execution of this order, the Referees beg leave to report that they have been attended by the attorneys of the parties: that they have subjected the books of Bollmann Brothers to a searching examination; that they have also examined witnesses produced by both parties, and that they find the assets of the copartnership to consist of:

Open accounts	$125,686 09
Bills receivable	28,130 48
Cash	6,831 17
Stock	52,213 78
Bonds and stocks realized	5,771 45
Office furniture	283 00
Blockade stock collected since Henry Bollmann's death	120 00
	$219,035 97

"From which should be deducted:

Open accounts due per ledger	$ 9,875 78
Open accounts not in ledger	5,813 48
Bills payable	11,302 58
Uncollected open accounts and bills receivable	57,692 18
Behrend Bollmann's account	26,835 97
Henry Bollmann's account	9,244 95
	$120,764 94

*33

*Net of assets realized	$98,271 03
From which deduct amount allowed Referees for their fees, clerk hire, room rent	2,000 00
Subject to division	$96,271 03

"The Referees find that this amount should be divided as follows:

Behrend Bollmann, one-half	$48,135 51
Estate of Henry Bollmann, one-third	32,090 35
Diedrich Bollmann, one-sixth	16,045 17
	$96,271 03

"The Referees are not unanimous as to the shares of the copartners, Mr. Wulbern and Mr. Matthews being of opinion that the copartnership consisted of B. Bollmann, H. Bollmann and D. Bollmann, and that the shares are respectively one-half, one-third and one-sixth; Mr. Mitchell being of the opinion that Behrend Bollmann and Henry Bollmann were the only partners, and that their interest or shares were equal.

"Of the above amount of thirty-two thousand and ninety dollars and thirty-five cents, ($32,090.35,) which is the share to which the estate of Henry Bollmann is entitled, we find that the administratrix has already received the sum of twenty-eight thousand nine hundred and fifty-nine dollars and forty-eight cents, ($28,959.48,) which would leave a balance of three thousand one hundred and thirty dollars and eighty-seven cents, ($3,130.87,) to which should be added interest to date, four hundred and eighty-eight dollars and sixteen cents, ($488.16,) which will make the total amount of realized assets yet to be paid to the estate of Henry Bollmann three thousand six hundred and nineteen dollars and three cents ($3,619.03.)

"We find that in addition to the above there yet remains the following unrealized assets, subject to division in the same proportions as determined in relation to the realized assets, viz.:

Bond of G. Byrns	$ 1,000 00
State stock	600 00
Uncollected open accounts and bills receivable	57,692 18
Five shares Wando stock	
Real estate in Orangeburg County.	

*34

* "We recommend that these unrealized assets be placed in the hands of Wm. St. J. Jervey, Henry A. DeSaussure and Charles S. Campbell, as Receivers, with power to collect the same by suit, sale or compromise.

"It is agreed that the $2,000 allowed the Referees be paid by the defendant, Behrend Bollmann, and credited to him in the partnership account.

"We are of opinion that the costs of the case, other than those already provided for, be paid from the copartnership fund, so that they fall upon the parties in proportion to their interests therein.

"The Referees are unanimous in all their findings and report, except in the matter of the shares of the copartners hereinbefore mentioned, and in the matter of Devereux's bill of $608.45."

To this report the following exceptions were filed by the plaintiff's attorneys, DeSaussure & Son:

The plaintiff excepts to the report of Messrs. C. Wulbern, J. D. Mitchell and C. Matthews, Referees, herein filed on the eleventh day of June, 1874:

1. For that the said Referees reported: "It is agreed that the $2,000 allowed the Referees be paid by the defendant, Behrend Bollmann, and credited to him on the partnership account;" whereas they should have found and reported that the $2,000 allowed the Referees constitute a part of the costs of this action, and should abide the final adjudication of the Court in regard to all the costs of this action, and meanwhile it is agreed shall be paid by the defendant subject thereto.

(a) In the order as signed by the Judge, the word "not" was omitted by mistake, but it was treated during the proceedings as if it had been inserted as agreed on by the attorneys of record before it was signed.

2. For that the said Referees reported: "We are of opinion that the costs of the case other than those already provided for be paid from the copartnership fund, so that they fall upon the parties in proportion to their interest therein;" whereas they should have found and reported that the plaintiff having recovered a larger sum than by the defendant was ever admitted to be due him in the account, the cost of this action, including as a part thereof the $2,000 allowed the Referees and such amount as has been paid J. D. Mitchell for examining the books, be paid by the defendant, Behrend Bollmann, individually.

*35

*And the following additional exceptions to said report were filed by the plaintiff's solicitors, Corbin & Stone:

Exceptions to the report of James D. Mitchell, Christopher J. Matthews and C. Wulbern, Referees, to whom said cause stands referred, filed by Corbin & Stone, solicitors for plaintiff:

Exception 1. This cause was referred, by order of May 17, 1873, to said Referees to hear the evidence and determine all questions raised by the complaint and answer and certify their decision to this court. In other words, to hear and decide the whole issue, whereby it became the duty of said Referees to hear all legal evidence upon the issues made by the pleadings and state the facts found and the conclusions of law separately. Said report, as made and filed, does not state the facts found upon the numerous and material issues made by the complaint and answer upon which testimony was produced, and upon which it became, and was, the duty of said Referees to pass, and upon which they were requested by complainant's counsel to pass and report:

1. The correctness of the statement of the balance as shown by the books of Bollmann Brothers during the existence of the copartnership business conducted by the defendant and Henry Bollmann, as shown in exhibit "C" to plaintiff's complaint. Said statement of balances and all the items thereof were put in issue, testimony introduced in reference thereto, and the Referees asked by complainant's counsel to report thereon; but said Referees have neglected and refused to state their finding upon items of said statements—in fact have omitted all reference thereto in said report.

2. The correctness of statement "B" and statement "A." The items of these statements were put in issue, and testimony was introduced in reference thereto, and the said Referees were requested by complainant's counsel to find the facts and report thereon; but the said Referees have neglected and refused so to do, and in fact have omitted from their said report all reference to the items of said statement.

3. Said Referees have not stated any items of the partnership account of Henry Bollmann and Behrend Bollmann as allowed or disallowed, although testimony in reference thereto was introduced and the said Referees were specially requested to report the facts found thereon.

*36

*4. Numerous issues of fact stated in the complaint and answer, to wit: The issues of fact made by Sections 1, 2, 3, 7, 8, 12, 15 and 16 of the complaint and answer, material to the cause and upon which said Referees were requested by complainant's counsel to pass and state their conclusion of fact but the said Referees have neglected and refused so to do.

Exception 2. For that said Referees in their said report have not stated the facts found and the conclusions of law separately, as required by law.—General Statutes, page 638, § 296.

Exception 3. For that the said Referees, upon the trial before them, permitted the defendant, Behrend Bollmann, to be examined as a witness as to the transactions between him, said Behrend Bollmann, and Henry Bollmann, deceased, plaintiff's intestate, to wit: As to the terms of the copartnership agreement between said Behrend Bollmann and said Henry Bollmann, made in 1857; the business transactions between them as copartners from 1857 to 1870, and an agreement between them for the dissolution of said copartnership upon certain terms stated and the formation of a new copartnership between said Behrend Bollmann, Henry Bollmann and Diedrich Bollmann in January, 1870, contrary to Section 415, General Statutes, page 672. Said testimony was duly objected to by plaintiff's solicitor, and the objection overruled and the testimony taken.

Exception 4. For that said Referees, upon trial of said cause before them, permitted Diedrich Bollmann, a person who has a legal interest which will be affected by the event of this action, (and so determined by said Referees,) to be examined as a witness in regard to certain transactions and communications between him, said Diedrich Bollmann, and Henry Bollmann, deceased, plaintiff's intestate, to wit: As to the terms of a copartnership agreed upon between him, said Diedrich Bollmann, deceased, and Behrend Bollmann, defendant, on the 7th and 8th of January, 1870, contrary to Section 415, General Statutes, page 672. Said testimony was duly objected to by plaintiff's solicitor, and the objection overruled and the testimony taken.

Exception 5. For that the findings of fact in said report are contrary to evidence, and without evidence produced on the trial, amongst others the following, to wit:

Open accounts due, not in ledger.....$5,813 48

*37

*Exception 6. For that said report is irregular, defective and contrary to law, and should be set aside.

Exception 7. For that the said Referees, on the trial of said cause before them, received evidence relative to some of the issues involved in said cause in the absence and without the knowledge or consent of the plaintiff or the plaintiff's attorney, among others the following, to wit:

It being made a question as to how much was due to B. Wohlers and W. Wohlers by the firm Bollmann Brothers, on November 12, 1873, B. Wohlers was put upon his oath and testified that the amount appearing at his credit and the amount appearing at the credit of W. Wohlers (Mr. B. Bollmann's list of debts due by the firm, and not appearing on the balance sheet,) were due them by the firm for services rendered prior to March 1, 1870, in addition to the amounts appearing at their debit on the balance sheet.

At the hearing of the cause in the Court below, defendant, Behrend Bollmann, filed his affidavit, asserting that the finding of the Referees had been accepted by plaintiff's counsel and he had paid $2,000 costs to the Referees. The defendant also said that no objection was made to him as a witness in the case.

The complainant, Caroline A. Bollmann, deposed that she never assented or acquiesced in the report of the Referees made and filed in the cause; that at the time the $2,000 were paid the Referees as their costs and fees in the case by the defendant, she was utterly ignorant thereof, ignorant that the Referees had come to a conclusion in the case, ignorant of what their costs and fees were to be, and ignorant that defendant proposed to pay them; that she did not know same had been paid till brought to her attention by defendant's affidavit.

The Court made the following decree:

Graham, J. Upon hearing the report of Messrs. C. Wulbern, James D. Mitchell and Christopher Matthews, Referees in this action, filed on the eleventh day of June, 1874, and the exceptions thereto filed by Messrs. Corbin & Stone, on behalf of the plaintiff, and also the exceptions thereto filed by Messrs. DeSaussure & Son, on behalf of the plaintiff, and after hearing argument thereupon by the attorneys of the plaintiff and defendant, it is adjudged, ordered and decreed that the exceptions filed by Messrs. Corbin &

*38

Stone be *overruled, and that the exceptions filed by Messrs. DeSaussure & Son be sustained; and it is adjudged, ordered and decreed that the defendant, Behrend Bollmann, personally do pay all the costs of this action, including as a part of such costs the amounts paid to James D. Mitchell for balancing the books of Bollmann Bros., and also the sum of two thousand dollars to the Referees; and that it be referred to Jacob Williman, Esq., Clerk of this Court, to tax the costs of the attorneys and clerk in this action.

It is further adjudged, ordered and decreed that in all other particulars the report of the Referees be confirmed and do stand as the judgment of this Court.

It is further ordered that either party have leave to apply at the foot of this order for any further order that may be necessary to carry this decree into execution.

Subsequent to the rendering of said decree, to wit, on the 17th of July, the plaintiff filed the following petition:

"The petition of Caroline A. Bollmann, executrix of Henry Bollmann, deceased, shows: That since the hearing of the above entitled cause, had on the 29th day of June, A. D. 1874, before the Court of Common Pleas, your petitioner has learned the facts set forth in the affidavit of J. D. Mitchell, one of the Referees, that said facts are material to the final determination of said cause, and she prays that it be referred to said Referees in the cause to report forthwith as to the truth of said affidavit, to the end that, if true, said facts may be taken into consideration in the final determination of the cause on the report and exceptions."

The following is the affidavit of J. D. Mitchell, referred to in said petition:

"Personally appears J. D. Mitchell, who, being duly sworn, deposes and says: That he was one of the Referees to whom the above entitled cause was referred; that on the last evening when the Referees, C. Wulbern, Christopher Matthews and myself, to wit, on the 6th day of June, 1874, met for consultation, and for the purpose of making up their findings in the case, it became a question, among others, as to what amount of interest should be allowed to the plaintiff on the sum found to be due her. Mr. Christopher Matthews then produced a certified copy of a bond which he said was a copy of the bond given by the plaintiff as administratrix of Henry Bollmann, and said that interest should only be allowed to the plaintiff from the date of that bond, as she was not au-

*39

thorized by *law to receive any payment before filing the same. This copy of bond was dated on the 17th day of February, 1872. We then used the date of this bond as the time from which to calculate the interest which was allowed plaintiff on the balance found due to her, the rate of interest allowed being at seven per cent. per annum.

"This copy of bond produced by Mr. Christopher C. Matthews had not been produced in evidence in the case before. Until that evening I knew nothing about it. In conversation with Mr. Christopher Matthews since, he mentioned to me that he got said copy of bond from Behrend Bollmann, defendant, and if there was any other bond he knew nothing about it."

On first day of August the defendant entered final judgment on the decree.

The petition of Caroline A. Bollmann, plaintiff, founded on the affidavit of J. D. Mitchell, one of the Referees, finally came up for hearing on August 18, 1874.

Two bonds of the complainant, as administratrix, one of date July 21, 1870, and the other of date February 17, 1872, were put in evidence.

The following order was proposed to the Court, and by the Court refused, to wit:

On hearing the affidavit of J. D. Mitchell, of July 16th, 1874, and the petition of the plaintiff, filed July 17th, 1874, in this cause, it is ordered that the Referees in this cause, or a majority of them, do forthwith report to this Court whether the facts stated in the affidavit of J. D. Mitchell are true, and that they do report, if true, how they came in possession of the bond mentioned in said affidavit.

To the refusal of the Court to make said order, the plaintiff excepted.

The plaintiff filed the following grounds of appeal:

The plaintiff in the above entitled cause, by her attorneys, Corbin & Stone, except to the judgment entered up by the defendant on the 30th day of July, A. D. 1874, on the following grounds:

1. The Court erred in making the order filed in said cause, on the 30th day of June, A. D. 1874, overruling the exceptions filed by Corbin & Stone to the report of the Referees. Said exceptions should have been sustained, the report of the Referees set aside, and a new trial granted.

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*2. The Court erred in refusing to grant the motion filed July 17th, 1874, founded upon the petition of the plaintiff and affidavit of J. D. Mitchell, one of the Referees. Said motion, postponed by absence of the Judge from the State, was finally heard, after a recess of the Court, on August 18th, 1874, upon said petition, affidavit and copies of the plaintiff's two bonds as administratrix of Henry Bollmann, deceased, and by the Court refused. Said motion should have been granted, because if the facts stated in the affidavit of J. D. Mitchell were true, then the report of the Referees filed in the cause, and the order of the Court of June 30th, 1874, confirming the same, and the judgment entered by defendant, July 30th, 1874, must have been set aside, and this on the sole ground of the misconduct of the defendant in surreptitiously placing testimony before the Referees to influence their final action in the cause, and which did materially control their action; and this after the testimony had been closed by the attorneys on both sides and counsel on both sides had made their final arguments. Also, on account of the misconduct of the Referees in thus receiving and considering said testimony; also, that said testimony, thus received, was false, and the said Referees were misled thereby, to the great wrong and damage of the plaintiff.

The defendant also gave notice of appeal, as follows:

Defendant, protesting against the right of appeal of either party in this case, nevertheless, if the plaintiff's appeal is to be heard, appeals:

1. Because, after the notice of appeal of the plaintiff, filed on the 3d of July, 1874, by Messrs. Corbin & Stone, from the decree on the merits, the defendant had a right to appeal from the decree on the question of costs.

2. Because the Referees had the right, under the order of reference, to pass upon the question of costs, and to award the same, and the Circuit Judge erred in not confirming their decision as to the costs of the action.

DeSaussure & Son, attorneys of record, and Corbin & Stone, assistant counsel, for plaintiff.

Whaley & Minot, for defendant.

*41

*February 26, 1875. The opinion of the Court was delivered by

MOSES, C. J. The principles which are to be applied to the determination of the motion in this case present no difficulty or intricacy. The latitude which was allowed to the counsel on both sides may be referred rather to their impressions of the questions involved than to any such recognition on the part of the Court.

While we do not consider that the result of the motion depends upon the view which we may take of the order of May 17, 1873, either as a reference under the Code or a general submission to arbitrators by both parties, through the exercise of a right inherent in the Court to permit such a determination of a pending action, our conclusion is that it falls within the latter class. The frame of it is inconsistent with one appointing a Referee under the Code. Apart from other inferences which may be drawn from its language, the exclusive power to the Referees, or a majority of them, to make a final decision, which was to stand as the judgment of the Court, not to be subject to appeal, distinguishes it from the technical reference, which is to inform the Court of the finding of facts and of law, that its judgment may be passed thereon. It contemplates that the judgment of the Referees should be substituted for what would otherwise be that of the Court, and forbids its review by any appellate tribunal. It has all the characteristics and distinguishing features of an arbitration at common law, and there is nothing in the Constitution or Statutes to forbid this exercise of power by the Court of Common Pleas to the same extent as assumed before the change in our judicial system. On the contrary, it is recognized as an existing incident, for Section 11 of Chapter CXXXI of the General Statutes, p. 725, makes it an offense, punishable by fine and imprisonment, to corrupt, or attempt to corrupt, by gift or gratuity, any arbitrator in relation to any cause or matter for the decision of which he has been chosen or appointed.

Mr. Russell, in his work on Arbitrators and Awards, p. 638, says: "In considering what may be the grounds of a motion to set aside an award, a distinction may be noticed between awards pursuant to submissions made rules of Court by the inherent jurisdiction of the Courts, and those on submissions of which the Courts take cognizance by virtue only of the statute of William III."

Even in those States where provision by statute is made for the arbitrament of cases, the common law right of parties to submit a

*42

*pending cause to arbitrators is not regarded as prohibited or in the least impaired, nor are the rights and incidents which properly belong to that mode of decision at all affected by the statutory regulation.—Blunt v. Whiting, 3 Sar., 4; Voone's Code, 96; Childs v. Updyke, 9 Ohio, 333; Lison v. Sellers, 40 Ga., 710; Brighton v. Guthrie, 19 Penn. St. Rep., 421; Yates v. Russell, 17 John., 462; Heckers v. Fowler, 2 Wall., 123 [17 L. Ed. 759].

The distinction is well illustrated and established by the case of Milligan v. Dick, 2 Ves., Jr., 23, where a reference to arbitrators, "in the same manner as is referred to the Master, and the parties to be concluded and bound by the award," was held not in nature of a reference to the Master.

The power conferred on the Court by the Code of Procedure in regard to Referees was not a restriction or limitation of that which it exercised under its common law power. Nor can the fact that no discontinuance of the case was entered at all impair the character or force of the order. The purpose of both the parties must have been, through the submission, to obtain an award which could be made the judgment of the Court on behalf of the one in whose favor it was pronounced. To this end its confirmation was necessary, for otherwise the award, instead of being in a form in which it could operate as a lien on the property of the party against whom it was made, could have had no higher rank than any other cause of action, to be converted into a judgment only by suit.

Viewed in the light in which we regard the submission, it was not necessary that the form of proceedings which apply to "trial by Referees" under the Code should have been followed by the "Special Referees" under the order in this cause. Why the term "Special" was applied, unless to distinguish them in comprehension of power from the class designated by the Code as "Referees," and deriving their powers only from its provisions, we cannot conjecture, unless to indicate their distinction from those recognized by the Code and owing their existence to it.

An arbitration proceeds from the consent of the parties. The Court is but the instrument through which in a pending case effect can be given to their will. It contemplates an adjustment of their controversy by a forum not bound by the strict rules of law, but permitted within certain limits to substitute their own mode of investigation in the place of that through which alone Courts of justice are allowed to exercise their func-

*43

tions. A ready ear is not *given to objections raised by the disappointed party, who, being dissatisfied with the result by the tribunal of his own selection, applies for the interposition of that which he had before renounced.

To avoid an award, according to the decisions of our Courts, (and it is not necessary to go beyond them,) the resisting party must show either corruption, misbehavior amounting to partiality, excess of authority or such palpable mistake of facts as must satisfy the Court, if they had not been made, the decision of the arbitrators, according to their manifest intent, would have been different.—Mulder v. Cravat, 2 Bay, 370; Executors of Radcliffe v. Wightman, 1 McC. C., 416; Askew v. Kennedy, 1 Bail., 4.

A misapprehension or mistake of the law will not be allowed to set aside an award.—Mitchell v. Deschamps, 13 Rich. Eq., 9; Cohen v. Habenicht, 14 Rich. Eq., 31.

The principle so announced may be general in its terms. It should be qualified by the principle laid down by Judge Story in Section 1455 of his Equity Jurisprudence, and sustained by the authorities to which he refers, that "if they mean to decide strictly according to law and they mistake it, although the mistake is made out by extrinsic evidence, that will be sufficient to set it aside."

While regarding the submission to arbitrators as the exercise by the Court of its inherent powers, irrespective of that derived from the Code, we do not perceive any ground on which either of the exceptions could be maintained, even if assumed to be made in a reference under the Code, except that which relates to the question of costs.

Those which involve questions of law we will hereafter notice. Those which arise on the findings of fact have been passed upon by the Circuit Judge. It is enough to say that we do not see such error in his conclusions from the testimony as would justify our reversal of his judgment. Following the example of the Supreme Court of the United States in Harrell v. Beall, 17 Wall., 591 [21 L. Ed. 692], "where the question is wholly one of the weight of evidence, and involving no controverted proposition of law," we do not feel ourselves called upon "to reproduce in our opinion the facts on which our judgments rest in such cases." More particularly will this rule be observed when our conclusions on the facts are in accord with those of the Judge below.

*44

*The exceptions which may be regarded as raising questions of law are:

1. That the report did not state the facts

'ound and the conclusions of the law separately.

2. That the defendant and Diedrich Bollmann were permitted to testify.

3. In not allowing interest from the death of Henry Bollmann.

4. That two of the Referees were used as witnesses.

5. That the evidence of Wohlers was received in the absence of the appellant's counsel.

In regard to the first, it may be enough to say that the language of the Code is to be considered as directory and not mandatory. In Grant v. Morse, 22 N. Y., C. J. Comstock says, at page 325: "If the report disclosed that the Referee was requested to find upon the issues, and refused to do so, one way or the other, a question would be presented not now necessary to be determined. It was the privilege of the defendants, in procuring the Referee to settle it, to require him to find on all the issues the one way or the other." No such demand in the case before us was made, and the party cannot take advantage of her own omission and be allowed to present an exception the necessity of which could have been avoided by her own foresight. But even if the exception was tenable, the appellant should certainly be required to show how she was prejudiced by the want of the separation of the issues of law and fact in the report. In addition to what has been said, if the separation was necessary to a better understanding of her rights, her course was not to except because of the omission, but to move for a recommittal of the report, that it might be reproduced in the desired form.

As to the second exception, no objection was interposed to the examination of the respondent as a witness, and it is too late to now make it. Diedrich Bollmann was no party to the record; has no interest in the event of the suit; the judgment could in no particular affect him; could never apply to him as res adjudicata; and there is nothing in section 415 of the Code which could, therefore, render him incompetent as a witness between the parties in the cause.

The exception as to the examination of Wohlers in the absence of the counsel cannot prevail. Although it was irregular, yet, as the Referees kept full and correct minutes,

*45

which were always open *to the inspection of the counsel, and as the examination of Wohlers was brought to his notice at a subsequent meeting, and as the witness was fully examined by him on the very subject matter to which he had testified at the previous meeting in his absence, how has she been prejudiced by what, from the previous course of her attorney, can be viewed only as an inadvertence, causing her no injury?

The exception that two Referees were used as witnesses does not come with a good grace from the appellant As far as it extends to the testimony of Mitchell at the meeting on July 8th, 1873, the counsel being present, "it was agreed that his statement should be taken as a starting point, and on motion of Mr. , attorney for the respondent, it was proved by Mitchell to be the one taken from the books." At the meeting of August 1st, 1873, the appellant's counsel "examined and swore him in regard to the correctness and accuracy of the several amounts due, as appeared in his balance sheet of the books."

The remaining exception is as to the interest. This is the only one that appears to be entitled to any consideration, if the order of the Court could be viewed as directing a reference under the Code, and then it would be subject to the objection that it was waived, because, with full knowledge of the conclusion of the Referees as to the interest, no expression, or even intimation, of dissent was interposed by the counsel or by the appellant until June 22d, 1874, although exception to the charge of the costs to the copartnership was taken on the 16th of the same month. Independent, too, of the terms of the submission "that the decision of said Referees or a majority of them shall be final and shall stand as the judgment of the Court, not subject to appeal," the course of the appellant debars her from seeking a review of the award on any of the grounds she has submitted. With notice of it, her counsel expressed himself "bound by it, and would at any day go into Court and consent to the confirmation." Besides this, he admitted in the Court below "that he felt bound not to appeal except upon the question of costs raised in his exceptions." This was but a compliance with the demand of the law. It was required by the submission, through the accepted construction which must be given to such an instrument. "Where an order of reference contains a clause restraining the parties from bringing a writ of error, they are precluded from moving in arrest of judgment."—Chowner v. Bowen, 2 Dowl. & S., 706.

*46

*But there are still other matters in the case that bear on all the exceptions and are as to the costs, which must preclude them. With knowledge of the fact that the $2,000 reserved to cover the expenses of the Referees, clerk, &c., had been charged to the copartnership fund, "it was agreed by the attorneys on both sides that it shall be paid to them by Mrs. B. Bollmann at once, &c.," and in their presence the payment was made. This is an acquiescence on the part of the appellant which should conclude her appeal, except to that portion of the award to which objection by her counsel was made. The payment must be assumed to have been induced by the purpose to which it was to be applied and the credit which was to be given to the respondent on the copartnership fund. It was a

fair impression on his part that the charge which the allowance created was to stand without dispute. The principle on which the Court proceeded in Kennard v. Harris (2 Barn. & Cress., 801,) to some extent applies here. It is well and truly expressed by Mr. Justice Curtis, in Swain v. Seamens, 9 Wallace, 274 [19 L. Ed. 554]: "When a person tacitly encourages an act to be done he cannot afterwards exercise his legal right in opposition to such consent if his conduct or acts of encouragement induce the other party to change his position so that he will be pecuniarily prejudiced by the assertion of such adversary claim."

Most of the points involved in the case, made since the award, have arisen from the irregularity of the proceedings which have followed. While there is no doubt or question of the propriety of the professional motives which have induced the action of the counsel for the appellant, if the mode pursued is allowed, it must lead to a course of practice which the Court cannot accept. While the attorney on record, the only one who represented her from the filing of the complaint to the award, (and still represents her,) concedes that he is bound not to appeal from the judgment of the Referees, (except as to the costs,) assistant counsel, retained after it is made, and not knowing to what extent the attorney on record may have committed himself against an appeal, finding what he believes to be errors, from which his clients, in his judgment, can be relieved, submits exceptions, which his colleague, by his own admissions, does not feel justified in taking, by reason of his own course in the previous conduct of the cause. There must be a time for the cessation of litigation in every case; and if the honest zeal of every new counsel employed can see objections which he thinks

*47

may favorably *affect his cause, although the counsel of record regards himself as not permitted to take them, when is the contest between the parties to terminate?

We concur with the Circuit Judge in refusing the motion founded on the affidavit of Mitchell, the notice of which was given on the 16th July, 1873. On the 30th June preceding, the judgment of the Court was pronounced. It disposed of the award and the arbitrators. It is of the very essence of an award that it should be final. The Court acts upon it in the light of a judgment, leaving nothing in the submission to be afterwards passed upon. If the appellant can claim any relief through the matter referred to in her petition, it cannot be afforded through the mode in which she has sought it. It is proper, in passing on this point, to say that the Referees had full knowledge of the time of the death of the intestate and the date of the grant of the letters of administration, for they were both set forth in the complaint. The first bond necessarily preceded the letters. It involved at most but a question of fact, and we see nothing which requires us to interfere with the course of the Circuit Judge in regard to it.

It remains to consider the motion on the part of the respondents: "Protesting against the right of appeal of either party, nevertheless, if the plaintiff's appeal is to be heard," the respondent appeals from the order of the Circuit Court requiring him personally to pay all the costs of the action, including the amount paid the Referees. His appeal arises out of the exception of the plaintiff's counsel to so much of the award as required the costs of the case and the amount paid the Referees to be borne by the copartnership. We have already passed upon the question raised on the payment of the $2,000 to the Referees, and, for the reasons assigned, so much of the decree of the Circuit Judge as disallows it as a charge against the copartnership must be reversed.

In rendering our judgment on so much of the motion of the defendant as relates to the costs, it must be understood that the rules by which we will be governed are those applicable to an award by arbitrators, for such we regard the return made to the Court, and not to a reference under the Code.

A matter of costs is not generally the subject of appeal, and it is sustained here, not purely as one of that character, but rather as drawing in question the right of the Circuit Court to entertain any exception to the award.

*48

*It must be decided by the solution of a single proposition. Did the reference of the pending case, with all issues of law and fact, to arbitrators carry with it as an incident of the submission the question of costs?

Mr. Russell, in his work on Arbitrators and Awards, page 371, says: "When a cause alone or a cause and all matters in difference are referred, and nothing is said in the submission respecting costs, the arbitrator has an implied authority to adjudicate respecting the costs of the cause, but not of the reference or award."

Mr. Billings, in his Treatise on Award, page 188, says: "Where the submission is silent as to the costs of the cause, the arbitrator has power to award them, for it is an act consequent upon the authority conferred upon him for determining the cause, and the insertion of a direction as to the costs is a restriction of his power of allowing the costs at his own election."—See Roe v. Doe, 2 T. R., 644.

Mr. Watson, in his volume on Arbitration and Awards, page 94, says: "It is perfectly clear that where a cause is referred, and the order of reference is silent as to costs, the arbitrator has power over the costs of the action, but not over the costs of the reference."

The American authorities do not concur in

any general rule.—See Morse on Arbitration, page 126. They seem, however, to recognize a distinction in regard to the power over costs between the reference of a matter in pais, where no cause is pending, and one of a subsisting action. Untrammeled by any prevailing rule in the American Courts, different from that established by the English authorities,—drawing our conclusions from principles prevailing in both,—we feel bound to follow the latter. The purpose proposed by the arbitration of a cause is to withdraw it from a trial according to the fixed rules of law and submit it to the adjudication of a forum not bound by those of a defined and established character, either as to its mode of conduct or decision.

"This case, with all its issues of law and fact, was referred to 'special Referees' to hear all extrinsic evidence upon all questions raised by the complaint and answer, its decision to be final, and to stand as the judgment of the Court, not subject to appeal." A submission more general could not be framed. Costs had already accrued; further costs were necessarily to follow. The case was withdrawn from the Court in which it originated and committed for a final decision to a tribunal chosen by the parties. If the

*49

power *to award as to the costs was not regarded as an "unquestionable incident," where was it left? Not in the Court, for both the plaintiff and defendant, by the exercise of a rightful power, had remitted it to judges of their own creation. They should abide by their choice.

It is ordered that the case be remanded to the Circuit Court for such orders as may be necessary to carry out the views expressed in this opinion.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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6 S. C. 49

MOBLEY v. CURETON.

(Columbia. Nov. Term, 1874.)

[*Pleading* ⇐218.]

On demurrer by plaintiff to defendants' answer, the Judge who heard the case endorsed "Demurrer overruled:" *Held*, That this was an interlocutory and not a final order on which judgment could be entered dismissing the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 561; Dec. Dig. ⇐218.]

[*Descent and Distribution* ⇐141.]

The fact that an heir holds his share of descended real estate under a decree for partition which assigned the different shares at fixed values, is no defense to an action by a creditor of the ancestor to subject the lands to the payment of his debts.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 499; Dec. Dig. ⇐ 141.]

[*Descent and Distribution* ⇐125.]

That the personal estate of the intestate was large and more than sufficient to pay his debts is no defense to an action against the heir to subject the real estate to the payment of the debts.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 460; Dec. Dig. ⇐ 125.]

[*Pleading* ⇐200.]

Demurrer to defenses, alleged in the answer, of payment and laches: *Held* to have been properly overruled;—the facts set forth as proof of payment and laches, being insufficient to enable the Court to determine the questions of payment or laches.

[Ed. Note.—Cited in Buist v. Melchers, 44 S. C. 64, 21 S. E. 449.

For other cases, see Pleading, Cent. Dig. §§ 470, 471; Dec. Dig. ⇐200.]

[*Descent and Distribution* ⇐141.]

That judgment, without satisfaction, was recovered against the executor for the same debt is no defense to an action against the heir to subject the real estate to the payment of the debt.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 501; Dec. Dig. ⇐ 141.]

[*Bankruptcy* ⇐421.]

In an action against husband and wife to subject real estate which had descended to the wife to the payment of debts of her ancestor, defendants alleged in their answer a discharge of the husband in bankruptcy subsequent to the indebtedness and the sale of the lands under the proceedings: *Held*, That a demurrer to this allegation was properly overruled.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 772; Dec. Dig. ⇐421.]

[*Pleading* ⇐216.]

A demurrer to a defense alleging a former recovery must be determined by the facts stated in the answer, and the record cannot be used to modify or affect them.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 539; Dec. Dig. ⇐216.]

[*Pleading* ⇐221.]

Where an answer sets up defenses, other than a counter claim, and a demurrer thereto is overruled, the effect is not to dismiss the complaint, but to leave the allegations as "controverted by a direct denial or avoidance, as the case may require," under the rule prescribed by § 191 of the Code of Procedure.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 567; Dec. Dig. ⇐221.]

Before Mackey, J., at Lancaster, July Term, 1874.

This was an action by Edward B. Mobley, executor of Biggers Mobley, deceased, against J. S. Cureton, F. D. Green and M. V. Green, his wife, and J. M. Green and Eliza J. Green, his wife.

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*The case and exceptions, as set forth in the brief upon which the case was heard in this Court, are as follows:

This action was begun in the Court of Common Pleas for Lancaster County on the 13th day of June, 1871, by Edward B. Mobley, as executor of Biggers Mobley, against the above named defendants, as heirs at law of Thomas K. Cureton, deceased. The cause of action is a sealed note, made by the said

Thomas K. Cureton, on the 23d of February, 1854, in favor of the said Biggers Mobley, for the sum of $1,373.88, due on 18th day of March, 1854, with interest due and payable annually; credited with the sum of $25 on the 18th of March, 1855, the sum of $25 on the 18th of March, 1856, and with the sum of $100 on 15th April, 1857.

The complaint sets out copies of said note and credits; alleges the death of the said Thomas K. Cureton on the 3d of July, 1854, seized in fee of the real estate therein described, leaving as his heirs at law his widow, Eliza R. Cureton, his children, James E. Cureton, T. K. Cureton, Jr., and the defendants, J. S. Cureton, M. V., now the wife of the defendant F. D. Green, and Eliza J., now the wife of the defendant James M. Green; that the said Eliza R., widow, has since died testate, and the said T. K. Cureton, Jr., as executor of her will, has commenced proceedings in the Court of Common Pleas for said County for the settlement of her estate, alleging its insolvency, and that the Court has made an order under said proceeding restraining creditors from suing the executor at law, and requiring them to establish their respective claims before a Referee; that the said J. E. Cureton has since died intestate and insolvent; that he has no administrator and no estate upon which to administer; and that the said T. K. Cureton, Jr., has been adjudicated a bankrupt under the laws of the United States; alleges that certain real estate therein described descended to the defendants, J. S. Cureton, M. V. Green and Eliza J. Green, as heirs at law of the said Thomas K. Cureton, deceased, and that the same exceeded in value the amount of the debt and interest herein claimed; alleges the death of Biggers Mobley testate, the appointment and qualification of the plaintiff as his executor; that the said note has never been paid, except as to the credits heretofore stated, and demands judgment against the defendants for the amount and interest still due upon the same.

*51

*The answer of the defendant J. S. Cureton is contained in the following paragraphs:

1. That he denies that the lands described in the complaint as "the Stinson Place" and "the Pea Top Place" descended to him and the defendant Eliza Jane Green, as heirs at law of T. K. Cureton, deceased, but states that in the partition and division of the real and personal estate of said deceased amongst his distributees and heirs at law, by the order or decree of a Court of Equity held for Lancaster District, the said lands were assigned or allotted to them at prices or values fixed upon the same by Commissioners appointed by the said Court. So that defendant states that, although they were both infants at the time, the one being about five and the other about eleven years of age, they thereby became virtually the purchasers of said land at the prices fixed upon the same as aforesaid.

2. That on or about the 15th day of October, A. D. 1860, at Lancaster Court House, in an action brought in the Court of Common Pleas by the said Biggers Mobley against Samuel B. Massey and James E. Cureton, as administrators of the estate of the said T. K. Cureton, deceased, for the same cause of action as that set forth in the complaint herein, the said Biggers Mobley recovered judgment, duly allowed upon the merits thereof, against the said administrators for $1,959.53.

3. That subsequent to the recovery of said judgment, the said administrators, this defendant is informed and believes, with a view to the payment and satisfaction thereof, assigned to the said Biggers Mobley several sealed notes by one Wm. Stevens, to them the said administrators made payable, for sums of money in the aggregate exceeding in amount the money then due on said judgment; and that the said Wm. Stevens was abundantly solvent and fully able to pay said amount of money.

4. That the personal estate left by the said T. K. Cureton was very large and far more than sufficient for the payment of all just debts against him.

5. That the lapse of time since the execution of the note set forth as the cause of action in the complaint, the ample sufficiency of the personal estate left by the said T. K. Cureton for the payment of all just debts against him, and the failure of the said Biggers Mobley to urge the claim until after the

*52

death of both of the *administrators of said estate, in connection with other circumstances, this defendant insists, show that said debt has been paid.

6. That if the said Biggers Mobley did fail to obtain from the said administrators payment and satisfaction of said debt, such failure arose from laches on his part so great and neglect so gross as to absolve this defendant from any liability which may have existed on his part to pay or contribute towards the payment of the same.

7. That there is a defect of parties defendant in the omission of the other heirs at law of the said T. K. Cureton or their representatives, to wit, of T. K. Cureton, Jr., Eliza R. Cureton, the widow of said deceased, and James E. Cureton, the two last named, who are now dead, having survived the said T. K. Cureton as his heirs at law.

8. That the said plaintiff ought not to be admitted to say that this defendant is bound, as heir at law of the said T. K. Cureton, deceased, by reason of real estate descended to him, to pay the said debt or any part thereof, because he says that the said Biggers Mobley, in his lifetime, on or about the 28th day of November, A. D. 1868, filed his bill of complaint in this Court against Thomas K. Cureton, Jr., this defendant, Francis D. Green and wife Virginia, James M. Green

and wife Eliza Jane, therein and thereby, amongst other things, seeking to compel the payment and satisfaction of said debt from this defendant and other heirs at law of the said T. K. Cureton, deceased; and that thereupon, after full hearing, it was determined and adjudged by the said Court that this defendant is not bound to pay said debt or any part thereof, and that said bill, "so far as it seeks leave to make the heirs of the late T. K. Cureton liable for his said debt by reason of lands descended to them, be dismissed," which said bill, as to other matters, is still pending in this Court.

To this answer the plaintiff made no reply, but demurred as follows, viz.: "The plaintiff demurs to the first, fourth, fifth, sixth and eighth paragraphs of the answer of the defendant J. Samuel Cureton for insufficiency in not stating facts sufficient to constitute a defense or counter claim." Afterwards, by leave of the Court, before trial, the demurrer, so far as the same relates to the eighth section of the above answer, was withdrawn.

*53

*F. D. Green and wife answered as follows:

The defendants Francis D. Green and wife M. Virginia Green, answering the complaint herein, deny that the debt of Thomas K. Cureton to Biggers Mobley, referred to and described in the complaint, is still due and unpaid, as claimed by the plaintiff in his complaint; but, on the contrary, affirm (as they are informed) that the same has been fully paid and satisfied, and that now no liability for the same rests on the heirs at law of the said Thomas K. Cureton, deceased.

These defendants, on further answering, allege:

1. That Biggers Mobley himself, some six years after the note referred to became due, and about six years after the property of the late T. K. Cureton, described in the complaint, was partitioned and divided among the heirs at law, viz., some time in the year 1860, brought his action on the said note against S. B. Massey and J. E. Cureton, as administrator of said T. K. Cureton, deceased, for the collection of the same; that the said S. B. Massey and J. E. Cureton, as administrators aforesaid, had already, at the time the property, real and personal, of the said T. K. Cureton was partitioned, in 1854, reserved a sufficiency of the assets of the estate of their intestate to defray the expenses and pay off the debts outstanding against the estate; and that, after such reservation, they did not enter an appearance to the action aforesaid of Biggers Mobley on the note aforesaid, and that, by entering no appearance, making no defense to the action and suffering judgment to go against them by default on the said note, they admitted in their hands assets sufficient to pay the said debt, and that the heirs are in no way liable for the same.

2. That Biggers Mobley (if he has not collected the money from the said administrators, which defendants are unwilling to admit,) has all the time been looking to the said administrators to pay the said debt, and he has been guilty of gross negligence and laches, so that the plaintiff, as his representative, has now no right in this Court as against the heirs at law of the said T. K. Cureton, deceased, to recover in this action.

3. That the personal assets of the said T. K. Cureton, deceased, were amply sufficient to pay and discharge the entire indebtedness of the said deceased, and that a sufficiency to

*54

pay the same passed *into the hands of his administrators, Samuel B. Massey and James E. Cureton, and that the heirs at law are not liable.

4. That on the 6th day of December, 1869, at Charleston, the United States District Court for the District of South Carolina duly made a decree discharging the defendant F. D. Green from all his debts provable under the Act of Congress entitled "An Act to establish a system of uniform bankruptcy throughout the United States," approved March 2, 1867; that the supposed indebtedness alleged in this complaint, if any such ever did accrue, occurred before the granting of such discharge; and the alleged indebtedness is one that was provable against the estate of the defendant F. D. Green, in the proceedings in which said discharge was granted, and was not, nor any part thereof, created in consequence of a defalcation as a public officer or as an executor, administrator, guardian or trustee, or while acting in any fiduciary capacity. And that the lands which descended to defendant M. Virginia Green have all been sold as defendant Francis D. Green's property, under the same proceedings in bankruptcy, and that defendants have now, since said proceedings in bankruptcy, no lands, tenements or hereditaments by descent from the said T. K. Cureton, deceased, and are not liable for the debt.

5. That on the day of , 1870, at Columbia, on an appeal taken to the Supreme Court of the State from Circuit decree, in an action or bill of complaint brought in the Equity Court for Lancaster County by Biggers Mobley (the intestate of present plaintiff) against all the heirs of said Thos. K. Cureton, deceased, and one John M. Beaty, as administrator of Samuel B. Massey, deceased, who was one of the administrators of the said Thos. K. Cureton, deceased, on the very same cause of action as that set forth in the complaint herein, the said bill of complaint was dismissed by the decree or judgment of the Court duly rendered, upon the merits of the whole case as presented, and by the said decree or judgment the defendant was relieved from paying the said sealed note or debt, being the very same as that upon which the present complaint is founded. And defendants claim that the said judgment is a

bar to any recovery in this action, and so plead and claim judgment for costs.

The answer of the defendants J. M. Green and wife Eliza J. contains the same number

*55

of sections as the answer of F. D. Green *and wife, and is substantially the same in statement, with the exception that there is no allegation of bankruptcy in paragraph 5.

To the said answers of F. D. Green and wife, and of J. M. Green and wife, the plaintiff made no reply, but demurred to each as follows: "The plaintiff demurs to the paragraphs marked 1, 2, 3, 4 and 5 of the answer of the defendants F. D. Green and wife M. Virginia Green (and the same as to J. M. Green and wife) for insufficiency in not stating facts sufficient to constitute a defense or counter claim."

The cause upon the demurrers was heard before His Honor Judge Thomas at the June Term for 1872. The Judge overruled the demurrer generally by endorsing upon the record of the demurrer to each of the three answers the words "demurrer overruled."

Predicated on this order, the defendant J. S. Cureton, on the 20th of August, 1872, without notice to the plaintiff, put on file in the Clerk's office the following, entitled "a judgment for J. S. Cureton on demurrer," viz.: "An order having been entered in this action at regular term of the Court on 20th June, 1872, overruling the demurrer of the plaintiff to the answer of the defendant J. Samuel Cureton; now, on motion of W. A. Moore, attorney for said defendant, J. S. Cureton, it is adjudged that the complaint herein be dismissed, and that the defendant J. Samuel Cureton recover of the plaintiff the sum of dollars for his costs and disbursements.

After service of the notice of adjustment of costs hereinafter mentioned, the costs and disbursements were inserted in the blank above, and execution for the same issued. A similar paper was signed and filed by the Clerk in favor of the defendants F. D. Green and wife, and J. M. Green and wife, without notice to the plaintiff, and similar action had in regard thereto.

Three days after entry of said papers entitled "judgment on demurrer," &c., as aforesaid, the plaintiff was served by the defendant J. S. Cureton with notice to be made before the Clerk for adjustment of costs, in the following words, viz.: "The plaintiff's counsel will please notice the within statement of costs and disbursements of the defendant J. Samuel Cureton, and that defendant will apply to the Clerk for an adjustment of the same on the 26th day of August, instant, 10 o'clock, A. M." A similar notice was given by the other defendants.

At the time mentioned in the foregoing notice, the plaintiff filed with the Clerk his protest and grounds against the adjustment of costs in the following words:

*56

*"The plaintiff having been served with notice of motion for an adjustment of costs in this case, enters the following protest against said motion, and objects to the entry of judgment and execution for costs herein, upon the following grounds:

"1. Because no order or decree has yet been made to warrant said motion.

"2. Because the said case, above stated, is still upon the dockets of the Court, and no order affecting the merits thereof has yet been made.

"3. Because, after the overruling of the demurrer, the plaintiff has the right, under Section 195 of the Code of Procedure, to controvert the allegations in the defendant's answer which were demurred to, and the only effect of the decision upon the demurrer is to allow the defendant to bring up as matters of defense the facts set out in his answer."

Whereupon the Clerk, without notice to the defendants or their attorneys, made the following order:

"On hearing the following protest, and deeming the grounds therein stated to be sufficient, it is adjudged that the motion for adjustment of costs be denied, and that the judgments for costs, filed 20th August, 1872, signed by me in blank, severally, in favor of the defendants, J. S. Cureton, F. D. Green and wife, and J. M. Green and wife, in the absence and without notice to the counsel for the plaintiff, be, and the said judgments are hereby, vacated."

The cause then remained upon the docket until regularly called at the extra term of the Court held in July, 1874, when the presiding Judge made the following order:

"The demurrers to the answers in this case having been overruled by His Honor Judge Thomas, it is ordered that the complaint herein be dismissed."

Whereupon the defendants' attorneys and the said Clerk were served on the 7th day of August, 1874, with the following notice and grounds of appeal:

The defendants, or their attorneys, and Thomas H. Clyburn, Clerk of the Court of Common Pleas, will take notice that the plaintiff appeals to the Supreme Court from the order of His Honor Judge Thomas, in this action, filed on the 20th day of June, 1872, overruling the demurrers to certain parts of the answers of the defendants; and from the so-called judgment thereupon signed by the said Clerk on the 20th day of August,

*57

1872, and set aside by him *on the 29th day of the same month; and also from the order of the Hon. T. J. Mackey, presiding Judge, made in this action at the extra term of this Court, entered July 10th, 1874, dismissing the complaint herein, upon the grounds following:

Exceptions to order of Judge Thomas:

1. Because the answers of the defendants

were not sufficient in law in the particulars demurred to.

2. Because his Honor Judge Thomas should have accompanied his decision upon the demurrers with a provision saving the right of plaintiff to controvert said answers, as by the plaintiff's counsel requested at the argument on the demurrers.

Exceptions to the so-called judgment taken before the Clerk of the Court:

1. Because the said judgment could not be legally entered upon the order of Judge Thomas therein referred to.

2. Because the plaintiff had no notice of the entry of said judgment.

3. Because the same was annulled by the order whereby it was set aside by the Clerk because of the irregularity of its issue.

Exceptions to the order of Judge Mackey:

1. Because the effect of Judge Thomas' order was not to dispose finally of the case, but to leave the answers controverted by the plaintiff.

2. Because it did not appear whether or not Judge Thomas had granted or refused permission to plaintiff to controvert the answers, notwithstanding the overruling of the demurrers. It is respectfully submitted His Honor Judge Mackey should have granted such permission, as requested by plaintiff's counsel, when his order dismissing the complaint was under consideration before him, and which he declined because he considered himself precluded by the order of Judge Thomas.

Kershaw, for appellant.

This is an action on a sealed note, dated February 23, 1854, upon which there were payments as late as April 15th, 1857, brought against the heirs at law of the obligor to charge them, by reason of lands descended, with its payment.

*58

*A bill was filed in the Court of Equity, November 28, 1868, against the same parties and others, seeking to recover this same debt.

The bill was dismissed as to these defendants on the ground of laches in plaintiff's testator, "without prejudice to the plaintiff in any remedy he may be advised to pursue in a Court of law."—Mobley v. Cureton, 2 S. C., 149.

This action was begun under the Code, June 13, 1871.

The questions presented are:

1. Whether lands assigned in partition to heirs, and assessed to pay a sum of money for owelty, are vested by descent or by purchase?

(a.) They are lands descended.

"If a person owning real estate dies seized or as owner without devising the same, the estate shall descend to his lawful descendants in the direct line of lineal descent." If they be more than one, the estate descends to all of equal consanguinity to the ancestor as "tenants in common."—4 Kent's Comm., 375.

The only variation to this rule in South Carolina is that the widow takes (as heir) one-third.—A. A., 1791, 5 Stat., 162.

The lands descended and vested in the heirs at law as tenants in common; had they not so vested, they would have had no title and there could have been no partition. Partition is merely a severance of interest between co-tenants.

2. Whether paragraphs 2 and 3 of J. S. Cureton's answer contain facts sufficient to constitute a defense or counterclaim?

(a.) It is not alleged or implied that the notes mentioned were received as payment, or that they were collected, or that it was the duty of plaintiff's testator to collect them.

3. Whether the allegation of the sufficiency of the personal estate of the obligor constitutes any defense?

(a.) It is immaterial whether the executor had or had not assets. The heir cannot plead that the executor had assets.—Vernon v. Valk, 2 Hill Ch., 259; Com. Dig., Tit. Pleader, 2 E., 3.

4. Whether lapse of time less than twenty years and laches of the plaintiff's testator in prosecuting this claim can be pleaded in bar to this action?

(a.) Laches is the creature of equity.

The doctrine amounts to this, that Courts of equity will not give their aid to the enforcement of stale demands. They simply

*59

*"refuse to interfere."—2 Story's Eq. Jur., § 1520, and cases cited in note 4.

It is admitted that equitable defenses may be set up under the Code to a legal demand; but not a defense that only went so far as to induce Courts of equity to refuse the exercise of their peculiar powers. They must be positive equities, not negative. They must be such matters as would have authorized a Court of equity to exercise its extraordinary jurisdiction and enjoin the enforcement of the legal demand or would have been ground for an equity suit. Lapse of time and laches would not have authorized such interference or action.—Wait's Annotated Code, p. 263, note b; Dobson v. Pearce, 2 Kernan, 166.

(b.) The allegations of lapse of time aside from laches are irrelevant, except as circumstances raising the presumption of payment. Defendants ought to have pleaded payment and proven it by the lapse of time and other circumstances.—Wait's Annotated Code, 257, note a; Stover & Barnes v. Duren, 3 Strob., 450; Dillard v. Brian, 5 Rich., 501.

5. Whether it is any defense that F. D. Green, who intermarried with one of defendants, was discharged in bankruptcy, and the lands descended to his wife had been sold

by the Bankrupt Court, so that he had nothing now by descent?

(a.) The defendant pleaded riens per descent, except certain lands which he had aliened for a valuable consideration before action brought. Demurrer sustained.—Hammond v. Gaither, 3 Harris & McHen., 218.

6. Whether the decree of this Court in the equity suit bars this action?

(a.) It is without prejudice.—Mobley v. Cureton, 2 S. C., 149.

7. Is there a fatal defect of parties?

(a.) Persons severally liable upon the same obligation may, any or all of them, be included in the same action.—Code, § 143.

(b.) By statute in New York, (1837,) they are required to be joined.—4 N. Y. Stat. at Large, 500, § 73.

But they are not jointly liable.—Kellogg v. Olmstead, 6 How., 487.

The adoption of the statute shows that it was not so before. There is no such statute here.

(c.) The reasons stated in the complaint justify the omission.

8. Was there a valid entry of judgment by defendants?

*60

*(a.) There was not, because it could only have been entered upon the direction of a Judge.—Code, § 302.

The Judge has simply overruled the demurrer.

(b.) If there were no such entry, plaintiff could not appeal.—3 Wait's Pr., 236.

(c.) There is no time less than two years within which an appeal may be taken if such were a valid entry of judgment.—Code, § 357.

(d.) If the matter come within Subdivision 2 of Section 11 of the Code of Procedure, notice of the order in writing must have been served to limit the time of appeal.

As to whether it was appealable from as an order.—Voorhies' Code, 8th ed., p. 689.

The party may acquire actual knowledge of the judgment or order in any manner; but unless the notice is actually served upon him, such knowledge will not limit the time of appeal.—4 Wait's Pr., 219.

There was, in fact, no order of the Court dismissing the complaint until July 10th, 1874.

Allison, contra:

The Act of the General Assembly amending the Code of Procedure, approved November 25th, 1873, limits an appeal from a judgment to three months.

The judgment in this case was entered and put on file on the 20th of August, 1872; therefore the appellant was limited to three months, beginning on the 25th November, 1873, in which to commence his appeal. He has not done so. It is now too late in this case and the appeal should be dismissed. The Clerk's order vacating judgment is irregular and void.

And it is also too late to appeal from Judge Thomas' order overruling the demurrers, dated June Term, 1872, upon which the said judgment is predicated.

The decision of the Court allowing or overruling a demurrer is in the form of an order for judgment in all cases, whether it gives leave to amend or not. Of course it must be appealed from while it remains an order, for after judgment is entered it becomes merged in the judgment; an appeal from the order would then be futile and irregular. The appeal must be from the judgment.—King v. Stafford, 5 How., 30; Lewis v. Acker, 8 How., 414; Ford v. Turner, 13 How., 193; Bentley v. Jones, 4 How., 335.

*61

*The order of Judge Mackey, of date the 10th July, 1874, dismissing the complaint, was made after the case had been pressed and called up by the appellants, and was wholly unnecessary. It was made not on the motion of respondents, but after the case had been pressed up by the appellants. The case had been ended two years before and was unnecessarily on the calendar.

If the defendants, on the merits of this case, have a valid, equitable defense against the demand of the plaintiff, it is the highest order of defense known to the law, and must prevail, whether the action should have, in its form or nature, been of an equitable or legal character, as marked by the former distinctions. Section 465, Code of Procedure, is in these words: "The provisions of this Code of Procedure apply to future proceedings in actions or suits heretofore commenced and now pending, as follows: 1. If there have been no pleadings therein, to the pleadings and all subsequent proceedings. 2. When there is an issue of law or of fact, or any other question of fact to be tried, to the trial and all subsequent proceedings."

Now, then, we contend that it has already been determined (Mobley v. Cureton, 2 S. C. 140,) that the plaintiff was barred by his laches of his remedy in equity; or, in other words, that the defendants have set up and established a good equitable defense to the plaintiff's claim. Biggers Mobley, in this case mentioned, brought his equity suit on the same cause of action as that upon which the present action is based, and the Court refused him relief and dismissed his bill, and the present plaintiff, as his administrator, must be held bound by such judgment and estopped thereby in this action.

Moore, for J. S. Cureton:

This judgment in the case referred to defendants have set up in bar of the present action; and an issue at law thereupon having been joined by the demurrers of the plaintiffs, the Circuit Court, by overruling the demurrers, have in effect decided, and

properly too, that such defense is sufficient to bar this action. Has the Circuit Court erred or not? We think not. Law and equity has been blended. This action has been brought under the Code of Procedure. The defendants, under the law, had a right to set up any equitable defense to the plaintiff's demand, and they have set up the identical equitable defense to this action which the

*62

Court has decided *to be a good one in a Court of equity. If this court has any peculiar characteristics, as between law and equity, as marked out by the English practice, it is a Court of equity.—Till. & Sherman, 320. Its purpose (the provision in the Code blending law and equity) and effect is to accomplish a perfect fusion of law and equity, so that every action is as much equitable as a legal one. This is the purport of the latest decisions, although they do not use precisely this language.—N. Y. Central Ins. Co. v. National Prot. Ins. Co., 14 N. Y., 85, 91.

The same rules, so far as possible, are to be applied to all classes of actions, and each party is entitled to all the relief in one action that he might have had under the former system, by proceeding both at law and in equity, and (if his claim is a legal one) to no more than he would have been allowed to retain if he had sued at law and his adversary had brought a counter action in equity.—Barlow v. Scott, 24 N. Y., 40.

Till. & Sherman, 684: "The distinction between legal and equitable actions being abolished, such judgment is to be granted, in every species of action, as taking into consideration all the principles of law and equity applicable to the case, may be proper. The same relief is not now to be granted through the medium of two actions, one at law and one in equity, in relation to the same matter; and whether the action is one formerly known as legal or as equitable, the same rules are to be applied in all cases, and relief is to be administered without any regard to such distinctions. As it was one of the chief purposes of equity to modify and control the operations of the common law and deprive men of privileges which that law conferred upon them against conscience, it follows that wherever the principles of law and of equity come into collision, the former are to be regarded as abolished by the Code. In effect, we think that every action is now to be regarded as an equitable one, and every Court of record as at all times and for all purposes a Court of equity."—N. Y. Central Ins. Co. v. National Prot. Ins. Co., 14 N. Y., 85; Crary v. Goodman, 12 N. Y., (2 Kern.,) 265; Dobson v. Pearce, idem, 156; 1 Abb., 97; Foot v. Sprague, 12 How., 355; Despard v. Walbridge, 15 N. Y., 374.

We therefore conclude: First, that the plaintiff has delayed too long in taking his appeal; and, secondly, if he be yet entitled to be heard on his appeal from the judgment which has been entered in the case, that the presiding Judge was correct in overruling

*63

the *demurrers, and that the effect of overruling the demurrers was to pronounce the defense made by the defendants as good and sufficient, and that the plaintiff is not entitled to recover his alleged demand.

The plaintiff demurred to the answer of the defendant J. S. Cureton because of the alleged insufficiency of each and every clause thereof (except the eighth) to constitute a defense.

This demurrer was overruled by the Court, June Term, 1872. Whereupon, August 20, 1872, the defendant J. S. Cureton entered a judgment dismissing the complaint.

It is denied by the appellant that this defendant had the right to enter such a judgment.

If he had, plaintiff cannot now appeal from the judgment; it is too late.—Act of 1873, amending Code. § 18, 500.

I. Was the judgment regular and proper?

1. It was.

"Where the matter in the answer admitted by the demurrer is sufficient in itself as a bar to the action, the proper course, on the demurrer being overruled, will be to enter a judgment dismissing the complaint, though there be issues of fact joined."—2 Whitaker's Practice, 195; Wightman v. Shanklin, 18 How., 79.

2. If the order overruling the demurrer was ever erroneous, still the judgment into which the order was merged could alone have been appealed from; but, as we have seen from that judgment, (three months having elapsed since the Act limiting the right of appeal,) no appeal can now be allowed.

II. The order of Judge Mackey dismissing the appeal amounted to no more than a recognition of the correctness of defendant's judgment entered to the same effect, and although, perhaps, unnecessary, was not erroneous.

March 10, 1875. The opinion of the Court was delivered by

WILLARD, A. J. This action is brought by the executor of B. Mobley on a sealed note given by T. K. Cureton, deceased, to plaintiff's testator, against certain of the distributees of the estate of T. K. Cureton, as his heirs with assets descended.

Several answers were interposed by the parties defendant, and demurrers filed to certain portions of their answers. The Circuit Court overruled these demurrers and gave judgment dismissing the complaint.

*64

*A preliminary objection is interposed to the appeal on the ground that it was not taken within three months after the entry of the judgment appealed from.

The facts bearing on this objection are,

briefly, as follows: At the hearing at June Term, 1872, an order was endorsed by the Circuit Judge upon the record of the demurrers as follows: "Demurrer overruled."

No other order appears to have been made by the Circuit Judge until July 10th, 1874. Without other authority than the order contained in the memorandum just recited, the defendants entered up a judgment dismissing the complaint with costs. The Clerk was proceeding to adjust the costs, when, on objection on the part of the plaintiff, he refused to proceed further, and made an order as follows: "On hearing the following protest, and deeming the grounds therein stated to be sufficient, it is adjudged that the motion for adjustment of costs be denied, and that the judgment for costs filed 20th August, 1872, signed by me in blank, severally, in favor of the defendants J. S. Cureton, F. D. Green and wife, and J. M. Green and wife, in the absence and without notice to counsel for the plaintiff, be, and the said judgments are hereby, vacated."

This order was signed by the Clerk, and dated August 29, 1872. No further action was taken until July 10, 1874, when the following order was made by the Circuit Judge: "The demurrers to the answers in this case having been overruled by his Honor Judge Thomas, it is ordered that the complaint herein be dismissed."

The appeal was taken in due time, so far as the last named order is concerned; but it is contended that the order overruling the demurrers, having been made more than three months prior to the appeal, cannot be heard.

The order for judgment made July 10, 1874, must be regarded as equivalent to a final judgment based on the order overruling the demurrers. The order overruling the demurrers was necessarily interlocutory, as it did not follow as a necessity from it that the complaint should be dismissed.

The judgment in form entered by the Clerk without the direction of the Court was invalid.—Code, § 302. The order of the Clerk assuming to vacate that judgment need not be considered; for no powers of that nature can be exercised by the Clerk, but by the Court alone.

*65

*The appeal having been duly taken from the final judgment, all interlocutory orders necessarily affecting the judgment were open for revisal.—Code, § 11, Sub. 1, as amended, 15 Stat., 495.

The objection to the regularity of the appeal is not well taken.

The first objection raised by the demurrer relates to paragraph 1 of the answers of J. S. Cureton.

This paragraph denies that the defendant holds as heirs at law, on the ground that actual partition had been made among the distributees of T. K. Cureton, and that, for the purpose of such partition, the allotment was made according to prices or value fixed on the land by Commissioners appointed by the Court, and that the defendants, then infants, took the premises held by them at prices so fixed.

The fact that defendant holds under title derived through partition, as it regards the particular tract assigned to him, does not discharge his liability for the debts of his ancestor, imposed by the fact of assets of that ancestor descended to him. This point was ruled by this Court in Barber v. McAliley [4 S. C. 49].

But although this averment is not good as a plea in bar to the whole of plaintiff's demand, it is ground in equity for relief as against the other defendants,—at least if the share of this defendant being in excess of his proportion as distributee, was compensated for out of his individual estate.

The averments of the answer are somewhat indefinite and uncertain as it regards the statement of their ground of equitable interference; but the remedy in such case is, under § 183, to obtain an order that the pleading be made certain and definite, and not a demurrer. It follows that the proper consequence of overruling the demurrer, so far as this clause was concerned, was not a dismissal of the complaint, but its retention for the enforcement of plaintiff's legal demand and the consideration of any equities that might be shown to have arisen out of such advance by the defendant interposing the answer.

The fourth paragraph, which was also demurred to, alleged that the personal estate left by the said T. K. Cureton was very large, and far more than sufficient for the payment of all just debts against him. Considering this paragraph as intended as in itself a bar to the plaintiff's action, it was insufficient. It must be concluded that the order overruling the demurrers treated this paragraph as setting up a defense in bar, and, as such,

*66

affirming the sufficiency in point *of law of such matter in bar. Such being the case, the order overruling the demurrer to this paragraph is erroneous. It was held in Vernon v. Valk (2 Hill Eq. 257,) that the heir cannot plead that the executor has assets. For the same reason he cannot plead that personal assets originally sufficient had been wasted in the hands of the personal representative.

The demurrer to the fifth and sixth paragraphs was properly overruled.

The fifth paragraph pleads payment. Although it unnecessarily assumes to set forth the nature of the proof by which the defendant hopes to establish the fact of payment, yet the facts and circumstances are not sufficiently detailed to enable the Court to determine on the face of the pleading whether an inference of payment properly arises from them.

The same observation is applicable to the sixth paragraph. Gross laches is alleged against the plaintiff. The nature of that laches is not disclosed, and the Court cannot determine on the face of the pleading whether that laches is of such a nature as to amount to a wrong as it regards any duty that the plaintiff may have owed to the defendant. It is obvious, that, as it regards these paragraphs, the order overruling the demurrer should have been followed by proper orders for the trial of the issues of fact raised by these paragraphs.

The defendants F. D. Green and wife answered, and portions of their answer were affected by the demurrer.

Paragraph 1st pleads in bar a recovery had in the same cause of action by Biggers Mobley, the plaintiff's testator, against the personal representatives of T. K. Cureton. Judgment recovered without satisfaction in an action against the personal representatives is not a bar to an action against the heir for the debt of his ancestor by reason of assets descended.

This would follow from what was held in Bird v. Houze, Speers Eq., 250. The right of the creditor to proceed against the heir after judgment against the personal representative is there fully recognized. The effect of the ruling upon the demurrer was to sustain the validity of their obligation as a bar to the plaintiff's demand, and in this respect it was erroneous.

Paragraph 2 alleges gross laches, but the matter of inducement as laid, points to the fact that the plaintiff's testator had looked to the administrator for payment as the ground of affirming laches.

*67

*This does not constitute a defense, and the demurrer to this paragraph should have been sustained.

Paragraph 4 pleads discharge in bankruptcy under proceedings instituted subsequent to the indebtedness alleged in the complaint and the sale of the lands descended under such proceedings.

Ground existed for overruling the demurrer to this clause. It does not appear what interest in the lands descended was treated as assets of the husband's estate, or what became of the wife's interest, if any such interest existed at the time of bankruptcy, so that the rights of the parties cannot be determined on the face of the pleading. Under any aspect, it is presumable that the facts and circumstances relating to the proceedings in bankruptcy are a material part of the defendant's case, either as bearing on their legal or equitable rights.

Paragraph 5, as it stands, contains a good plea of a former action on the same cause of action between the same parties and final judgment denying the validity of the plaintiff's demand. This plea, as demurred to, must be tested by the matter set forth in the pleading, and recourse cannot be had to the record in the case recited therein to modify or affect the terms of the plea. The inspection of the record is matter of proof under an issue joined on the truth of the plea, and cannot be considered upon demurrer.

The answers of J. M. Green and wife were demurred to likewise; but as all the grounds of demurrer taken thereto are already disposed of in relation to the answers of F. D. Green and wife, it will not be necessary to make further reference to them.

In each of the three answers already considered there was one or more defenses which, if established by proof, would constitute a complete bar to the plaintiff's demand. Demurrers being interposed to these pleas, and these demurrers being overruled, a question arises whether a judgment dismissing the complaint was the proper proceeding on the part of the Court. This raises the question of the effect of a demurrer to an answer under the Code of Procedure.

Where an answer sets forth matter amounting to a counter claim, the plaintiff is bound either to demur or reply, (Code, § 176,) and, failing to do so, the defendant is entitled to judgment as it regards the matter of such counter claim, as upon an admission of the truth of its allegations.—§ 191. A counter claim relates to matter that might be the subject of an action and give rise to a judgment independently of the matters set forth in the

*68

complaint to which it is *interposed. It is rather in the nature of a cross action than of a defense, and may be pleaded conjointly with as many defenses to the complaint as the defendant may have to offer.

Matters set forth by way of defense, whether of a legal or equitable nature, in an answer, and not amounting to a counter claim, are, by the Code, "deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require."—§ 191.

The plaintiff, however, may demur or reply to any matter set forth in the answer. This is conferred as a privilege and not as a necessity of pleading. On the other hand, the Court may, if justice requires it, make an order requiring the plaintiff to reply to any new matter set up in the answer.—§ 176.

As the effect of a demurrer is not specifically defined by the Code, it must be gathered inferentially from it. That the Code intended materially to change the nature and effect of pleading, is clearly evinced by Section 163, which says: "All the forms of pleading heretofore existing are abolished, and hereafter the forms of pleading in civil actions in Courts of record and the rules by which the sufficiency of the pleading is to be determined are those prescribed by this Code of Procedure."

Abolishing the forms of pleading necessarily abolishes the technical incidents depending wholly on such forms. But the Code does not in terms or intention abolish the substantial characteristics of the several pleadings that are retained either in name or by their equivalents under other names. Where an incident of pleading arises out of its substantial nature and not merely from its technical form, it cannot be considered as affected by this general provision of the Code.

The clause of Section 191, putting the allegations of the answer as affecting defenses other than counter claims at issue, without regard to subsequent pleading on the part of the plaintiff, is absolute, and nowhere in terms conditioned on the plaintiff's abstaining from interposing a demurrer as authorized in Section 176. The two last mentioned Sections must be read together. If consistent, there is no ground for qualifying the terms of Section 191 so as to exclude the case of matters demurred to. Such an inconsistency cannot arise unless there is something in the substantial nature of a demurrer that renders it inconsistent with its use that matters demurred to should, after the demurrer is overruled, be regarded as subject to traverse.

*69

*A demurrer does not necessarily test the rights of the parties in suit. It questions alone the mode of statement of them in the pleadings demurred to, and tests the rights involved only so far as they are correctly stated in the pleading. If the defendant interposes a defense which, in the judgment of the plaintiff, is both insufficient in law and false in fact, it is perfectly consistent that he should question its legal character by demurrer in order to avoid the expense and delay attending the trial of an immaterial issue, and that, if in the Court its sufficiency in point of law should be established, he should be in a position to deny the truth of the matter alleged. It may be concluded that there is nothing in the substantial nature of a demurrer that is inconsistent with a subsequent issue of fact upon the very matter to which it relates. As the technical characteristics of a demurrer at common law, as dependent upon form, is inapplicable to pleadings under the Code, the rules of the common law practice determining the character of the judgment that should follow the overruling of a demurrer need not be considered, for they cannot operate on the text of the Code so as to give rise to a necessity for modifying Section 191 on the principles of construction.

The judgment should be set aside and the order overruling the demurrer modified to conform to the foregoing conclusions.

MOSES, C. J., and WRIGHT, A. J., concurred.

6 S. C. 69

CHARLES v. JACOBS.

(Columbia. Nov. Term, 1874.)

[*Evidence* ⇐158.]

Where proof that J. C. was the agent of the plaintiff is material to the issue, and such agency is alleged to have been created by a power of attorney, proof of the fact cannot be shown by parol without proof of the loss or destruction of the power of attorney.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 475, 516; Dec. Dig. ⇐158.]

[*Appeal and Error* ⇐560.]

A case for the Supreme Court should state enough of the facts to show the practical bearing thereon of the questions of law to be discussed and decided.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2490–2493; Dec. Dig. ⇐560.]

[*Evidence* ⇐271.]

Where one of the questions in the case was whether J. C. was the agent of the plaintiff, with authority to receive payment of the demand sued on, and the defendant proved that another claim of the plaintiff had been paid to J. C.: *Held*, That plaintiff's declaration, when he first heard of the payment, that J. C. was not his agent, was admissible as evidence for the plaintiff.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1069; Dec. Dig. ⇐271.]

[*Executors and Administrators* ⇐433.]

It is no defense in an action against an administrator de bonis non that the first administrator had wasted assets of the intestate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1695; Dec. Dig. ⇐433.]

[*Appeal and Error* ⇐690.]

[A judgment will not be reversed for the exclusion of evidence, unless the case stated upon the record shows the relevancy and materiality of the evidence excluded.]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2902; Dec. Dig. ⇐690.]

*70

*Before Cooke, J., at Greenville, September, 1874.

This was an action by W. B. Charles, trustee, against R. H. Jacobs, administrator. The case, as stated in the brief, is as follows:

"This was a complaint to renew a judgment held by the plaintiff above named, as trustee for his mother, Martha A. Charles, and her children, which judgment was originally a confession to William Jacobs, the maternal grandfather of the plaintiff, by one Edward O. Jacobs. The judgment was turned over to plaintiff as a part of a legacy to him, in trust as aforesaid, under his said grandfather's will. Edward O. Jacobs died in 1861, the judgment having been confessed September 23, 1859. One John Charles, the father of plaintiff, became administrator of the estate of said Edward O. Jacobs, and continued as such some eleven years, without any attempt to enforce the judgment, when his letters were revoked and the defendant became administrator de bonis non of said Edward O.'s estate, and this action was commenced to renew the judgment.

"In 1862 the defendant, who held a tract of land bound by the judgment, gave to said John Charles, who represented himself as agent of the plaintiff, money to apply to said judgment, and in 1863 gave him an additional sum, sufficient to satisfy the same. It appears, however, that said John Charles never applied the money to the judgment, but appropriated it to his own uses.

"On the trial, one question was as to the agency of said John Charles. To disprove such agency, the plaintiff introduced as a witness one Thomas Goldsmith to prove that he, Goldsmith, was the agent of plaintiff, and had during the war a written power of attorney to act for him. The defendant's attorney objected to the introduction of any testimony concerning the power of attorney without the production of the same or proof of its loss. The presiding Judge overruled the objection and admitted the evidence. The witness, however, while he claimed to have the power of attorney, admitted that he never had acted as such agent—never had collected or paid out any money for plaintiff.

"John W. Stokes, counsel for plaintiff, and a witness for defendant, testified that during the war he paid John Charles five hundred dollars on a note belonging to the trust estate, and that said John Charles receipted him as agent for W. B. Charles, trustee. On the cross-examination he testified that W. B.

*71

Charles remonstrated with *him afterwards for so paying, and said that John Charles was not his agent. Defendant's counsel objected to this evidence as hearsay, and the objection was overruled on the ground that it was part of the res gestæ.

"The defendant also offered to prove by S. J. Douthit, Probate Judge, that the said John Charles, as administrator of Edward O. Jacobs' estate, had received and misapplied a large amount of money, more than enough to have paid the judgment, and amounting to some twenty-three thousand dollars; also that the said John Charles had received money in his office as agent of the trust estate. This testimony was rejected as irrelevant.

"The verdict was for the plaintiff for $4,124.97.

"The defendant moved for a new trial, because of the rulings already stated as objected to, and also on the ground of after discovered evidence.

"The motion was refused without argument."

The defendant appealed on the grounds:

1. That it is respectfully submitted that His Honor the presiding Judge erred in admitting testimony concerning an instrument in writing without the production of the same or proof of its loss.

2. That it is respectfully submitted that His Honor the presiding Judge erred in allowing the introduction of the declarations of the plaintiff as evidence in his favor, the same not being, as is submitted, part of the res gestæ.

3. That His Honor erred in rejecting the evidence of S. J. Douthit, Probate Judge, as to the amount of money received by John Charles, former administrator of the estate of E. O. Jacobs, deceased, against whom the judgment originally stood, and as to the said John Charles having received money in the office of the Judge of Probate as agent of the plaintiff, the said evidence being clearly relevant to the issue before the Court.

4. Because it is submitted that a new trial should have been granted for the reasons above stated, and also because of the discovery of new evidence.

5. Because the verdict in the case was contrary to law and evidence.

[For prior opinion, see Charles v. Jacobs, 5 S. C. 348. For subsequent opinion, see Id., 9 S. C. 295; Goldsmith v. Jacobs, 14 S. C. 624.]

Moore, Cothran & Wells, for appellant.
Sullivan & Stokes, Earle, contra.

*72

*March 20, 1875. The opinion of the Court was delivered by

WILLARD, A. J. The first exception is presented in the brief as follows: "On the trial, one question was as to the agency of said John Charles. To disprove such agency, the plaintiff introduced as a witness one Thomas Goldsmith to prove that he, Goldsmith, was the agent of plaintiff, and had during the war a written power of attorney to act for him. The defendant's attorney objected to the introduction of any testimony concerning the power of attorney without the production of the same or proof of its loss. The presiding Judge overruled the objection and admitted the evidence. The witness, however, while he claimed to have the power of attorney, admitted that he never had acted as such agent,—never had collected or paid out any money for plaintiff."

If the proof of the existence and execution of a power of attorney by the plaintiff was material to the issue, it is evident that proof of the fact without the production of the instrument or accounting for its non-production by proof of destruction or loss was inadmissible.

The case does not present enough of the nature of the proofs submitted to enable us to determine as to the materiality of the testimony in relation to the power of attorney. The defendant was endeavoring to prove payment of the judgment on which the action was founded by establishing two facts: first, that J. Charles was authorized to receive payment of that judgment from the defendant; and, second, that payment to the full amount of such judgment was made to such agent. The fact that Goldsmith was an agent

of the plaintiff, either general or special, at the time of the alleged agency of J. Charles, is not in itself inconsistent with the existence of such an agency in Charles. Still it is possible that the evidence in the case might have created such an inconsistency between them that proof of agency in Goldsmith was in the minds of the jury fully equivalent to a denial of the fact of agency in J. Charles. The testimony is not before us, either in detail or on its character and bearing. We must assume its materiality for the single fact that it was offered by the plaintiff and admitted by the Judge without objection as to the materiality of the facts attempted to be proved. It is possible that our conclusions as to the materiality of the proof may not conform to the facts as they appeared upon the trial; if so, the result is due to the

*73

manner in which it is presented *in the brief. It may not be amiss to say that, in view of the expense and delay attending an appeal to the Supreme Court, it is proper that the questions to be discussed before this Court should be raised with precision and care, and that all the necessary elements of the question should be brought to view clearly and succinctly. This Court does not sit to hear the discussion of abstract propositions of law, but only of such as have a practical bearing on the matters in controversy, and therefore the bearing of the questions of law presented on the issues should be made clearly to appear and should not be left to surmise.

The concluding statement of this part of the brief, that the witness admitted "that he never had acted as such agent,—never had collected or paid out any money for plaintiff," does not affect the question of materiality. As we cannot know, from the case before us, under what circumstances the proof of the fact of a power of attorney became material to the case, we are not in a position to hold that the fact that the agent did not act as such destroyed the materiality or value of such proof.

The second exception is not well taken. A witness for defendant testified to payments made to J. Charles as agent for the plaintiff. On his cross-examination the witness stated that plaintiff afterwards remonstrated with him for such payment, stating that J. Charles was not his agent. The object of the testimony must be assumed to have been to form a link in a chain of proof authorizing the conclusion that J. Charles acted as agent under the authority and with the consent, either expressed or implied, of plaintiff.

Assuming that, independently of the statement of the plaintiff as to the want of authority on the part of J. Charles, the jury were at liberty to draw the conclusion that plaintiff consented to this exercise of authority on the part of J. Charles, and the materiality of plaintiff's statement at once appears. If, on the first information of the fact, he repudiated the authority of J. Charles, such fact would tend to do away with any inferences that might have been drawn from that act upon the assumption that the plaintiff remained silent after notice of it. The testimony of the witness as to what plaintiff said was not hearsay but direct testimony. It was the best possible proof of the state of mind and action of the plaintiff as it regards the claim of J. Charles to authority as an agent. The declaration of the plaintiff in that case was equivalent to an act disapproving of the conduct of J. Charles, and as such was proved directly by a witness of such act.

*74

*The next point made is that evidence was improperly rejected; that J. Charles, as administrator of E. O. Jacobs' estate, had received and misapplied a large amount of money—more than enough to have paid the judgment. The default or devastavit of the first administrator is no defense to an unpaid demand against the estate in the hands of an administrator be bonis non.

The last objection was that evidence was rejected; that J. Charles had received money in the office of the Judge of Probate as agent of the trust estate. The only importance of the proof thus offered, as it stands, is to show that J. Charles claimed to be the agent of plaintiff and acted as such.

It is not easy to see on what ground this evidence was rejected, when evidence bearing on the same proposition had been previously admitted, unless, in the judgment of the Court, the defendant had failed to connect these assertions of authority on the part of J. Charles with the plaintiff, so as to affect him by them, and for that reason refused to allow the case to be strengthened as it regards the conduct and claims of J. Charles. It will not be important to consider whether we are bound to draw such an inference in support of the ruling of the Circuit Judge, as there must be a new trial on the first exception; and so far as the last exception involves anything that may have to be disposed of on the new trial, it is, substantially, considered in what has been already said.

There should be a new trial.

MOSES, C. J., and WRIGHT, A. J., concurred.

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6 S. C. 74

HUNTER v. WARDLAW & EDWARDS.

(Columbia. Nov. Term, 1874.)

[*Chattel Mortgages* ⇨265.]

A gave B an agricultural lien for $175, with a mortgage of chattels as further security. From sales of the crop and some of the chattels A paid B $192.25, but gave no directions as to the application of the money. B.'s whole ac-

count against A amounted to $241.52: *Held*, That the mortgage was satisfied.

[Ed. Note.—Cited in Reese v. Lyon, 20 S. C. 22; Ellis v. Mason, 32 S. C. 280, 10 S. E. 1069; Barfield v. Coker & Co., 73 S. C. 190, 53 S. E. 170.

For other cases, see Chattel Mortgages, Cent. Dig. § 547; Dec. Dig. ⟸265.]

Before Cooke, J., at Abbeville, April, 1874.

Action by Samuel Hunter, appellant, against Wardlaw & Edwards, respondents, to recover the possession of a mare and a mule.

*75

*On the 8th of March, 1872, the appellant gave to the respondent an agricultural lien, under the Act, for an amount not to exceed $175, with a mortgage of the mare and mule and other chattels as further security. From sales of the crop and also of a yoke of oxen and a cart included in the mortgage, appellant paid respondents $192.25, but gave no direction as to the application of the money. Respondents' whole account against appellant, commencing in January and ending 4th of November, 1872, amounted to $241.52. The balance due was $48.57, and for this balance respondents, in December, 1873, seized the mare and mule under the mortgage, and thereupon this action was commenced.

The appellant contended that the mortgage was satisfied by the payments made, but His Honor overruled the defense and instructed the jury to find for the respondents, which they did.

Hunter appealed on several grounds—the first of which was that the mortgage was satisfied.

Noble, for appellant.

Cothran, contra.

January 20, 1875. The opinion of the Court was delivered by

WRIGHT, A. J. The appellant executed to the respondent an instrument in writing, called an agricultural lien, on all his crop to be grown during the year 1872; and, to further secure respondents, this instrument reads as follows: "I do hereby mortgage to said Wardlaw & Edwards all my horses, mules and other stock, to wit: One bay mare, (Lucy,) one bay mule, (Jim,) two milk cows, (one white and one red,) one yoke of oxen, (Buck and Bill.)"

The amount advanced to appellant was one hundred and seventy-five dollars ($175.)

The appellant paid at various times during the year 1872 (the year for which the lien was given) one hundred and ninety-two dollars and ninety-five cents ($192.95); and this amount of money was realized from the sale of the crop raised in the same year, and also by the sale of beeves and the yoke of oxen mentioned in the instrument of writing called the agricultural lien. Therefore the payment of the debt for which the lien was given was satisfied, and His Honor the presiding Judge should have so held.

The first ground of appeal fully disposes of this case.

The motion is granted, and a new trial ordered.

MOSES, C. J., and WILLARD, A. J., concurred.

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6 S. C. *76

*BOYKIN v. WATTS.

(Columbia. Nov. Term, 1874.)

[*Witnesses* ⟸83.]

To render the evidence of a plaintiff incompetent under the proviso to Section 415 of the Code of Procedure, it is not necessary that the action should be against the defendant as executor. It is enough that it appears from the pleadings that he defends for the benefit of the estate of his testator, whose declarations the plaintiff is offered as a witness to prove.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 217–220, 227–238; Dec. Dig. ⟸83.]

[*Witnesses* ⟸160.]

The declarations of a deceased person in reference to a transaction between him and a party to the action cannot be proved by the party himself, although such declarations were made, not to the witness, but to some one else in his presence.

[Ed. Note.—Cited in Robinson v. Robinson, 20 S. C. 572; Griffin v. Earle, 34 S. C. 252, 13 S. E. 473.

For other cases, see Witnesses, Cent. Dig. § 696; Dec. Dig. ⟸160.]

[*Trial* ⟸159.]

A non-suit may be ordered wherever there is a total failure of proof, or the evidence is insufficient to sustain the plaintiff's case.

[Ed. Note.—Cited in Carter v. Columbia & G. R. R. Co., 19 S. C. 24, 45 Am. Rep. 754; Carrier & Harris v. Dorrance, 19 S. C. 32; Davis v. Columbia & G. R. Co., 21 S. C. 102; Bridger v. Asheville & S. R. Co., 25 S. C. 26.

For other cases, see Trial, Cent. Dig. § 360; Dec. Dig. ⟸159.]

Before Carpenter, J., at Edgefield, June Term, 1874.

This was an action by Isabella A. Boykin and Elizabeth Brown against John B. Watts.

The complaint alleged that the plaintiffs were possessed of two single bills drawn by B. W. Ball, payable to Richard Watts, deceased, of the value of $666.66 each, which the payee in his lifetime had given to the plaintiffs; and that the defendant wrongfully took said bills from their possession and unjustly detains the same, &c.; wherefore they demanded judgment for the recovery of the possession of said bills, or for $1,333.32, the value thereof, and interest.

The answer denied the possession of the plaintiffs and the alleged gift, and alleged that the bills were in possession of the said Richard Watts and his property at the time of his death, and that defendant came into possession of them as the qualified executor of his will, and as such holds them.

The plaintiffs, to maintain the issues upon

their part, and to establish their claim as a death bed gift, offered in evidence the written testimony of Mrs. Isabella A. Boykin, taken before the Clerk of the Court, in which she testified that Richard Watts died in the year 1870, on the 30th of May; that she and Mrs. Brown, the co-plaintiff, went, at his request, to attend on him in the second week of February, and attended on him from that time until his death; that Richard Watts was the father-in-law of witness and father of Mrs. Brown; that he, on the 9th of May, gave witness and Mrs. Brown two notes on B. W. Ball, in the presence of the defendant and his wife and Mrs. Harriet Watts. Richard Watts said to witness and Mrs. Brown: "I will give you two notes on B. W. Ball." He then asked defendant to witness the gift, saying that he wished the defendant to understand that the gift of the notes were over

*77

and above his will, for *their kindness and attention. The defendant then said to his father: "I understand." Richard Watts then said to Mrs. Harriet Watts: "I give Bella and Bess the two notes on Ball, over and above my will," and he added would that he had five times as much to give us for what we had done for him. She then rose up, repeated his words, and said she understood him. This was in his last illness, and he had remarked "all of my family are present." Some days after this Richard Watts called Mrs. Harriet Watts, Miss Lou. Watts and Mrs. Boazman and said to them that he had given to witness and Mrs. Brown the two notes on B. W. Ball. Mrs. Boazman got up to leave; Major Watts asked her to sit down —that it was she he wished to mention the matter to. Major Watts said then to her: "The two notes which I held on B. W. Ball I have given to Bess and Bella." He said he wanted her to know that these notes were witness's and Mrs. Brown's and did not belong to his estate—it was over and above his will—and that he had thought of it for a long time. The notes were left by witness and Mrs. Brown in a leather pocketbook in the secretary, of which they kept the keys till a few days of his death. After the gift, Major Watts saw us frequently with the pocketbook. After his death, while the notes were being taken out, Mrs. Brown demanded the two notes, and said they were hers and mine. Mrs. Brown took up one of these notes and claimed them. J. B. Watts, the defendant, said he admitted the gift made by his father, but she would have a lively time getting them. The amount of these notes were $666.66 each. The witness being cross examined, testified, among other things, that when Mrs. Boazman got up to leave, Major Watts said: "No, I want to state to you I have given to Bella and Bess the two notes I held on B. W. Ball, over and above my will."

The defendant objected to the testimony as to everything said by Richard Watts, the donor, and the Court held that it was inadmissible under Section 415 of the Code of Procedure. The plaintiffs excepted.

The plaintiffs then introduced in evidence the testimony of Mrs. Elizabeth Brown and Miss Lou. Watts, taken by commission.

Mrs. Brown testified that "Richard Watts was in his last illness, and expected to die. He assembled the members of his family, Isabella Boykin, myself and brother John B. Watts, around his bed, in the presence of Mrs. Matilda Boazman and Miss Lou. Watts, and said that he wished to give Isabella and

*78

myself, for our services, *over and above what was mentioned in his will, the two notes he held on B. W. Ball." The defendant objected to the testimony as to anything said by Richard Watts, the donor. The Court sustained the objection, and the plaintiffs excepted.

Miss Lou. Watts testified as follows: "I am acquainted with the plaintiffs and defendant in this case. I was acquainted with Major Richard Watts in his lifetime. He was my brother. I was present a short time previous to the decease of Major Richard Watts, at a conversation had between Major Watts and the plaintiffs, in relation to the gift to them of certain notes or single bills. He said the girls, Isabella and Bess, had done a great deal for him, and he wished them, at his death, to have two notes he held on B. W. Ball for about five hundred dollars each. The defendant, J. B. Watts, was present, and his father told him he wished the girls to have the two notes. I do not know in what manner the delivery of said notes or single bills was made, whether by the delivery of said notes themselves or the keys of the box or desk in which the said notes or single bills were."

Cross-examined: "I am seventy years old. I was present and heard brother Richard Watts call John B. Watts in the house and tell him that the girls, Bess and Bella, were to have the two notes on B. W. Ball."

The plaintiffs having no other witness, the defendant moved the Court for a nonsuit, which, after argument of counsel, was granted.

The plaintiffs appealed on the grounds:

1. It is respectfully submitted that His Honor the Circuit Judge erred in ruling that the testimony of Isabella A. Boykin and Elizabeth Brown, as to anything said by Richard Watts, the donor, is not admissible in evidence:

First. Because the action is not against the defendant as executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor, but in his individual capacity as a wrong-doer.

Second. Because the parties to this action bear the same relation to the donor, Richard Watts, deceased; and the parties

plaintiff are no more restricted in their testimony under Section 415 of the Code of Procedure than is the party defendant.

Third. Because the testimony stating the conversation had between the donor and defendant is admissible, and should have been received in evidence, it not being a conversation between donor and witnesses.

*79

*Fourth. Because the testimony in regard to the statements made by the donor to Mrs. Boazman and Mrs. Harriet Watts is admissible and should have been received in evidence, as they were not made to the witnesses, and therefore are not excluded by the terms of the proviso or exception in Section 415 of the Code of Procedure.

2. It is respectfully submitted that His Honor the Circuit Judge erred in ruling, that the evidence is not sufficient to be submitted to the jury for their consideration, because the admission by the defendant of the gift, as Mrs. Boykin testified, and the testimony of Miss Lou. Watts was sufficient evidence to go to the jury.

3. It is respectfully submitted that His Honor erred in granting an order of non-suit and overruling the motion for new trial, because it was contrary to law and the evidence.

Magrath & Abney, for appellants:

1. The policy of the law prior to the adoption of the Code of Procedure was that no witness should be excluded on account of interest in the event of the action.—A. A., 1866. 13 Stat., 377. The statute declaring that policy is still of force.—Rev. Stat., 514, § 17. The Code of Procedure recognizes and asserts the same policy.—§§ 414, 415.

2. The proviso contained in Section 415 is restrictive of this general policy, and restrictive of the general law declared by Section 414, and it must be strictly construed.—Guerry v. Kinsler, S. C., 426.

3. The action is not against the estate of Richard Watts, and the defendant has never been made a party in a representative capacity; but he is a party to the action in his individual capacity.—See § 415, proviso.

4. If the defendant could testify in his own behalf, under the subjunctive clause of the proviso, then the plaintiffs certainly can in their behalf. If the defendant can in any way be considered in a representative capacity as to the two notes, then the plaintiffs are likewise. While he may be executor, they are donees or assignees.—See § 415, proviso, subjunctive clause; Lee v. Dill, 41 N. Y., 619 N.; Mattoon v. Young, 45 N. Y., 345.

5. The proviso excludes testimony as to the "transaction or communication" between witness and deceased only.—See § 415, proviso. "The exception does not exclude a party from testifying as to the particulars of a transac-

*80

tion which took place between the *deceased and a third person in the presence of the witness."—33 How. Pr. Rep., 347. "Or from testifying with regard to a conversation heard by him between the deceased and a third party."—Simmons v. Sisson, 26 N. Y., 265. Therefore the testimony stating the conversation had between deceased and defendant and deceased and Mrs. Boazman and Mrs. Harriet Watts is admissible in evidence.

6. This proviso creates an exception to the general law. "The Legislature having undertaken to specify the exceptions, the Courts cannot allow any that are not specified by the Legislature."—Lobdell v. Lobdell, 33 How. Pr. Rep., 372. "The Section is in restriction of a general right, and we are not at liberty to extend it beyond its clearly expressed design."—Guerry v. Kinsler, 3 S. C., 426.

7. The defendant admitted the gift, and the testimony of Miss Lou. Watts shows that there was an intention to give, and her testimony also shows the consideration; and plaintiffs left the notes in the secretary of which they had the keys. This was sufficient evidence to warrant a verdict for plaintiffs.—Essweinn v. Seigling, 2 Hill Ch., 601; Reid v. Colcock, 7 N. & McC., 592; Fowler v. Stuart, 1 McC., 504; Blake v. Jones, Bail. Eq., 141.

8. "The practice of ordering a non-suit in invitum for defect of evidence is to be pursued with caution. If a plaintiff has any prima facie testimony, he has a right to the verdict of a jury upon it."—Rogers v. Madden, Bail., 321.

Gary & Gary and Ball, contra:

The grounds of appeal in this case raise two questions:

1. That His Honor the presiding Judge erred in holding that Mrs. Boykin and Mrs. Brown were incompetent witnesses.

2. That the testimony of Miss Lou. Watts was insufficient to carry the case to the jury.

Mrs. Boykin and Mrs. Brown were held incompetent under Section 415 of the Code of Procedure. That Section enacts that no party to the action who has a legal or equitable interest in the event of the suit, &c., shall be examined as to any transaction or communication between the witness and a deceased person, against a party defending as executor, administrator, heir at law, &c., of such deceased person.—Code, § 415.

Here the proposition was to examine the plaintiffs as to a transaction, the gift of certain notes to them by the defendant's testa-

*81

tor. *They had an interest, to wit: Their interest grew out of an alleged conversation with a deceased party, and the defendant is resisting the claim as executor of this deceased party. There can be no doubt, then, that the ruling of His Honor was in accordance with this Section of the Code.

Had the defendant been examined, then the plaintiffs would have been competent; but

defendant has not offered himself as a witness.—§ 415, Code.

The second point of plaintiffs raises the question of the sufficiency of Miss Lou. Watts' testimony to carry the case to the jury.

Whenever it appears that the evidence is insufficient to make out the plaintiff's case, or where there is total failure of proof for that purpose, it is the duty of the judge to order a nonsuit whether the plaintiffs consent or not.—Hopkins v. De Grafenread, 2 Bay, 441; Brown v. Frost, 2 Bay, 126.

The plaintiffs' case turns upon the proof of a gift of the notes.

The evidence of Miss Lou. Watts totally fails to sustain a gift.

March 20, 1875. The opinion of the Court was delivered by

WRIGHT, A. J. It is contended, on the part of the appellants, that the objection to their competency as witnesses cannot prevail by reason of the proviso to Section 415 of the Code, because the respondent is not sued in his representative character as executor of Richard Watts, deceased.

The statute must be construed by the intent appearing on its face. Its purpose cannot be defeated by the mere form of the proceeding selected by a plaintiff, for if this were allowed its application would depend not on the real issue involved, but on the form of the action which plaintiff might please to select. If this were permitted, the operation of the proviso would be controlled by the mere will of the plaintiff. Its benefit may be claimed if the party is "prosecuting or defending the action as executor, administrator, heir at law, next of kin, assignee, legatee, &c."

Whether he is so defending must depend on the nature of the defense by which he seeks to resist the claim of the plaintiff, and must be determined by the issue raised through the pleadings.

Here the respondent (the defendant below) claims title to the notes, not in his own right,

*82

but as executor of Richard Watts, his *testator, to whom they were payable. The issue raised by the pleadings is, whether they of right belong to the plaintiffs or to the defendant as such executor? He asserts no title in himself individually, but as executor of Richard Watts, for the benefit of whose estate he is contesting the claim of the appellants. Suppose one sued who defends through a right vesting in him as an assignee. Is he deprived of the benefit, in terms extended to him by the proviso to the said Section, because the plaintiff in his complaint did not style him assignee, although his whole right and interest are derived from an assignment and depends on its validity? This ground of appeal cannot be sustained.

It is next objected that the Circuit Court erred in excluding the testimony of the appellants as to the declarations of Richard Watts to Mrs. Boazman and Mrs. Harriet Watts.

The appellants contend that as they were not made to them they are not within the terms of the said proviso. The "transaction" on which the testimony was to bear was one directly between the appellants and the deceased and the declarations made in their presence. It was in respect to the alleged gift; and though the declarations were made to third persons, they were, in the very language of the Code, "in regard to a transaction between such witnesses and a person at the time of the examination deceased."

The distinction contended for is against the obvious purpose and intent of the proviso, which is to exclude the evidence by a party interested in the event of the suit of any transaction or communication with a deceased by which such event may be determined in favor of such witness. If the testimony of the two witnesses, thus properly excluded, was considered by the appellant as important in their behalf, it is strange that they forebore to introduce Mrs. Boazman, who was present on one of the occasions referred to.

No such objection could have been urged against her competency. Nor does the brief disclose any relation to the case by Mrs. Harriet Watts, who was present at both the conversations of the deceased, which could have been successfully interposed to preclude her evidence. The testimony of Miss Lou. Watts, (who was also present at the time of the alleged declarations of the deceased to Mrs. Boazman and Mrs. Harriet Watts, and one of the persons with them called and addressed by the testator,) so far from sustaining the case made by appellants, entirely contradicts all notion of a present gift and leaves the complaint without anything to rest upon.

*83

*It is not necessary to refer to authority to show that whenever it appears that the testimony is insufficient to make out the plaintiff's case, or there is a total failure of proof to sustain it, the proper course is to order a nonsuit.

The motion is dismissed.

MOSES, C. J., and WILLARD, A. J., concurred.

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6 S. C. 83

DeSAUSSURE v. McCLENAGHAN.

(Columbia. Nov. Term, 1874.)

[*Executors and Administrators* ⇐368.]

Where, in October, 1861, an administrator, by leave of the Ordinary, sold the personal estate of his intestate on credit, secured by notes payable in one, two and three years, with interest payable annually, and in stating his account

it was assumed that the contracts were made with reference to payment in Confederate currency; that the principal and interest were paid as they became due, and that the Scaling Act applied to the case: *Held*, That the amounts should be charged and scaled not as of the date of the sale, but as of the dates when the principal and interest became due.

[Ed. Note.—Cited in Wilson v. Braddy, 16 S. C. 521.

For other cases, see Executors and Administrators, Cent. Dig. § 1509; Dec. Dig. ⟸ 368.]

[*Executors and Administrators* ⟸104.]

Where an administrator is charged with the amount of the sale bill, he should not, as a general rule, be charged with interest until the end of the year.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 423–432; Dec. Dig. ⟸104.]

[*Executors and Administrators* ⟸104.]

In stating the account of a deceased administrator on behalf of an administrator de bonis non of his intestate, interest should not be charged during the period that the estate of his intestate was unrepresented, but the liability for interest is not suspended from the time letters of administration de bonis non are sued out until action commenced against the representative of the administrator.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 428; Dec. Dig. ⟸104.]

Before Carpenter, J., at Richland, August Term, 1874.

This was an action for account brought by D. B. DeSaussure, administrator de bonis non of A. Brodie, deceased, against H. McClenaghan, administrator of C. H. Black, deceased, T. N. Gibson and R. H. Reaves, commenced September 8, 1874.

The facts were as follows:

Brodie died intestate in 1861, and on the 4th of September of that year Black sued out letters of administration on his estate. Gibson and Reaves were the sureties on his administration bond. On the 13th of September, 1861, the Ordinary of Richland District made an order for sale of the slaves,—of which the estate almost wholly consisted,—for one-sixth cash and for the balance on a "credit of one, two and three years, with interest from the day of sale, to be secured by well-endorsed notes payable at one of the

*84

*banks. Interest in all cases from date payable annually." On the 9th of October, 1861, the sale was made and it realized $6,482.81. Notes were taken according to the terms of the order, payable at the Commercial Bank, and were deposited in that bank for collection, and were all collected except three, each for $318. Black died in 1865, and in 1866 McClenaghan administered on his estate. When the plaintiff sued out letters of administration de bonis non on the estate of Brodie did not appear, but until the complaint in this action was filed no demand was made upon McClenaghan for settlement of the estate of Brodie or notice given him of the claim made by the complaint.

The case was referred to a Referee to state the account of Black as administrator of Brodie, and he made a report based upon the assumptions that the sale on the 9th of October, 1861, was made with reference to payment in Confederate currency; that the notes given for the credit portion had all been paid up except the three, each for $318, and that the Act known as the Scaling Act applied to the case, and he submitted it to the Court to decide as to the time at which the amounts charged against Black should be scaled. His Honor held, and so instructed the Referee, that the amounts should be scaled as of the date of the sale, and thereupon the Referee submitted a supplemental report in conformity with the instructions of the Court. In this report he charged interest on the cash portion of the sale from the 9th of October, 1861, the date of the sale, and on the credit portion from the same date until the 9th of October, 1864, when the last note became due, and then, adding principal and interest together, charged interest upon the aggregate from that date.

No exception was taken to the report, and it was confirmed by a decree of the Court dated the 24th of August, 1874.

The defendants appealed, and filed two exceptions to the decree, one dated August , 1874, as follows:

For that in and by said decree it is adjudged that the Referee should adjust the account of Charles H. Black, administrator of Alexander Brodie, and ascertain his liability thereon "as of the time of the making of the contracts of sale," upon which day were executed the several notes given for the credit portion of the purchase money of the negroes sold.

*85

*Whereas the said decree should have adjudged as follows:

That the liability of Charles H. Black, administrator of Alexander Brodie, should be ascertained as of the dates on which the several notes given for the payment of the purchase money of the negroes, sold by order of the Ordinary, matured; upon which several dates it is presumed that the administrator possessed himself of the funds. And that such were the proper dates for ascertaining the relative value of Confederate States notes and national currency in fixing the liability of the administrator.

And another, dated September 2, 1874, as follows:

1. For that in and by said decree the estate of Charles H. Black is charged with interest on all amounts coming into his hands from the date of the day of sale. Whereas the said decree should have adjudged as follows: That the estate of Charles H. Black, if at all liable, was only liable for interest on the several amounts received from the first day of January next after the same

came into his hands or became due and payable.

2. For that in and by said decree the estate of Charles H. Black is charged with compound interest on a portion of the sale bill. Whereas the said decree should have adjudged as follows: That the estate of Charles H. Black, if at all liable, was only liable for simple interest on the several amounts received by him from the first day of January next after the same came into his hands or became due and payable.

3. For that in and by said decree the estate of Charles H. Black is charged with interest from the ninth day of October, 1861, the day of the sale, to the twenty-fourth day of August, 1874, the date of the decree. Whereas the said decree should have adjudged as follows: That the estate of Charles H. Black was not liable for interest on the funds in his hands during the interval between the death of Charles H. Black, the first administrator, on the day of , 1865, and the eighth day of September, 1874, the date of the filing of the complaint herein, upon which day demand was first made upon the administrator of Charles H. Black for the fund, and prior to which time he had no knowledge that there was any one legally authorized to demand or receive the same.

Evans, Melton & Clark, for appellants.
Butler & DeSaussure, contra.

*86

*March 22, 1875. The opinion of the Court was delivered by

WILLARD, A. J. As the respondent has not raised the objection of the want of exceptions to the Referee's report, this Court is enabled to dispose of the questions discussed upon the hearing.

The defendant is sued as the administrator of Black, for the default of Black as administrator of Brodie, for not accounting for the estate of Brodie that came into his hands as such administrator. The sureties on Black's administration bond are made parties defendant with Black's administrator.

On the 13th of September, 1861, an order was made by the Ordinary of Richland District directing Black, as administrator, among other things, to sell a specified portion of the personal estate of Brodie "for one-sixth cash, the balance upon a credit of one, two and three years, well-endorsed notes to be given, payable at one of the banks. Interest in all cases from date, payable annually."

The sale was made accordingly. Notes were taken bearing date October 7, 1861, payable in one, two and three years, and were deposited in bank for collection. The Referee, in stating the account, charged the amount of these notes, on the assumption that all of them, except three, had been paid, both as it regards principal and interest, at the various dates at which they matured. The result of the judgment confirming the Referee's report is that Black's estate and sureties are, as to all the notes, except the three unpaid, charged on the following principles:

First, that the notes were considered as given with reference to payment in Confederate currency; second, the value of the principal of the notes is computed according to the standard of relative values set forth in what is called the Scaling Act, (14 Stat., 277,) as the relative values of Confederate notes and lawful money are stated by that Act as existing on the day of the date of the notes; third, interest on the value of the principal of the notes thus ascertained is charged as if it were cash in the hands of Black at the date of the notes.

This mode of stating the account holds Black's estate accountable for the whole amount of interest annually accruing on the notes prior to maturity in lawful money; whereas, on the assumption that the notes were originally intended to be paid in Confederate currency, and on the further as-

*87

sumption that the annually *accruing interest was paid according to the intention of the notes, Black would only have received Confederate currency in payment of such interest as of the respective dates when interest fell due.

The foregoing statement presents with sufficient fullness the nature of the legal question involved in the first exception. It is contended by the appellants, in substance, that the account should have been stated as if the principal and interest of the notes had been paid into Black's hands in Confederate currency at the respective dates at which such principal and interest matured and became payable, and that Black should have been charged at these respective dates with the value in good money of the Confederate currency thus received. On the other hand, the respondents claim that the judgment of the Circuit Court is correct in charging Black, upon the basis of turning Confederate values into good money as of the date of the notes.

The controversy arises upon a misconception of the force of the Scaling Act. It is not necessary to resort to that Act for the basis of the liability of the administrator. He is chargeable with assets coming into his hands according to the value of such assets at the time his responsibility in regard to them arises. This is true both of the original assets and of assets substituted in the place of original, as the notes in the present case were by the order of sale made by the Ordinary, which is assumed, for the purpose of this case, to have been properly carried into effect by the taking of notes payable in Confederate currency.

The object of the "Scaling Act" is to assist in the adjustment of contracts intended by the parties to be liquidated in Confederate money by furnishing a legislative declaration of the relative values of Confederate money and lawful money, which should be conclusive between the parties in the absence of direct testimony as to the existing state of those values.—Neely v. McFadden, 2 S. C., 169.

The charges against Black's estate rest on the assumption that the payments called for by these notes, both as it regards principal and interest, were actually made in Confederate money at the respective times when, according to the tenor of the notes, they fell due. Following this assumption, which, as it is not the ground of exception, must be taken as a fact in this case, it would result that the account should have been stated on the following principles:

1. He should have been charged with the actual value, in good money, at the time of

*88

payment of the Confederate currency re*ceived, either as principal or interest, assuming such payments to have been made at the times called for by the notes.

2. In charging his estate with interest on the moneys held in his hands, such interest account should be based upon the value in good money of the Confederate currency that came into his hands, having regard to the date of its receipt.

The case of a single one of these notes will illustrate the application of these principles. Take one of the notes having three years to run, carrying interest payable annually. At the end of the first year, from the date of this note, Black's estate should be charged with an amount of cash equal to the value in good money of the amount of interest payable on that note at the end of one year. At the end of the second year a similar charge should be made, the value of Confederate currency at the time of actual receipt being the basis of ascertaining the amount charged in cash. At the end of the third year the balance of interest and the principal should together be turned into good money value and be charged as of that date.

The first exception is well taken, and the report of the Referee and the judgment based upon it was erroneous.

The first of the exceptions, dated September 2d, 1874, is to the effect that Black should not have been charged interest upon the sale bill until the end of the current year, to wit, the first of January then next ensuing.

This objection is in conformity with the rule considered and applied in Davis v. Wright, 2 Hill, 560.—See Jones v. West, [2 Hill, 561, note] in note to this case. According to that authority interest should not be charged on receipts from the sale bill, or other source during the year in which they are received. The present case is not entitled to the benefit of the point ruled in Dixon v. Hunter, (3 Hill, 204.) There the administrator presented an account full, specific and complete, giving the date and amount of each receipt and disbursement, so that an interest account could be accurately stated according to the facts. That was clearly not a case for the application of a rule that claims merely to approximate the truth of the account, as in that case the truth of the account was spread out before the Court; but in this case the statement is at least an approximation, as the accounts are not and cannot be made full. It is therefore a case for applying the rule considered and settled in Davis v. Wright.

*89

*There has been in this case an entire departure from the method of settling the accounts enforced by that rule. If it were practicable, this Court would open the accounting only so far as it regards the particular features objected to, inasmuch as no general objection is interposed to the method of statement, but the particular objections are of such a nature that it renders a statement necessary.

If the account is properly stated, the objection raised by the second exception will be obviated. It is therefore not necessary to consider what force there is in that objection under the mode of statement adopted in the present case.

The rule for settling the accounts of administrators, laid down in Davis v. Wright, is so clearly stated and so well understood that it is not necessary that we should further illustrate or explain it.

The last exception claims that interest should not have been charged against Black's estate in the defendant's hands during the period when Brodie's estate was unrepresented, so that Black's administrator could not make a settlement. This point has been definitely ruled in Davis v. Wright, which sustains the ground of this exception. The circumstances of the two cases are strictly analogous, and that authority fully disposes of the exception under consideration.

This exception goes, however, a step further, and claims that interest ought not to be charged until the complaint was filed. We cannot concur in this view. The moment there was a representative of the estate to whom it was possible to make payment, the reason of the rule suspending interest ceases.

The judgment and report of the Referee should be set aside and the case remanded for a statement of the account on the foregoing principles.

MOSES, C. J., and WRIGHT, A. J., concurred.

6 S. C. *90

*BILLINGS v. CLINTON.

(Columbia, Nov. Term, 1874.)

[*Appeal and Error* ⇨1022.]

Conclusions of a Referee upon questions of fact, concurred in by the Circuit Court, reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015–4018; Dec. Dig. ⇨ 1022.]

[*Trusts* ⇨89.]

A resulting trust arising from the alleged use of another's money in the purchase of lands will not be established upon parol evidence unless the proof is clear and convincing. Doubtful evidence is not sufficient.

[Ed. Note.—Cited in Mims v. Chandler, 21 S. C. 491; Rogers v. Rogers, 52 S. C. 391, 29 S. E. 812; Phillips v. Yon, 61 S. C. 438, 441, 39 S. E. 618.

For other cases, see Trusts, Cent. Dig. §§ 134–137; Dec. Dig. ⇨89.]

[*Trusts* ⇨79.]

Not only must the payment be shown, but where it is not the whole consideration, then some definite part, as one-half, one-third or the like, must be shown to have been the money of the party alleging the trust.

[Ed. Note.—Cited in Gaines v. Drakeford, 51 S. C. 38, 27 S. E. 960.

For other cases, see Trusts, Cent. Dig. § 111; Dec. Dig. ⇨79.]

[*Trusts* ⇨89.]

The evidence reviewed by the Court and: *Held* not to sustain the claim of a resulting trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 134–137; Dec. Dig. ⇨89.]

[*Trusts* ⇨365.]

A claim to a resulting trust: *Held* to be barred by the laches of the claimant.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 572; Dec. Dig. ⇨365.]

Before Mackey, J., at Lancaster, July Term, 1874.

The brief upon which the appeal was heard fully states the case, and is as follows:

Minor Clinton, Esq., who was the executor of the last will of Abram Perry, deceased, died in 1865 testate. Irvin Clinton and K. G. Billings were named as executors in the will of M. Clinton, but the former declined to qualify. The will, without giving any description of the real estate, after first reserving a house and lot which he had previously given to Mrs. Mayer and her son, disposed of his property as follows, to wit: "I give, devise and bequeath to my brother, Irvin Clinton, and my friend, Kennedy G. Billings, to be equally divided between them, all the rest, remainder and residue of my entire estate, consisting of about sixty-three negroes, my law office and lot, stock of all kind, choses in action and every other species of property I may own or possess at my death, share and share alike, under this clause and bequest. My entire estate will pass and descend to the said Irvin Clinton and Kennedy G. Billings, except the house and lot given to Mrs. Mayer and son."

The will neither shows what real estate he owned nor what interest he had therein, and it bears date the 15th November, 1864. Shortly afterwards, K. G. Billings, who was named executor in the will, was duly qualified as such and regularly assumed the administration of the estate. On the day of , 1867, he filed a bill in the Equity Court for Lancaster alleging the insolvency of the testator's estate, seeking an injunction against suing and other creditors, and requiring them to come in and establish their claims against the estate, and praying a sale of the realty to aid in the payment of the debts.

*91

*At the hearing, June 27, 1867, (an order pro confesso of the same date having been taken against the defendants,) Chancellor Carroll ordered that the creditors be enjoined; that Benjamin R. Clyburn be appointed Special Referee; that the creditors be called on to establish their claims before him; that the executor account before said Referee; that the complainant and the defendants named as creditors have leave to apply at Chambers for a sale of the real estate; that the defendant, Irvin Clinton, have leave until the first day of the next January to file his answer to the bill, and that the Referee in his report on the accounts of the executor distinguish between the claims belonging to the estate of the testator and those which may appear to belong to the estate of Abram Perry, deceased. Irvin Clinton being a devisee under the will of M. Clinton was made a party defendant to this bill.

Shortly afterwards, under an order obtained at Chambers, the real estate was sold by the Commissioner in Equity, who reported the same to the Court at the June sitting in 1868 as follows:

"The Commissioner reports that, in obedience to the decretal order of this Court made at Chambers, 1867, he exposed to sale at public auction at Lancaster Court House, on Monday, the 7th day of October, 1867, after having advertised for twenty-one days in the Lancaster Ledger, the tracts of land described in the pleadings as belonging to the estate of Minor Clinton, deceased.

"The Bear Creek place, containing five hundred acres, more or less, was bought by W. J. White for the sum of $2,500, he being the highest and last bidder therefor. The Commissioner executed to the said Will J. White a deed of conveyance for the same, he having complied with the terms of sale by giving his bond for the sum of $2,414.45, with Martin P. C. White as security, together with a mortgage of the premises.

"The Flat Creek land, containing seven hundred acres, more or less, was bought by John A. Bird for the sum of $1,700. Commissioner executed a deed of conveyance to the said John A. Bird, he having complied with the terms of sale by giving his bond for the sum of $1,641.80, with Charles Bird and Amos

Cook as securities, with a mortgage upon the premises.

"The Dry Creek place, containing one hundred acres, more or less, was bought by Albert Clinton for the sum of $190, he being the highest and last bidder therefor. The

*92

Commissioner executed *to him a deed of conveyance for the same, he having complied with the terms of sale by giving his bond for $183, with Isom Clinton and Irvin Clinton as securities, with a mortgage upon the same.

"The Wild Cat place, containing two hundred and sixty-eight acres, more or less, (the interest of deceased being one-half thereof, which interest was sold,) was bought by B. J. Witherspoon for the sum of $90. The Commissioner executed to him a deed of conveyance for the same, he having complied with the terms of sale by giving his bond for the sum of $86.92, with J. H. Witherspoon as security, together with a mortgage upon the premises.

"The lot in the village, known as the law office, was bought by John Brown, who, having complied with the terms of sale by giving his bond, with D. W. Brown as security, for $714.68, together with a mortgage, the Commissioner executed to him a deed of conveyance.

"Lot No. 3, being fourteen feet in front, was bought by A. Mayer for the sum of $24.18, which he paid in cash. The Commissioner executed a deed of conveyance to the said A. Mayer."

An order of the Court confirming this report was made June 22, 1868.

On the 31st day of December, 1867, the defendant, Irvin Clinton, pursuant to the leave granted by Chancellor Carroll, in his order of June 27th, 1867, put on file an answer to the bill, which contains the following statements:

"Respondent, in further answering, is unwilling to admit the broad allegations of the bill, that testator, at his death, was seized and possessed in his own right of the tracts and parcels of land described in the bill of complaint, but denies that he was so seized and possessed of that portion of the tract known and described as the Flat Creek plantation. This Flat Creek plantation, as described in the bill, containing seven hundred acres, more or less, is composed of some three tracts, one of which, bounded, &c., and containing about acres, was purchased by Minor Clinton and this respondent, jointly, from John Belk and Robert Belk, about the year 1850. Defendant does not know anything of the title deed to this tract so purchased from John and Robert Belk, and cannot now tell whether a deed for the same ever, in point of fact, was made or executed by John Belk and Robert Belk; but respondent certainly knows the fact that the purchase

*93

of this tract was made *jointly, by Minor Clinton and himself, with common funds arising from the proceeds of the copartnership in the practice of law that existed between the said Minor Clinton and this respondent for a number of years. Respondent avers that the testator and he, both, soon after the purchase aforesaid, took possession of the said tract of land with a full knowledge and understanding that it was their joint property, and to be used and enjoyed between them as such. And defendant does not know that his brother, Minor Clinton, ever, in his lifetime, disputed the right and claim of this respondent to the same, and believes that if his brother were now living and could speak, he would verify the statement herein made and concede to this respondent his just rights in the premises.

"As to the balance of the Flat Creek plantation, respondent does not know how it was purchased, in whose right it was purchased, or with what funds.

"Respondent, in further answering as to Bear Creek plantation, situate near Lancasterville, cannot say whether it was held by the testator in his sole right or not. Respondent, of his own knowledge, does not know whether testator paid for this tract out of his own funds, or out of the copartnership funds, and cannot tell in whose name the title deeds were taken,—whether, in point of fact, any titles to the same ever were taken. Respondent has been informed that the titles to none of the tracts described in complainant's bill are on record in the office of the Register of Mesne Conveyance for the District."

On the 28th of September, 1868, the respondent, Irvin Clinton, pursuant to leave granted by order of the Equity Court, put on file an amended answer, which contains statements as follows:

"He avers that the Bear Creek tract of land, described in the bill of complaint, which was sold under the prayer of the same by order of the Court, was purchased and acquired by funds belonging to the law copartnership aforesaid between Minor and Irvin Clinton, and has been held in common ever since by Minor Clinton and this respondent. Respondent does not know in whose name the title deed was taken; whether in the name of Minor Clinton or Irvin Clinton, or in the name of both, this respondent cannot now tell. Respondent, at the time of the filing of the original answer, believed that he had a joint interest in the land or plantation, and desisted from making the positive averment of his right and claim in this behalf at that time solely for the reason that, although

*94

he felt satis*fied in his own mind of his said right, title and claim, was unwilling to make the positive averment and lay the claim without some other extrinsic and tangible evidence than existed in his own bosom and feelings.

"Respondent, in further answering, shows to your Honors that since the filing of his original answer he has found a written agreement, duly signed and executed, partly in the handwriting of Minor Clinton himself, for the employment of a superintendent and manager for the said Bear Creek tract of land. Exhibit A, herewith filed, is a copy of the same, which said agreement affords evidence that the said tract of land was the joint property of Minor Clinton and this respondent, and he thinks that he will be able to produce other evidence of the joint ownership. And this respondent, in addition to the claim set up in his original answer, now claims and asserts his right to the one-half interest in the proceeds of the sale of said Bear Creek tract of land as sold by the Commissioner of this Court, and also to the one-half portion of the rents, issues and profits of the same from the time of the purchase of the same from Abram Perry in the year 1831 up to the date of the sale by the Commissioner."

An order of reference was then made, referring it to the Referee to inquire and report upon the subject matter of this answer as amended.

And at the reference held by the Referee, the plaintiff, K. G. Billings, interposed no objections whatever to the claim as set up by Irvin Clinton; but the appellants, who were not parties to the record, but who came in as creditors and defendants, after the published notice through their attorney, interposed objections by cross-examining Irvin Clinton's witnesses. These appellants being defendants without filing answers, did not undertake to file any cross bill or in any other manner allege any objections to Irvin Clinton's claim until they did so orally on the hearing of the Referee's report. And the said Irvin Clinton was in no way advertised of their objections until said hearing.

On the reference held on the claims set forth in the above mentioned answer and amendment, eleven witnesses, including the claimant himself, six of them being persons of color, formerly the slaves of one or the other of the Clintons, were examined on the part of the said Clinton. And the appellants examined no witnesses and did not offer any testimony.

*95

*From the testimony of the respondent himself were elicited the following facts:

Minor Clinton became located at Lancaster Court House in the practice of law in the year 1819. The respondent, Irvin Clinton, entered the office, by the persuasion of his brother, as a law student and clerk, in the year 1823, and continued in this capacity to the year 1830, when he was licensed and then entered into copartnership with his said brother. From 1823 to 1830, the time of the forming of the partnership in law, the said Irvin Clinton acted continually in the office of his brother, doing all kinds of office work, such as issuing writs and processes and filing declarations, &c., in which business he was as expert before he was licensed as he was afterwards. The copartnership between the brothers continued up to 1845 or 1846, their earnings averaging from $800 to $1,000 per annum. Minor Clinton received almost all the moneys due the law copartnership and never accounted to the witness for the same.

The Abram Perry portion of the Bear Creek place was bought in 1831, bought from the said Abram Perry, who had for a number of years been a client of Minor Clinton's. This tract was cultivated by M. & I. Clinton jointly up to 1846, and ever after by the said Minor Clinton alone until his death in 1865. And since 1846, Minor Clinton appropriated to himself the profits thereof without accounting to Irvin Clinton.

Irvin Clinton did not receive more than $700 in cash from the law copartnership, and nothing else unless it be the consideration of partnership lands as claimed by witness. He has never seen the title deeds to any of the lands claimed by him as partnership property; has searched for such papers; never saw any deeds executed to M. & I. Clinton, or to either of them, for the lands referred to in his answer. Has no knowledge that any such deeds were ever executed. He says the Bear Creek place and the Belk lands, on Flat Creek, are the lands which he claims to have been purchased by M. & I. Clinton as partnership property; also the Black Otter or Cedar Creek place; both M. & I. Clinton were present when the Black Otter place was purchased. [Here certain declarations of M. Clinton were proposed to be proved by this witness, (I. Clinton,) but appellant's counsel objected to the testimony as inadmissible, and the Referee sustained his objections.] Witness resided on the Bear Creek place for several years after it was purchased, cleared land, built houses thereon, and worked the

*96

*same and acted and felt that he was a joint owner therein. M. Clinton never denied by any act or word to witness the joint interest of witness in the Bear Creek place, the Belk and Black Otter places, but M. Clinton, after witness had left the Bear Creek place, took possession of the same and appropriated the profits to his own use. Witness left the place on account of sickness and not on account of any unpleasantness with his brother. Witness could have remained there as long as he pleased. Witness says M. Clinton had a conference with witness before the purchase of the Belk lands.

Witness says the Belk lands were bought before 1850 or 1851. Irvin Clinton had a view of settling there, but after working a few months clearing lands and building houses he left in 1850 or 1852, and M. Clinton took possession and worked the lands until his death. These lands were bought of

John and Robert Belk, who had been the clients of M. & I. Clinton in a big lawsuit between the years 1845 and 1850. I. Clinton having continued after 1845 or 1846, the time he left the Bear Creek place, to attend the Courts and assist in the cases then pending.

Witness had nothing to do with the negotiations for the purchase of the Bear Creek and Belk lands; paid no money out of his own pocket; says they were paid for, as above indicated, by M. Clinton; was not present when deeds were executed, if any ever were executed. Witness at one time did say to M. Clinton that he would like to have a settlement of their partnership matters. Witness says that all the definite information he has in reference to the Bear Creek and Belk lands having been purchased as copartnership property of M. & I. Clinton was from the declarations of M. Clinton, and all his knowledge that these lands had been bought with partnership funds, in whole or in part, is derived from same source, except where otherwise shown above.

It was admitted that after diligent search for the deeds relating to these lands, no deeds could be found,—no deeds to any person,—and that no records of any such deeds can be found in the Clerk's or Mesne Conveyance office for Lancaster County; and that no record of any deeds to M. Clinton for any land are to be found in said office.

Other witnesses testified to various declarations of M. Clinton made at different times from 1846 up to his death, in which he acknowledged that Irvin Clinton had an interest as partner or joint owner not only in the Bear Creek or Perry and in the Belk lands, but also in the other lands held by the deceased.

*97

*The report contains the following findings of fact, conclusions and recommendations:

"The claim of Irvin Clinton is presented, since my last report, in the answer and amendment thereto of Irvin Clinton. The plaintiff in this case, as executor of Minor Clinton, deceased, filed his bill to marshal the assets of the estate of Minor Clinton, and for a sale of the real estate of said deceased. The answer of this defendant, Irvin Clinton, seeks to establish the fact that the defendant, I. Clinton, was a joint tenant and owner with Minor Clinton in his lifetime in respect to the lands situate on Flat Creek, purchased from John and Robert Belk, and also in so much of the lands situate on Bear Creek, near the village of Lancaster, as were purchased from Abram Perry, from the time the lands were purchased up to the death of the said Minor Clinton, and also that he was a joint owner in a tract of land on Dry Creek alleged to have been sold by Minor Clinton to one W. B. Cauthen. And the defendant, I. Clinton, further claimed rents and profits of the estate of Minor Clinton, because of the same having been almost exclusively appropriated by Minor Clinton so far as the lands referred to are concerned. He also claimed that a very large amount of money would be due him from the estate of Minor Clinton, in a fair accounting, on account of the law partnership which existed for so many years between him and his said brother. This claim, as thus made, appears not to be denied by any pleading in the case; in fact, the plaintiff, who is in general the representative of all creditors, legatees and devisees, has offered no resistance to the said claim, but appears to treat with becoming respect the claim made by the brother of his testator. The claim, however, has been indirectly resisted by William A. Moore, Esq., as attorney for certain heirs of one A. Perry, deceased, but, being so resisted, without an opportunity of stating in the form of pleadings his objections to said claim, it has been with some difficulty that the Referee has been able to see the full force of such objections."

The Referee finds in the testimony the following state of facts:

"1. That I. Clinton entered the law office of his brother Minor as a student and clerk in the Fall of 1823, his brother Minor having opened in Lancaster in 1819; that he con-

*98

tinued in this relation *with his brother up to 1830, when the two entered regularly into copartnership, which ended about 1845 or 1846.

"2. That the copartnership was profitable, and that M. Clinton received and appropriated almost all the profits of the law firm.

"3. That there never was any accounting by Minor and settlement with his brother on account of law partnership, and that Minor Clinton has often acknowledged to witnesses that he owed Irvin Clinton.

"4. That they bought, jointly, the Perry lands, on Bear Creek, worked them jointly for some twelve or fifteen years, each exercising a full joint ownership over the same; and that Minor, up to a few months before his death, accorded to Irvin a joint interest in these lands, and that he, according to the proof, at no time was heard to deny the interest of his brother; but it does not appear in whom vested the legal title, in one or the other, or in both.

"5. That the same state of facts appear with reference to the Belk lands, on Flat Creek, and the lands on Dry Creek, sold by Minor Clinton to W. B. Cauthen, except that Minor sold the latter, in probably 1864, to W. B. Cauthen, and received the money for the same.

"6. That from the declarations of Minor Clinton, as proved by a number of witnesses, he, although being in actual occupancy of these lands for a number of years, never claimed them exclusively as his own, but appeared to recognize at all times the joint interest of his brother. I therefore conclude

that Irvin Clinton was a joint owner with his brother, Minor Clinton, in these tracts or portions of land above described, to wit: The Perry lands, on Bear Creek, the Belk lands, on Flat Creek, and the lands on Dry Creek, as sold to W. B. Cauthen, and that he is now either entitled to the one-half part in the lands themselves or to the one-half part of the sales of said lands by order of this Court in this case, where the lands have passed out of the control of the plaintiff, as executor aforesaid. And in case any of the lands be still in the possession or control of the plaintiff, as executor aforesaid, then the Referee considers that said land should stand pledged for the payment of any sum that may be ascertained to be due Irvin Clinton on account of the same. And the Referee considers that no order should be made for the disbursement to the creditors of moneys belonging to the estate of Minor Clinton until the claim of Irvin Clinton shall be first ascertained to its full extent. And to this end the Referee would recommend that it be referred to Special Referee to inquire and report:

*99

*"1. How much land is included in the Perry tract, on Bear Creek, the value thereof on the day of alleged sales as compared to the Caston lands belonging to same body, and in whom vests the title at this time, and whether the sale by the Commissioner has been realized.

"2. The amount and value of the Belk lands, on Flat Creek, as compared with the other lands in the same body on the day of sale.

"3. The value of the lands on Dry Creek, sold by Minor Clinton to W. B. Cauthen, and what sum, if any, is due Irvin Clinton from the estate of Minor Clinton on account of these lands.

"4. The sum or sums on account of the rents and profits of all these lands in the lifetime of Minor Clinton, as well as since his death, is or are now due Irvin Clinton, and should be paid to him by the plaintiff as executor.

"5. What amount of money, if any, is now due Irvin Clinton from plaintiff as executor of Minor Clinton on account of their unsettled law copartnership. And that said Referee report any special matter with the testimony taken."

To this report the appellants excepted orally at the hearing:

1. That the conclusion of the Referee that the respondent was jointly entitled to the lands described, as tenant in common with Minor Clinton, in the lifetime of the latter, was wholly unauthorized by the facts proven.

2. That the claim of respondent is a stale claim.

3. That inasmuch as only the interest and title of Minor Clinton, deceased, in the land was sold and conveyed by the Commissioner, the respondent could in no point of view lay claim to any portion of the proceeds of the sales.

4. That if the estate of Minor Clinton, deceased, is indebted to respondent for rents of land and any balance on their copartnership accounts, the same should have been presented and established as a simple contract debt.

The decree of His Honor the presiding Judge is as follows:

Mackey, J. On hearing the report of the Referee, B. R. Clyburn, filed July 10, 1874, in relation to the claim set up in the answer of Irvin Clinton, and the oral exceptions thereto, and the argument of counsel, it is

*100

ordered, adjudged and decreed that *said report, with its recommendations relating to the said claim of Irvin Clinton, except as to the tract of land referred to in said report as having been sold by M. Clinton, in his lifetime, to W. B. Cauthen, be confirmed and become the judgment of this Court.

It is further adjudged and decreed that the lands referred to in said report as the Perry lands, on Bear Creek, and the Belk lands, on Flat Creek, at the time of the death of Minor Clinton, were held by the said deceased and Irvin Clinton as tenants in common, and that the defendant, Irvin Clinton, is now entitled to receive the one-half of the proceeds of the sales of said lands, with interest thereon from the date of the sale of the same by the late Commissioner in Equity for Lancaster.

It is further ordered that it be referred back to the same Referee to inquire and report how much land is included in the said Perry tract, on Bear Creek; the value thereof on day of sale by the Commissioner in Equity as compared with the Caston lands belonging to the same body, and whether the legal title to the same, at this time, is in the plaintiff to this action, and whether the proceeds of the sale by the Commissioner in Equity has been realized.

And said Referee do inquire and report the value of the Belk lands, on Flat Creek, on the day of sale as compared with the other lands in the same body which were so sold by the said Commissioner. And that he report the value of the tract sold by M. Clinton, in his lifetime, to W. B. Cauthen, at the time of such sale, and what may be now due Irvin Clinton from the estate of Minor Clinton on account of the sale of this tract of land.

And it is further ordered that said Referee do inquire and report what sums of money are now due Irvin Clinton from the estate of Minor Clinton on account of the rents and profits of the Perry and Belk lands above described, and also on account of the law copartnership which existed between M. and I. Clinton; and, further, that he inquire and report what rents and profits may be due I. Clinton from plaintiff as executor of M. Clinton, arising since the death of M. Clinton.

Testimony also to be reported to this Court.

The appellants, creditors of M. Clinton, deceased, appeal on the following grounds:

1. Because His Honor erred in confirming and not overruling the report of the Referee in so far as the same relates to the claim of Irvin Clinton, the respondent.

*101

*2. Because the respondent utterly failed to establish by competent evidence that he had ever acquired title to any interest in the Perry, the Belk, or even in the land sold by M. Clinton to W. B. Cauthen.

3. Because, even if the respondent had shown by evidence legally sufficient that he had been entitled as tenant in common with Minor Clinton in the Perry and the Belk lands, inasmuch as only the interest and title of the said Minor Clinton was or could have been sold and conveyed by the Commissioner, the respondent could lay no claim to any portion of the proceeds of the sale.

4. Because the claim of respondent is a stale claim, and as such should have been rejected.

5. Because His Honor erred in directing an accounting for what rents and profits may be due I. Clinton from plaintiff as executor of M. Clinton arising since the death of M. Clinton.

Moore, for appellants.

Allison, contra.

March 22, 1875. The opinion of the Court was delivered by

MOSES, C. J. The case presents some peculiar features. One not the least remarkable is, that while the respondent claims an undivided half interest in the separate tracts of land alleged in the lifetime of his brother, Minor Clinton, to have been held between them as tenants in common, no proof by a deed or other instrument was produced to show from whom the legal title was derived or in whom it actually vested. The lands were bought at different times from different persons;—not a deed is produced, and it is conceded that there is none on record. It is not only a singular instance of neglect on the part of the deceased, Minor Clinton, but a more extraordinary one on the part of Irvin, who from 1831, when the first purchase of the land in question was made, to June, 1867, when he filed his answer, by no act or declaration, in the absence of all paper title, did he prefer a claim to any portion of it devised by the will of the said Minor, of which he was appointed executor, and under which one-half of the whole estate was conveyed to him in fee; and this notwithstanding that an order for the sale of all the lands was made by a bill filed by the qualified executor, to which he was a party, and the order actually executed.

*102

*While the legal title of Minor Clinton to one-half of the two parcels of land is not disputed, Irvin claims that one-half of the consideration money paid by Minor was derived from a fund in which he held some interest not definitely stated, and rests his claim on no other right. He can then only sustain it as a trust of the legal estate in an undivided interest in the land resulting to him from the application of his money by the said Minor Clinton to the purchase. A trust so arising may be established by parol, for it is not within the Statute of Frauds, being expressly excepted from its operation.

Although parol proof is admitted to establish a trust thus resulting, nevertheless, to divest one of a legal title and confer it on another, it will not avail, unless it is clearly sufficient for the proposed end. Testimony which, while it may induce doubt, does not satisfy the mind of the actual existence of the facts necessary to establish such a trust will not be enough. The payment of the purchase money, on which the claim depends, must not be made out by conjecture, but by circumstances which show the fact. If they are loose and equivocal, they will not suffice. —See Lewin on Trusts and Trustees, 206; Hill on Trustees, 94; 3 Sugd. on V. and P., 174.

While the fact of payment must be established, it must "be of some definite part of the whole consideration, as one-half, one-third or the like."—Sayre v. Townsend, 15 Wend., 651; White v. Carpenter, 2 Paige, 238, 241. In the case before us, so far from any proof of a definite portion of the consideration paid by Minor having been of the money of Irvin, it is a claim through an unsettled copartnership, which for a time existed between them, no account having been taken, and their relation to the fund not yet ascertained. It assumes that Minor was indebted to Irvin for one half of the earnings of a law copartnership for about fifteen years, yielding from $800 to $1,000 per annum, of which, in the language of the respondent, in his evidence, "Minor received all the moneys due." It is, therefore, clear that if he was entitled to an interest in any portion of the lands, even if bought with the proceeds of the partnership, the extent must depend on the portion of his money thus derived and appropriated, and this to be ascertained on an account between them which was never taken. Now, it is true that in the absence of proof of the interest which a partner is to have in the earnings of the

*103

firm, he will be entitled to an equal *share of the profits. Here, assuming an indebtedness by Minor to Irvin, the amount of it is not established. How, then, even supposing that the purchase was made with copartnership funds, is the interest of Irvin in the lands so purchased ascertained to be one-half? The Bear Creek plantation, for instance, was bought in 1831, when they had only been in copartnership for one year;

how much of Irvin's interest in its earnings was applied by his brother to the purchase?

A brief review of the facts of the case, looking to the time when this claim was first presented, cannot fail to make impressions not at all consistent with its support. Minor Clinton died in 1865, leaving a will executed in November, 1864, by which he disposed of all his property, including sixty-three slaves, in equal proportions, between his brother Irvin and R. G. Billings. They were nominated his executors, but the latter alone qualified. In 1867, Billings filed a bill alleging the insolvency of the testator,—seeking to enjoin creditors, and praying a sale of the realty in aid of the payment of debts. At June Term of the same year a Referee was appointed, creditors enjoined and called in, and shortly afterwards, under an order therefor, a sale of the real estate was made on 7th October, 1867. Irvin Clinton had been made a party to the bill before the order of sale. A report of sales was submitted to the Court at June Term, 1868, and confirmed. On 31st December, 1867, he filed his answer, in which he claimed that the Flat Creek plantation (which was bought in 1850) was purchased by his deceased brother and himself from the Belks, with the proceeds of their law copartnership; but as to the Bear Creek place, he did not know whether the testator paid for it out of means derived from the same source or how it was held. On 28th September, 1868, he amended his answer, alleging that from extrinsic evidence which he had obtained he believed he had an equal interest with his brother in the said tract, derived through the "funds belonging to the law copartnership." No testimony of any kind was produced before the Referee, (save a contract with a superintendent for the Bear Creek place, year not given,) but the declarations of the deceased at various times and to various persons, from 1841 to 1865 inclusive, not only as to the joint interest of Irvin in the Bear Creek and Flat Creek plantations, but in all the lands he owned, together with his negroes, and, in fact, "all the property he had," as was said by one or more of the witnesses.

*104

And yet Minor to *his death was in the use and possession of all the property,—notoriously dealing with and treating it exclusively as his own, even through the solemn act of a last will and testament.

There was no testimony as to the circumstances of Irvin,—why he so long rested without asserting his right to a settlement of the copartnership, which expired as long ago as 1845 or 1846, Minor in the possession of property sufficiently large to respond,—and in fact there was no claim ever made until his whole estate was disposed of by a judicial sale in a cause to which the respondent was a party, and that sale confirmed without objection. Standing by and allowing these two parcels of land, in which he claims so large an interest, to be sold without a word of interposition, and then contesting the proceeds with the creditors, who had trusted the deceased, most likely, on the faith of the very property.

He says, in his examination, "that he had nothing to do with the negotiations for the purchase of the Bear Creek and Belk lands:" but in his answer he states "that the purchase of the Belk tract was made jointly by Minor and himself with common funds arising from the proceeds of the copartnership in the practice of law that existed between them for a number of years;" and, further, "that they soon after took possession of the said tract of land with a full knowledge and understanding that it was their joint property, and to be used and enjoyed between them," and yet no claim in the lifetime of Minor was ever asserted, although he alone retained the possession and use, and none was made after his death until the lands were sold, and then an interest in the proceeds of the sale was set up by reason of his alleged interest in the money with which they were bought.

The contract with the superintendent of the Bear Creek place made by the two brothers, while it may be a circumstance to show that they planted together, cannot be regarded as an admission by Minor of any interest in the land on the part of Irvin. Their joint planting ceased in 1845 or 1846, and the place was exclusively used by Minor to the time of his death without any claim of rent by Irvin.

The alleged declarations of Minor, in the manner they were made, in the face of the facts of the case, do not amount to an avowal or admission of a trust in any portion of his property in favor of his brother. If they amounted to that kind of acknowledgment which could bind him as a trustee, it

*105

would cover and include the whole *of the property which he had in possession at his death; for, looking to the testimony of all the witnesses, the alleged declarations would leave nothing in the possession of Minor at his death to be claimed through his individual right.

We do not regard the conclusion of the Referee on the facts as legitimately resulting from the testimony. On the contrary, in our judgment, the evidence leads to a different result. It may not be out of place to refer to the fact that although the Referee finds that the real estate was purchased by the copartnership funds and the said Irvin entitled therein to a one-half interest, he commends a reference to ascertain what amount is now due on such account, although Irvin in his answer preferred no such claim.

It might strike a practical mind as not unworthy of inquiry, if the earnings of the law practice of the firm amounted only to $800 or

$1,000 per annum, after the support of both the partners, how much, on the most economical calculation, could have been left for the purchase of the lands in question?

Conceding to the witnesses who testify to the declarations of Minor the fullest credibility, testimony of that character is not favored by the Courts. Mr. Sugden, in his work on Vendors and Purchasers, p. 178, says: "When the evidence is merely parol, it will be received with great caution. Evidence of naked declarations made by the purchaser himself is, as Sir William Grant observed, in all cases most unsatisfactory evidence, on account of the facility with which it may be fabricated and the impossibility of contradicting it. Besides, the slightest mistake or failure of recollection may totally alter the effect of the declaration."

But if Irvin had the interest in the lands for which he now contends, he has lost it by his laches. Even where the Statutes of Limitation can be interposed, "it is the knowledge of the fact relied on which prevents the bar, not the discovery of evidence to establish it."—Parham v. McCravy, 6 Rich. Eq., 140. It was at one time doubted whether a resulting trust was exempted from the operation of the statutes. It is not necessary here to consider the effect of time on such a trust through the statutes. The analogy of the statutes have, however, been applied to such trusts by the Courts, "and relief has been refused where the party with full knowledge, or being in a situation to have full knowledge, of his rights has delayed for twenty years to prosecute his claim. On more than one occasion "a delay of eighteen years in

*106

enforcing a claim founded *on a constructive trust has been held a sufficient reason for dismissing the bill."—Hill on Trustees, 265.

Mr. Lewin, in his work on Trusts and Trustees, p. 207, says: "The real purchaser may be also barred of his interest by laches, for the presumption of a resulting trust will not be raised after a great length of time in opposition to the evidence from actual enjoyment."

We think the principle so announced must prevail here.

The order of the Circuit Court of July 10, 1874, as far as it sustains the said claim, must be set aside, and it is so ordered.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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6 S. C. 106

BILLINGS v. PERRY.

(Columbia. Nov. Term, 1874.)

[*Executors and Administrators* ⟸508.]

Where, under a decree to account, a report was made ascertaining a balance due by the executor, and upon the coming up of the case again a second decree to account was made directing the Commissioner to state the accounts since the date of the ascertained balance, beginning with that balance as a charge against the executor, and before a second report was made the executor died insolvent: *Held*, That the second decree was not entitled to rank as a judgment for the ascertained balance in the winding up of the estate of the executor.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2198; Dec. Dig. ⟸508.]

Before Mackey, J., at Lancaster, July, 1874.

This was a bill in equity by K. G. Billings, executor of Minor Clinton, deceased, against J. D. Perry and others.

The case is as follows:

Minor Clinton, Esq., died, and his estate is largely insolvent. On the day of , 1867, K. G. Billings, as executor of his last will, filed his bill in equity against the legatees, devisees and creditors of M. Clinton, seeking, inter alia, a sale of the real estate of the testator, a marshaling of the assets of the estate, an injunction restraining creditors from suing and further prosecuting suits at law, and requiring them to establish their claims in that Court. Whereupon, June the 27th, 1867, an order was made requiring, inter alia, the creditors to come in and establish their claims before B. R. Clyburn, Esq., as Special Referee.

*107

*In compliance with this order, J. D. Perry and others presented a claim evidenced by certain records of the Equity Court, which culminated in an order or decree made by Chancellor Ingliss in the cause therein stated, of which the following is a copy, the names of the cases stated in the caption being omitted:

Abram Perry, who died in the year 1839, left in force a will, of which the defendant, M. Clinton, Esq., is the surviving executor. The only provision of the will which need now be adverted to is the direction that after the death of testator's wife, to whom an estate for the term of her own life had been given, the property should, under certain circumstances, which in fact there came to exist, be divided amongst such children of his brothers and sisters as should then be living. The distributees being designated thus not by name, but only by relationship, and being unknown to the executor, the latter, soon after the death of the widow, to wit, on the day of , A. D. 1853, exhibited his ex parte petition in this Court, with a view to call in all the persons entitled under the terms of designation and require them to prove their relationship.

At June Term, 1853, an order was made in that case requiring the children of the brothers and sisters of the testator, living at the death of the widow, to establish their rights before the Commissioner within a day limited, and the Commissioner to make publication therefor and report at the next term.

Publication was accordingly made very extensively, and at the June Term, 1854, the Commissioner reported the names of thirty-four persons who had satisfactorily established their relationship to the testator within the terms of description, and their consequent right to participate in the distribution. These persons were scattered in six different States and in seventeen different Counties. The Commissioner, in his report, also mentioned the names of four other persons who, in the testimony taken before him in behalf of other parties, were said to be nephews of the testator, among whom was Willis Richards, but states that no claim had been preferred on the behalf of any of the four to a share in the distribution. An order was thereupon made, at the same term, that the said report be confirmed and become the decree of the Court as to those whose rights are therein reported and established.

On the 24th April, 1857, nearly three years after the date of this decree, James Baker and eight other of the thirty-four persons who had so established their rights exhibited

*108

their bill in this *Court in the cause first stated at the head of this order, on behalf of themselves and the twenty-five of whom the names are stated in an exhibit to the said bill, against Minor Clinton, Esq., executor, for an account of the estate in his hands and a distribution of the same.

On the 22d June, 1857, the executor, Minor Clinton, Esq., exhibited his bill in this Court, stating that since the decree establishing the rights of the thirty-four persons claiming as legatees, some of those persons had died, and he knows not who the personal representatives of such deceased legatees were, if there were any; that others were stated to have assigned their claims, and that a part of them had filed their bill against him, and praying that the nephews and nieces of the testator, Abram Perry, living at the death of his widow, the personal representatives of such of them as had died during the interval since the decree of June Term, 1854, and the assignees of such as had transferred their interests should interplead and settle their several and respective rights to the funds in his hands. To this bill the thirty-four persons who had previously established their relationship, or their representatives, where known, were made defendants, and also James E. Cureton, the petitioner in the latter of the two petitions, the style of which is stated at the head of this order, who claimed as the assignee of Abram Perry Hall, and who filed an answer to the said bill. To neither of these causes was Willis Richards or his representative a party.

In the case of Baker et al. v. Clinton, executor, an order was made, at June Term, 1857, referring it to the Commissioner to take the accounts of the defendant, as executor, and report at the next term. Accordingly at June Term, 1858, the Commissioner brought in his report upon the accounts of the executor, showing a balance in his hands on the 16th January, 1855, of $14,563.30, subject to certain deductions and credits for commissions on paying over and for payments supposed or alleged to have been made to individual distributees.

The Commissioner proceeds further, in his report, to state the proper distribution of this balance amongst the thirty-four nephews and nieces already ascertained as entitled to take shares, and to ascertain the distributive portion of each one of them. Exceptions were filed to this report by both parties, plaintiff and defendant, all of them having respect,

*109

however, to some supposed error in the *Commissioner's statement of the executor's accounts. Some of these exceptions were abandoned at the hearing. An order was made at the June Term by which some of the exceptions not abandoned were sustained and others overruled, and all the costs were directed to be paid out of the funds in the hands of the executor, but there was no general confirmation of the report.

The executor, it seems has made payments to some of the distributees upon the basis of the report and assumption of its correctness.

On the 14th May, 1860, Columbus Heard exhibited his bill against M. Clinton, Esq., executor, claiming that Willis Richards, a nephew of the testator, Abram Perry, was living at the death of the widow and so entitled to a share of the estate; that he had since died and administration of his personal estate had been granted to the plaintiff, and praying payment of his share. The facts of Willis Richards' relation to the testator, his surviving the widow, his subsequent death and the grant of administration have been fully established. Nearly six years had elapsed after the decree of June, 1854, before this claim was preferred. Every reasonable effort had been made by the executor to ascertain the parties entitled to distribution, and during all the interval proceedings of divers forms had been pending in regard to the distribution of the estate. No complete settlement of the executor's accounts and apportionment of the assets have yet been made by any decree of this Court, and a large part of the funds is yet in the executor's hands. Willis Richards is unquestionably entitled as one of the class of persons designated by the testator. Whatever loss or injury must result from the long delay in preferring and asserting his claim, notwithstanding the continued and bona fide efforts to advertise him of his rights, must be endured by himself or those who claim under him. He must participate in the fund so far as that can be done without loss to those who have acted in this, upon the rea-

sonable and well-authorized assumption there was no such claimant.

The petition of Rebecca Massey and others, being certain of the thirty-four nephews and nieces whose right to participate had been previously adjudicated, and the petition for his assignee, are petitions filed on the 28th May, 1860, in the cause of Baker et al. v. Clinton, executor, in each of which the benefit of a decree supposed to have been made in that cause is sought. It does not appear, however, that any final decree fixing the rights and shares of the parties was made in that cause. In this state of facts, as now

*110

known, it is mani*fest that in no one of these causes are the pleadings free from defect in the want of proper parties. The personal representative of Willis Richards, clearly a distributee, is not a party to any of the earlier proceedings; and to the recent bill brought by his personal representative, not certainly for a specific or pecuniary legacy, but for a distributive share in a fund in which thirty-four others have interests, there are no other than himself and the executor of the original testator. Yet in some one or other of them every one interested seems to be before the court; and with a view, if possible, to make an end of this protracted and expensive litigation, an order will be framed blending the purposes of all the different proceedings:

It is ordered that the Commissioner of this Court audit and state the accounts of the executor, Minor Clinton, Esq., since the date of the balance ascertained in the report filed in the case of Baker et al. v. Clinton, executor, on the 18th June, 1858, and beginning with a charge against the executor of that balance; that in such accounting the said executor be allowed credit for all proper charges against the estate arising since that time, including the counsel fee passed at the present term, also for two and one-half per centum commissions for distribution, so far as such commissions have not been previously allowed and deducted: that he deduct from said balance all the costs of these various causes, except the costs of the plaintiff in the case of Columbus Heard, administrator, v. M. Clinton, executor; that he ascertain and state the proper distribution of the net residue, admitting the said Columbus Heard, as administrator of the estate of Willis Richards, to a share in the said distribution, as well as the thirty-four persons whose rights had been previously established; that he state accounts between the executor and each distributee to whom the executor had at any time made any payments, allowing to the executor in such accounts credit for all such payments at the date thereof; that if, upon the adjustment of these various accounts, it shall appear that he had, before he received notice from the said Columbus Heard of his claim as administrator of Willis Richards, paid to any of the distributees an excess over the share of such distributee, as said share shall now be ascertained, the said executor shall be reimbursed for such over-payment out of the share of the said Willis Richards, except in so far as such over-payment shall exceed the

*111

share as *ascertained in the Commissioner's report in Baker et al. v. Clinton, executor, filed as aforesaid on the 18th June, 1858; that he ascertain the amount or balance to each distributee who has not been paid in full; that to the conclusion of the Commissioner's report, in respect to any of these matters now referred, the parties, or any of them, be at liberty to file their exceptions at any time within ten days after notice of the filing of the report, (A. A. 1836, § 9, Stat., 341,) the said exceptions to be heard and determined at Chambers after legal notice; that when the balance in the hands of the executor, Minor Clinton, Esq., shall be thus fully ascertained, the said Clinton pay said balance into the hands of the Commissioner; that out of said fund so to be paid in the Commissioner pay and satisfy all the costs of these several causes, except as aforesaid, and distribute the residue according to the several and respective rights of the distributees as then ascertained, and that the costs of the plaintiff in the case of Columbus Heard, administrator, v. M. Clinton, executor, be paid out of the share which shall be found due to the said Columbus Heard, administrator.

This order or decree was filed in the Commissioner's office July 20th, 1860. Owing to the late war or some other cause, the reference therein directed was never held, nor the balance in the hands of M. Clinton, as executor of A. Perry, ascertained in the lifetime of the executor; but the Referee, B. R. Clyburn, on the reference held in obedience to the order dated June 27th, 1867, herein above referred to, ascertained the same, and in his report on claims, filed July the 10th, 1874, it is established to be $14,013.30, with interest from June, 1858. In reference to its status, however, he reports this: "Exhibit B is the claim of the legatees of A. Perry, deceased. It is contended that this claim is a decree, having the effect of a judgment. Referee regards it as a matter of law for the Court to decide—the testimony is reported." Upon this branch of the cause, the presiding Judge made the following order or decree:

Mackey, J. Upon hearing that portion of the report of B. R. Clyburn, Esq., Referee, relating to the claim of the legatees of A. Perry, to set up a decree of Chancellor Ingliss, dated June 29, 1860, as a judgment against the estate of Minor Clinton, deceased, which question is submitted to the Court for its decision by the said report, it is adjudged and decreed that the said decree was interlocutory only, and does not operate as

*112

a judgment against the *estate of the said Minor Clinton, deceased, and that the same be disallowed as a preferred claim against said estate.

The legatees of A. Perry appealed on the following grounds:

1. Because, it is respectfully submitted, His Honor erred in deciding that the decree of Chancellor Ingliss was interlocutory only, and in not allowing it to take rank as a judgment of a Court of record.

2. Because the said decree was and is a judgment against M. Clinton, deceased, for $14,013.30 in favor of appellants.

Moore, for appellants.

Kershaw & Connors, Allison, contra.

March 23, 1875. The opinion of the Court was delivered by

MOSES, C. J. Whether the decree in question was entitled to rank as a judgment against the testator, Minor Clinton, Esq., at his death does not depend on our recognition of it, either as final or interlocutory.

It may be conceded to be final so far as it established a right to an account on the part of those claiming interests under the will of Josiah D. Perry, of which he was the surviving executor. It was the material issue between the parties, and nothing remained to be done but take the accounts and thereby ascertain the indebtedness, if any, of the executor to the estate. The decree "is final to the extent which it goes, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by further decree the accounts between the parties pursuant to the decree passed."—Thomson v. Dean, 7 Wallace, 346 [19 L. Ed. 94]. But though final, as fixing the liability of the executor to account, the result which was to follow the proceeding on the order remained yet to be ascertained. Until that was established and confirmed by the court, no money decree could be rendered of rank and dignity with a judgment at law.

Chancellor Ingliss' decree, so far from passing on the account reported by the Commissioner at June Term, 1858, by his order extended the reference, and directed that the accounts since the date of the balance so reported should be credited, "beginning with the said balance as a charge against the ex-

*113

ecutor, who should be *allowed credit for all proper charges arising against the estate since that time." When the account should be concluded under his order, it was then to be subject to exceptions to be heard and determined at Chambers after legal notice; "and when the balance in the hands of the executor, Minor Clinton, Esq., shall be thus fully ascertained, the said Clinton shall pay the said balance into the hands of the Commissioner, who shall," &c. The order found and established no amount; this was left to depend on the result of the further examination which he ordered.

If it was a judgment establishing a sum recovered, for what amount was it to stand? How could it be enforced by a writ of fieri facias? How or against whom could a writ of attachment have issued for default of payment? For if it was a decree ordering the payment of money, there should have been some one against whom it could have been enforced by the proper process of the Court.

The view which we take of the order renders it unnecessary to inquire how far, if it could be considered a money decree, claiming rank with a judgment at law, it was affected by the Act of 1840, 11 Stat. at Large, 116.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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6 S. C. 113

THARIN v. SEABROOK.

(Columbia. Nov. Term, 1874.)

[*Pleading* ⇐360.]

A motion to strike out a sham or irrelevant answer, or defense, should not in terms demand judgment; though if the motion is granted and nothing remains of the answer presenting an issue for trial, and leave to amend is not given, judgment may be pronounced at once.

[Ed. Note.—Cited in Carroll County Savings Bank of Uniontown v. Strother, 22 S. C. 557; American Button-Hole, Overseaming & Sewing Mach. Co. v. Hill, 27 S. C. 165, 3 S. E. 82.

For other cases, see Pleading, Cent. Dig. § 1130; Dec. Dig. ⇐360.]

[*Pleading* ⇐364.]

Objections for irrelevancy arise upon the face of the pleading, and are in the nature of a demurrer. Objections to sham defenses ordinarily present questions of fact to be decided upon affidavits, or in such manner as the Court may direct. If the defense is manifestly false, and interposed to delay or defeat the action, it may be struck out; but the power should only be exercised in cases free from doubt.

[Ed. Note.—Cited in Ransom v. Anderson, 9 S. C. 440; Grayson v. Harris, 37 S. C. 607, 16 S. E. 154; Badham v. Brabham, 54 S. C. 402, 32 S. E. 444.

For other cases, see Pleading, Cent. Dig. §§ 1156–1162; Dec. Dig. ⇐364.]

[*Pleading* ⇐17.]

Argumentative and rhetorical matter should not be introduced into a pleading. Only facts capable of being affirmed or denied, and of being established by evidence, should be stated.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 38, 41, 195, 350; Dec. Dig. ⇐17.]

[*Pleading* ⇐122.]

It is a good form of denial to state "that defendant has no knowledge" of certain facts alleged in the complaint, without adding "or information sufficient to form a belief."

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 249–252; Dec. Dig. ⇐122.]

*114

[*Elections* ⇐38.]

*The proper authorities of a municipal corporation may hold an election for corporate of-

ficers at a time different from that fixed by ordinance.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 27; Dec. Dig. ⟸38.]

[*Costs* ⟸108.]

Whether the relator, in an action to determine the right to a corporation office, shall be required to give security for costs, is a matter of discretion for the Circuit Judge.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 418; Dec. Dig. ⟸108.]

Before Graham, J., at Charleston, February, 1874.

This was an action under the Code to determine which of the parties was lawfully entitled to the office of corporation counsel of the city of Charleston. R. S. Tharin was the relator and E. B. Seabrook the defendant.

The complaint alleged that the relator was duly appointed and constituted corporation counsel, to hold the office until his successor should be elected and qualified; that, by an ordinance of the corporation, the time for holding the election was fixed for the month of December, 1873; that the election was not held in that month, but was held on the 7th January, 1874, when the defendant received a majority of the votes given; and by the third, fourth and fifth paragraphs it was charged that there were more votes given at said election than there were members of the City Council present and voting. By the same paragraphs, charges of fraud were made in terms, as denied by the sixth and seventh paragraphs of the answer hereinafter set forth.

The sixth and seventh paragraphs of the answer were as follows:

"VI. That the defendant does not know that any illegal ballots were cast at the said election, as alleged in section fourth of the complaint; and as he deems such a charge to be highly detrimental to the fame of men chosen to fill such high positions, and when made under oath in the public Courts, as in this case, calculated to bring the entire administration into disrepute, he demands strict proof of the same, and also, for the same reasons, strict proof of the allegations in Article V, (allegations highly insulting to the entire City Council,) that the course of the defendant and his friends was corrupt and unlawful, and that the election was unlawful, foul, fraudulent and without any legal force whatsoever.

"VII. The defendant has no knowledge of the various pretenses, devices and slanderous misrepresentations charged upon the defendant and his friends in the third article of the complaint."

The defendant gave notice that he would move His Honor the Judge of the Circuit Court for an order requiring the plaintiff to give security to indemnify the State against

*115

the costs and expenses *of the case, and the plaintiff gave notice that he would move His Honor for "judgment on the pleadings in this case, because the answer in its sixth and seventh articles is sham, and irrelevant and frivolous as to the residue thereof."

His Honor, after hearing argument, granted the motion of the defendant, and required the plaintiff to give security for costs in the sum of $100, and he denied the motion of the plaintiff.

The plaintiff appealed from the order requiring him to give security for costs; and he also appealed from the order denying his own motion, "because the answer admits all the material allegations of the complaint, sets up new matter which constitutes no defense to the action, and states that the defendant "does not know" (that is, that the relator does know,) that the election was fraudulent whereby the defendant says he was elected.

Tharin, for appellant.

Mitchell, contra.

First. Plaintiff appeals from an order of the Circuit Court refusing to strike out the answer, upon the ground that it was in part sham, and as to the residue irrelevant and frivolous.

1. Such an order is not appealable.

Appeal does not lie from an order refusing to strike out an answer, or from an order of the general term reversing an order of the special term striking out an answer.—Tabor v. Gardner, 41 N. Y., (2 Hand,) 232; 6 Abb., N. S., 147, sub. nom. Tabor v. Gardner.

The amendment to the Code of 25th November, 1873, makes appealable "any intermediate judgment, order or decree involving the merits." But the order appealed from does not involve the merits; on the contrary, it leaves them intact, to be heard and determined by the Court.

2. Plaintiff asks that part of answer be stricken out as sham, and the residue as irrelevant and frivolous.

Part of an answer cannot be stricken out as sham; the whole must be struck out or none.—Winslow v. Ferguson, 1 Lans., 436; Lockwood v. Salhenger, 18 Abb., 136.

Separate allegations or part of a defense cannot be stricken out as sham or false.—Collins v. Coggill, 7 Rob., 81; Slack v. Cotton, 2 E. D. Smith, 398; Bell v. Odgen, 13 Abb., 93, (n); Littlejohn v. Greeley, id., 311.

*116

*Plaintiff offers no evidence of falsity.

On a motion to strike out an answer as false, it must be shown by an affidavit, other than the verification of the complaint, to be false.—White v. Bennett, 7 How., 59; Kellogg v. Baker, 15 Abb., 287.

Slight evidence indicating good faith is sufficient to prevent a verified answer from being struck out as sham.—Munn v. Barnum, 1 Abb., 281; 12 How., 563.

The defense is, that the office in question

being vacant, the defendant was duly elected and qualified. This, it is submitted, is a good defense.

Even if vaguely pleaded, it is well settled that vagueness in pleading is not frivolousness: it is to be corrected by amendment and not visited by judgment.—Kelley v. Barnett, 16 How., 137.

Even if insufficient, the insufficiency must be so apparent that the Court can determine it upon inspection without argument.—Sixpenny Savings Bank v. Sloan, 13 How., 544.

An answer, to be adjudged frivolous, must be clearly so in its whole scope and bearing, and not merely through a formal defect that might be cured by amendment. If argument is required to establish its character as frivolous, the Court will not dispose of it in the summary manner authorized by the Code.—Boylston v. Crews, 2 S. C., 422.

Second. Plaintiff appeals from an order that the relator give security to indemnify the State for costs and expenses.

1. Such an order is not appealable.

Before the amendment to the Code of November 25th, 1873, no order made before judgment was appealable, except one which virtually determined the action and prevented a judgment, from which an appeal might be taken.—Code, Sec. 11. This amendment provides that an immediate order, involving the merits, may be appealed. This order does not affect the merits of the action, and therefore does not fall within the words of the amendment.

2. This order was proper.

It was made under Section 449 of the Code, which provides: "The Circuit Judge may require, as a condition precedent to bringing such action, that satisfactory security shall be given to indemnify the State against the costs and expenses to be incurred thereby." The order was made after the action was brought, but as soon as the attention of the Court was called to the statute.

*117

*Where power is given by statute to public officers in permissive language, as that they "may, if deemed advisable," do a certain thing, the language used will be regarded as peremptory where the public interest or individual rights require that it should be.—Supervisors v. United States, 4 Wall., 435.

The State has allowed the relator to bring suit in its name, and, to secure itself, has required that security be given before bringing the action. It has imposed upon the Circuit Judge a positive duty and not a discretionary power, in language which must be taken as mandatory, as the public interest is concerned. That he required it after the bringing of the action affects no rights of the relator—places him in no worse position than if it had been required before.

The defendant has no interest in this question; it is one solely between the State and the relator.

March 26, 1875. The opinion of the Court was delivered by

WILLARD, A. J. The first question to be considered arises upon the motion of the plaintiff "for judgment on the pleadings in this case because the answer in its sixth and seventh articles is sham, and irrelevant and frivolous as to the residue thereof."

Sham and irrelevant answers and defenses may be stricken out on motion.—Code, § 175. In such cases the motion should be to strike out, and not in terms for judgment. Irrelevancy in a pleading is a question that arises on the face of the pleading in the nature of a demurrer to that part of the pleading alleged to be irrelevant. The objection to sham defenses ordinarily presents a question of fact for the Court, to be determined on affidavits, or in such manner as the Court may direct. If the pleading is manifestly false, and interposed to delay or defeat the plaintiff's action, the Court will strike it out. This power should be sparingly used, and only in cases free from doubt. Where any portion of a pleading is stricken out, the residue of the pleading stands; and, unless the Court authorizes amendment, the cause proceeds upon such pleadings.

The objection of frivolousness arises under Section 270 of the Code: Where the entire pleading, either a demurrer, answer or reply, is manifestly, and from matter appearing on its face, a mere contrivance to prevent the entry of judgment previous to the cause coming up for a formal hearing or trial. In that case the Court on motion, gives judgment at once. But in order to demand such judgment, the objection of friv-

*118

olousness must extend to and embrace *the whole pleading objected to, so that nothing is left of the pleading that can entitle the party to a trial.

Paragraph 6 of the answer certainly contains matter that is entirely irrelevant. Neither argumentative nor rhetorical matter should be introduced into a pleading, but merely facts capable in their nature of being affirmed and denied, and of being established by legal proofs. The facts should be systematically arranged, and in the complaint or counter claim the proper legal conclusions from them should be embodied in the nature of the judgment demanded.

It is quite immaterial, in point of law, whether the persons charged by the plaintiff with official misconduct occupied high or low positions. The only question for the Court is, whether the charges are material and true. In other respects, however, the sixth and seventh paragraphs contain matter that is material. They deny the knowledge of certain facts alleged by the complaint

as material to the cause. The plaintiff objects that the answer states that the defendant "has no knowledge." This is a good denial. The Code permits the party to state that he has no knowledge sufficient to form a belief. This implies some knowledge, but not sufficient to form the ground work for a prudent man to act upon. The defendant goes beyond the requirement of the Code, and, instead of denying knowledge of sufficient certainty to bind his conscience, he denies all knowledge. The greater includes the less, and the denial must be regarded as full and complete.

Under the circumstances, the Court could not properly strike out the whole of the sixth and seventh paragraphs. As it regards the irrelevant matter contained in paragraph 6, it does not appear that the plaintiff was prejudiced by it, and, therefore, no ground exists for objecting to the refusal of his motion.

There was no ground for the motion for judgment on account of the frivolousness of the answer. Although there are many things in both the complaint and answer that will be found to have no important bearing on the real issues, yet there is an issue raised distinctly by the pleadings, and that is sufficient to defeat the motion for judgment on the ground of frivolousness. It is only necessary to point out a single ground of defense as sufficient to bar the plaintiff's demand. The election pleaded by the defendant is such an averment. The fact that such election was held at a time different from that required by the general ordinance does not invalidate it, as the same authority that

*119

passed the ordinance *ordered the election. If such order was in contravention of the ordinance, it must be regarded as repealing it to the extent that the two were inconsistent with each other. The second question arises on an appeal from the order requiring the plaintiff to file security for costs under Section 449 of the Code of Procedure. The present case is one within Section 449. It is brought by a person having an interest in an alleged and lawful holding of a corporate office and prosecuted in the name of the State, the name of such party in interest being joined therewith. Section 449 makes it the right of the Circuit Court in such cases to demand security for costs from the party thus using the name of the State. The precise ground upon which the Circuit Judge granted the order is not stated in the brief, and we cannot, therefore, say from the record before us whether the discretion of the Court was exercised on sufficient grounds in point of fact.

The appeal should be dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

6 S. C. 119

BILLINGS v. WILLIAMSON.

(Columbia. Nov. Term, 1874.)

[*Bonds* ⇐122.]

A former Commissioner in Equity, to whom a bond and mortgage had been given for the benefit of others, payable to him or his successors in office, may maintain an action thereon in his own name under the Code, although, as directed by the Act of 1868, they had been turned over to the Clerk of the Court of Common Pleas.

[Ed. Note.—Cited in Daniels v. Moses, 12 S. C. 137; Carroll v. Still, 13 S. C. 433; Clark v. Smith, 13 S. C. 594; Barnwell v. Marion, 54 S. C. 228, 32 S. E. 313.

For other cases, see Bonds, Cent. Dig. § 148; Dec. Dig. ⇐122.]

Before Mackey, J., at Lancaster, July Term, 1874.

This was an action by K. G. Billings, late Commissioner in Equity for Lancaster County, against J. S. Williamson, for foreclosure of mortgage of real estate, given to secure the payment of a bond payable to the plaintiff as Commissioner in Equity, his successors in office, attorney, executors, administrators or assigns. They were taken for the benefit of the heirs or devisees of Sarah Massey, deceased, under a decree of the Court of Equity for partition, and bore date the 7th January, 1867. The consideration was the purchase money of the mortgaged

*120

property which had been sold *by the plaintiff as Commissioner and purchased by the defendant. The action was commenced in May, 1872, and before it was commenced the Court of Equity and the office of Commissioner in Equity had ceased to exist, and the bond and mortgage had been turned over, under the provisions of the Act of 1868, to Thomas H. Clyburn, Clerk of the Court of Common Pleas.

The defendant, by his answer, set up two defenses to the action: 1. That the plaintiff could not maintain the action, inasmuch as his office had ceased to exist before the action was commenced, and he had turned over the bond and mortgage to the Clerk of the Court of Common Pleas, who was his successor in office. 2. That the defendant held an assignment of three out of five shares of the amount due on the bond, which entitled him to a credit thereon of three-fifths of such amount, and he had always been anxious to pay the other two-fifths, but never could find any one who was entitled to receive the same.

His Honor overruled the defenses, and referred it to the Clerk of the Court, as Referee, to compute the amount due on the bond, and also to inquire and report the names of the parties beneficially entitled to the fund. The Clerk submitted his report, wherein he stated the amount due, and also the names of five devisees of Sarah Massey,

deceased, as the parties beneficially entitled to the fund; and thereupon His Honor made a decree for foreclosure in the usual form, and ordered that two of the parties named by the Clerk, in his report, be paid their shares of the sale, and that the other three shares be held subject to the further order of the Court.

The defendant appealed on the ground that the plaintiff could not maintain the action in his own name.

Allison, for appellant, contended that the plaintiff could not maintain the action in his own name under the Code of Procedure.

The action should have been in the name of Thomas H. Clyburn, Clerk of the Court of Common Pleas, as successor in office of the plaintiff. On the 1st January, 1869, the bond and mortgage had been turned over to him, under Section 19 of the Act of 1868, entitled "An Act to organize the Circuit Courts," which provided that all the books, records and property of the Courts of Chancery should, on that day, be transferred to the Courts of Common Pleas, and that the Clerks of the Circuit Courts shall receive the same and give receipts for the same. He

*121

referred to the Constitution of *1868, Article IV, Sections 16, 17, and Cunningham v. McGregor, 12 How., 305; 5 Duer, 648; Commissioners v. Glass, Voorhe's Code, 9 ed., 189, N. E.

Moore, contra, contended that the case came within Section 136 of the Code of Procedure. The contract was made with the plaintiff for the benefit of others. He is, therefore, the trustee of an express trust, and may maintain the action in his own name, as that Section expressly provides.

April 6, 1875. The opinion of the Court was delivered by

WRIGHT, A. J. We do not see the benefit which the appellant is to derive by resisting the judgment rendered by the Circuit Court in this case, unless it may be through the matter of costs.

He does not deny his liability on the bond; so far from it, he avers that he holds an assignment of three out of five shares of it, implying that he is bound to pay the remaining two shares still due.

The orders made by the Court below are so carefully worded that they must protect him from any suit which may be brought by any party having a supposed interest in the bond, for the names of all who can possibly be interested in it have been ascertained by the Referee, and his report stands confirmed. Still further, the record in the case in which the bond was taken is set out in the complaint, not denied in the answer, and the proof on which the report of the Referee is found was itself a matter of record.

The appellant made no exception to the report, thus admitting that the parties in interest were those so found by the Referee. His delay in the payment of the bond, he avers, has arisen from his inability to ascertain who was entitled to receive the money due on it.

This obstacle, at least, has been removed by the proceeding. The Act of 1868 did require a transfer of the bond to the Clerk of the Court; and Clyburn, the Clerk, could have maintained an action upon it in his name as the successor of the respondent. It is said in the argument on behalf of the appellant that this bond had been so transferred. If so, Billings, to whom it was made payable, must have afterwards received it from Clyburn, who is not only Clerk of the Court, but acted as Referee in the case. It must, therefore, be assumed that he authorized Billings to bring the complaint in his own name as late Commissioner for the bene-

*122

fit of *those really interested. In the case of an ordinary bond assigned, the assignee may sue in the name of the assignor.

Under Section 136 of the Code, a trustee of an express trust may sue alone; and, "within its meaning, a person with whom, or in whose name, a contract is made for the benefit of another is construed to be a trustee of an express trust."

It is possible that a strict compliance with mere technical form would have been better fulfilled if the complaint had been brought in the name of the Clerk. The relief sought was to be administered through the equitable jurisdiction of the Court, and we do not see in its grant of it such error as would justify an interference.

The motion is dismissed.

The costs of the respondent in the Circuit Court have been provided for by its order. Each party will pay his own costs since accruing.

MOSES, C. J., and WILLARD, A. J., concurred.

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6 S. C. 122

WITHERS v. JENKINS.

(Columbia. Nov. Term, 1874.)

[*Trusts* ⇦22.]

Where a voluntary deed of trust for the benefit of the wife and infant daughter of the grantor, purporting on its face to have been "signed, sealed and delivered," was executed in the absence of the grantee, and handed by the grantor to one of the subscribing witnesses, in the presence of the other, to be proved and recorded, which was done: *Held*, That this was a sufficient delivery to vest the title for the benefit of the cestui que trusts, though the grantee refused to accept the deed.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 31; Dec. Dig. ⇦22.]

Before Carpenter, J., at Columbia, May Term, 1874.

This was an action by Thomas Withers against Samuel Jenkins to recover the possession of a lot of land in the city of Columbia.

The case was as follows:

The plaintiff, by his counsel, having opened his case, produced in evidence a deed, bearing date November 6, 1867, whereby the grantor, Samuel Jenkins, the defendant, conveyed to Francis Lopez, "his executors and

*123

administrators forever," upon certain *trusts, for the benefit of the grantor's wife and daughter, a parcel or lot of land, with its appurtenances, situate in the city of Columbia, in the said County, the same being the lot of land in dispute in this action. At the date of the said deed, the grantor lived upon the premises conveyed, with his wife and daughter, the latter then being an infant. The attesting clause of said deed is in the following words: "Signed, sealed and delivered in the presence of us, W. S. Monteith, T. L. Stark."

It was admitted on the part of defendant that the grantee, Francis Lopez, resided in the city of Charleston, in the said State, and was not present when the said deed was signed and sealed by the grantor, Samuel Jenkins.

The plaintiff then called as a witness Walter S. Monteith, who testified as follows:

"I saw the defendant, Samuel Jenkins, sign and seal the deed after it was read to him. He did so by making his cross to his name written opposite the seal. After the deed was signed and sealed, it was subscribed by myself and Theodore L. Stark as attesting witnesses. Samuel Jenkins then delivered it to me to be proved and recorded: and on the 11th November, 1867, I proved the deed by making the affidavit annexed to it, and on the same day I left it with the Register of Mesne Conveyance to be recorded, which was accordingly done. Francis Lopez declined to accept the office of trustee under the said deed."

In his affidavit annexed to the deed, witness W. S. Monteith deposes that he saw Samuel Jenkins "sign, seal and deliver the foregoing deed of conveyance."

Upon this evidence, the presiding Judge held, that, as the trust was voluntary and the trustee had declined it, there was insufficient proof that the deed had been delivered, and therefore ordered that the complaint be dismissed with costs.

The plaintiff appealed.

Carroll & Janney, Pope & Haskell, for appellant.

Williams, contra.

April 8, 1875. The opinion of the Court was delivered by

MOSES, C. J. It is not necessary to the valid execution of a deed that there should be actual delivery either to the grantee in

*124

*person or to some one expressly authorized to accept it on his behalf. Much less is such a requisition essential where the instrument creates a trust, conferring on the trustee a mere naked title, coupled with no interest. There he holds for the mere purpose of protecting and preserving the trusts for the beneficiaries who may be entitled to their enjoyments.

If the grantor, in the absence of the grantee, and without his knowledge, has actually consummated the delivery in accord with the purpose declared on the face of the instrument, the object to be effected by it is as fully accomplished as if there had been an actual transfer of the paper from the hands of the grantor to those of the grantee. Mr. Monteith, the witness, says that after it was signed and sealed by Jenkins, in the presence of the two subscribing witnesses, Jenkins handed it to him "to be proved and recorded." That within five days from its date he made the necessary affidavit and lodged it for record in the proper office. The intention of the grantor, signified by the words "signed, sealed and delivered" on the face of the deed, was thus carried into full effect and the delivery completed; it was beyond the power of recall by the grantor. "Delivery to a third person, for the use of a party in whose favor a deed is made, where the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery, although the person to whom the deed is so delivered be not the agent of the party for whose benefit the deed is made."—Doe on Dem. of Garnons v. Knight, 5 B. & C., 671. In Harris v. Saunders, 2 Strob. Eq., 370, it was held "that there was no prescribed form for the delivery of a deed. If it appears, from all the facts and circumstances, that the gift was complete, without any conditions or qualifications annexed, and without anything more remaining to be done, it is a valid delivery and a perfect deed, although left in the hands of the donor."

The delivery to a stranger, for the use and on behalf of the grantee, fulfils all the purposes which the grantor proposes by the act. If the deed is valid in other respects, when he has actually passed it from his control and directed it to be recorded, all his power over it is gone, and it at once becomes subject to that of the grantee.

The deed in question was a conveyance to one Lopez, "upon certain trusts, for the benefit of the wife and daughter of the grantor," —the daughter then an infant. The trustee,

*125

who was not present *when the deed was signed and sealed, on notice of it, declined

to accept. Upon the evidence offered, (which is above set forth,) the presiding Judge held "that, as the trust was voluntary and the trustee had declined it, there was insufficient proof that the deed had been delivered," and ordered a dismissal of the complaint.

Where a deed is delivered to a third party for and on behalf of the grantee, if it confers a benefit, the presumption is that he will accept it. It, however, may not arise where the conveyance is to a trustee, who, while he takes no interest under it, may subject himself to liability if he neglects a due performance of the duties which it imposes for the benefit of others. But though he may not be bound to accept, still his refusal to do so cannot operate to the prejudice of the cestui que trust. His dissent certainly cannot divest them of their rights under the deed, and the delivery so made by their grantor is as effectual, for all the purposes proposed by it, as if the trustee named had accepted in the most formal manner. His dissent cannot affect the trusts nor reinvest the grantor with the title from which he has parted. The grantor himself will even be regarded as the trustee if this is necessary to prevent a failure of the trust. The cases of Dawson v. Dawson, Rice Eq., 258, and Cloud v. Calhoun, 10 Rich. Eq., 362, are so full to the point involved that reference to other authorities is not necessary.

That the trust was voluntary in no way affected the rights of those who took interests under it, which could not be defeated by the mere refusal of the trustee to accept. A voluntary deed, where there are no creditors or subsequent purchasers without notice intervening, is as binding on the grantor as a deed given for a valuable consideration, and the Courts will as readily enforce the one as the other.

The brief does not disclose through what right the appellant, the plaintiff in the Court below, asserted a claim to the property for the recovery of which the action was brought. From what, however, does appear, we are authorized to infer that the deed of Jenkins was a necessary link in his claim of title. In the face, then, of his own written declaration that he "signed, sealed and delivered" the deed, without any proof on his part that it was intended as an escrow, or evidence of some act, at the time contradictory of or inconsistent with his expressed intention, how can Jenkins contend that, at least against him, any necessary element in the execution of it was wanting?

*126

*The motion is granted, the order dismissing the complaint set aside, and the case remanded for a new trial.

WRIGHT, A. J., and WILLARD, A. J., concurred.

6 S. C. 126

RUNION v. LATIMER.

(Columbia, Nov. Term, 1874.)

[*Mandamus* ⇐77.]

A and B both claimed to be the lawful County Treasurer, and A being rightfully in possession of the tax duplicate, B wrongfully entered his office during his absence and carried off the tax duplicate, leaving a receipt therefor: *Held*, That A had the right to compel B to return the tax duplicate to him, and that mandamus was the proper remedy.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 165; Dec. Dig. ⇐77.]

[*Mandamus* ⇐146.]

Mandamus is the proper remedy to compel the performance of acts of official duty in which the public are directly interested, and in all such cases the proceedings should be in the name of the State.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 287; Dec. Dig. ⇐146.]

[*Mandamus* ⇐63.]

Mandamus lies not only against public officers, but also against persons exercising the powers of the office, though not lawfully holding it.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 127; Dec. Dig. ⇐63.]

[*Mandamus* ⇐77.]

The title to a public office will not be determined under an application for mandamus where there is a plain and adequate remedy prescribed by law, or where the necessity for the application arises out of the unlawful act of the party tendering the issue.

[Ed. Note.—Cited in McDowell v. Burnett, 90 S. C. 405, 73 S. E. 782.

For other cases, see Mandamus, Cent. Dig. §§ 161–169; Dec. Dig. ⇐77.]

[*Mandamus* ⇐154.]

Where an application for mandamus was in the name of the applicant, when it should have been in the name of the State, but the objection was not made by the return or antecedently thereto, the questions involved could be legally decided and the proceedings afterwards amended.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 315; Dec. Dig. ⇐154.]

Before Cooke, J., at Chambers, Greenville, December, 1874.

Petition for writ of mandamus by James M. Runion (in his own name) against Joseph P. Latimer, respondent. A rule to show cause was issued and the respondent made a return thereto, and afterwards, by order of the Judge, a supplemental return.

From the pleadings, it appeared that the petitioner was appointed Auditor of Greenville County in July, 1871, and held the office until the 30th of November, 1874, when he resigned; that on the 26th of the same month and year he was appointed Treasurer of said County; that on the 29th his appointment was revoked, and the respondent appointed County Treasurer in his place; and that on the 9th of December of the same year he was again appointed County Treasurer. Both parties claimed the office, but the petitioner was in possession of the books and

*127

papers, including the *tax duplicate,—keeping them in the Auditor's office, which he had not vacated, his successor as Auditor not having been appointed.

After the petitioner's last appointment as County Treasurer, the respondent obtained a key from some one else, and in the petitioner's absence, and without his knowledge or consent, entered the Auditor's office and took therefrom the tax duplicate, leaving his receipt for the same.

The object of the petition was to compel the respondent to restore the tax duplicate to the custody of the petitioner.

The return to the rule presented an issue as to the title to the office of County Treasurer, and denied that the remedy of the petitioner, if he had any, was by mandamus.

His Honor heard the case on the 23d of December, 1874, and made an order that a peremptory writ of mandamus do issue.

The respondent appealed the case to this Court on the following grounds:

1. Because it is respectfully submitted that the petitioner was not entitled to the relief sought under the form of the action adopted.

(a.) The action should have been brought in the name of the State, ex relatione the Attorney General, with whom the petitioner should have been joined, and not in his own name.

(b.) Because the petitioner failed to state in his said petition that he had no other remedy in the premises.

(c.) Because the petition showed that he had another remedy.

2. Because the act sought to be compelled by the mandamus, to wit, the returning the Treasurer's tax duplicate, was not an act appertaining to the office and duty of the County Treasurer, and therefore mandamus will not lie to compel its return.

3. Because the return of the book was not an act in which the public had an interest, and therefore mandamus will not lie.

4. Because the petitioner had no legal or equitable title to the book.

5. Because no useful purpose could be accomplished by the return of the book to the petitioner. He already had the receipt of the respondent as County Treasurer, (no one else at that time claimed to be the County Treasurer,) and respondent's receipt was a suffi-

*128

*cient protection to the petitioner in his accounting to his successor in office for the book.

A. Blythe, J. P. Moore, for appellant.
Earle & Wells, contra.

April 8, 1875. The opinion of the Court was delivered by

WILLARD, A. J. The most important function of the writ of mandamus is to compel the performance of acts of official duty in which the public are directly interested. In this class of cases, the relator proceeds on the right of the State, which has not merely a nominal but a substantial interest.

The maintenance of activity and life in every part of the body politic is a primary duty imposed upon governments; and it is essential to its attainment that all public functions should be performed with regularity and exactness. The writ of mandamus issuing out of the Courts of common law is the proper remedy to enforce the performance of such official acts as are of absolute obligation upon the officers called upon to perform them, and are essential to a due administration of the government, when performance has been improperly refused.

Not only public officers, duly and rightfully exercising the powers incident to the offices held by them, may be compelled by the writ of mandamus to perform such official acts, but persons exercising the powers of such offices, though not rightfully holding the same, may be so compelled. This results from a familiar principle, that one unlawfully assuming an agency, either public or private, may be held to all the responsibilities incident to such agency while in the actual exercise of the same.

The application of these familiar principles to the present case leads to the conclusion that the peremptory writ was properly issued in the present case. What the respondent alleges as justification for his conduct involves a claim to the office of County Treasurer and rightful action under that claim.

It is not necessary for us to consider the conflicting claims of the relator and respondent to the office of County Treasurer. It appears by the facts stated in the petition, and not contradicted by the return, that the relator was actually in possession of the office of County Treasurer, and possessed of

*129

the "tax duplicate," which *is a record of the taxes imposed within the County, and a necessary warrant in the hands of the collector; that the respondent, claiming to be rightfully County Treasurer, took the book in question from the office of the relator, unlawfully and clandestinely entering the same, in the absence of the relator, for that purpose. The relator now demands its return. The mode of obtaining possession of the book was a wrong, and his possession of the record cannot be regarded as offering evidence of his actual possession of the office. The book must still be regarded as of right in the custody and control of the relator, who, as he also holds the evidence of appointment to the office by due authority, must be regarded as prima facie entitled to the office and all matters incident thereto.

We are not called upon, in the present case, to decide whether a question of title to public office can properly be considered in this proceeding by mandamus. It certainly cannot

where the ordinary remedy, by an action in the nature of quo warranto, affords an adequate remedy, nor in a case where the ground of complaint arises out of the illegal and wrongful misconduct of the party tendering the issue, based upon a question of title to office. The present case belongs to the class just named. The respondent has an adequate remedy by action for any right that he may possess. At all events, he has, by his own wrong, deprived the relator of the record which it is the whole object of the present proceeding to have returned to his possession, and the respondent cannot interpose a question of title between the wrong that he has committed and its proper legal remedy.

The writ should have been entitled in the name of the State. Had this objection been raised, either by motion previous to a return or by the return, it would have been necessary for the relator to have amended the title of his proceeding. But it does not appear that such objection was raised by the return or in any antecedent proceeding. The Circuit Court may at any time amend the proceeding as to a matter of form.

The appeal should be dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

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6 S. C. *130

*HAMMOND v. NORTH EASTERN RAILROAD COMPANY.

(Columbia. Nov. Term, 1874.)

[*Carriers* ⇐241.]

A mail agent who is transported by a railroad company under a contract with the government to carry its mail agents free of charge may maintain an action against the company to recover damages for injuries arising from negligence. Such action is not founded on the contract with the government, but upon the duty which the law imposes upon the company.

[Ed. Note.—Cited in Jenkins v. Bennett, 40 S. C. 398, 18 S. E. 929.

For other cases, see Carriers, Cent. Dig. § 979; Dec. Dig. ⇐241.]

[*Dismissal and Nonsuit* ⇐57.]

Where the allegations of a complaint clearly show that the action is to recover damages for a tort, and the defendant was not, and could not have been, misled as to the nature of the action, it is no ground for a motion, at the trial to dismiss the complaint, that the summons was framed under subdivision 1 of Section 152 of the Code, and the complaint concluded by demanding judgment for a specific sum of money.

[Ed. Note.—Cited in Graveley v. Graveley, 20 S. C. 105; Pickens v. South Carolina & G. R. Co., 54 S. C. 502, 32 S. E. 567; Mims v. Seaboard Air Line Ry., 69 S. C. 343, 48 S. E. 269.

For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 129–133; Dec. Dig. ⇐57.]

[*Damages* ⇐158; *Pleading* ⇐375; *Torts* ⇐26.]

Where the action is to recover damages for injuries to the person, the plaintiff is not bound to prove at the trial every specific injury alleged in the complaint.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 441; Dec. Dig. ⇐158; Pleading, Cent. Dig. § 1224; Dec. Dig. ⇐375; Torts, Cent. Dig. § 33; Dec. Dig. ⇐26.]

Before Graham, J., at Charleston, March Term, 1874.

This was an action by Isaac Hammond, plaintiff, against the North Eastern Railroad Company, defendant, to recover damages for injuries sustained by the plaintiff on the 16th of May, 1873, on the road of the defendant.

The summons was framed under the first subdivision of Section 152 of the Code of Procedure, and the complaint concluded with a demand of judgment for the specific sum of money mentioned in the summons.

The second paragraph of the complaint alleged that the defendant made a contract with the United States, for a certain consideration, to convey the mails over its road in a separate car or apartment, suitably fitted up for the assorting and safekeeping of the mails and for the exclusive use of the agent of the government, and also to convey such agent free of charge. The other paragraphs alleged that on the 16th of May, 1873, the plaintiff was the mail agent of the government; that on that day he was received as such agent by the defendant, on its road at Florence, in the apartment of a car used for the conveyance of the mails and the mail agent to be conveyed to Charleston, for reward paid or agreed to be paid the defendant by the United States; that the defendant having received the plaintiff on its car, as aforesaid, it became its duty to convey him safely and securely, and it became responsible to him for any injury he might receive through the negligence or unskillfulness of the defendant, its agents or servants; that a trestle supporting the track of defendant's road at, &c., was at that time defective and

*131

*unsound, as defendant knew, and unfit to be used for the purpose for which it was constructed, and yet the defendant, not regarding its duty, negligently suffered it to be used, and as the car in which the plaintiff was being transported was proceeding along said track the said trestle broke and gave way, and the said car was thrown from the track, and the right thigh of the plaintiff was fractured, the left leg badly cut and bruised, and the plaintiff otherwise bruised and injured; that by reason thereof the plaintiff became for a long time ill, and spent a large sum of money, &c., to his damage $10,000.

The defendant, by its answer, set forth the terms of its contract with the United States; admitted that the plaintiff was the mail agent of the government at the time the accident occurred; denied that he was being carried for reward, and also denied all the paragraphs of the complaint alleging that it

was the duty of the defendant to convey the plaintiff safely and securely; that the trestle was defective, unsound and unfit for use; that there was negligence on the part of defendant; that the plaintiff sustained injuries as he alleged, and that he became ill and spent money in his care.

At the trial the plaintiff introduced evidence tending to show a tort committed by defendant, causing damage to the plaintiff, as stated in the complaint.

This evidence was excepted to by defendant on the ground:

"That the action brought is an action ex contractu, for a specific money demand, being the damages consequent upon the breach of the contract of the defendant with the United States government; and the plaintiff, having elected to sue in contract, is limited in his proof, first, to the proof of the contract as alleged; second, to the proof of its breach; and, third, to the proof of the damages legally resulting from such breach; and the plaintiff cannot go into proof as in an action ex delicto."

The objections of the defendant having been overruled, the plaintiff proceeded with his testimony. Plaintiff was introduced as a witness, and, having stated that he was acting as postoffice agent under authority of the United States government, was being examined as to the damages received by him at the hands of the defendant, whereupon the defendant objected to the proof, on the ground:

*132

*"That, the claim being for damages to the plaintiff, as mail agent of the United States government, under a contract between the United States government and the defendant, the plaintiff must show the contract referred to in the testimony of the witness and in the complaint before the examination proposed is gone into; which objection being overruled by the Court, the defendant excepted."

The plaintiff then proceeded with his testimony, and proved the contract between the defendant and the United States government for transporting the mails, the only clause of which that need be here inserted is as follows:

"1. That the mail (including British, Canada and other foreign mails) shall be conveyed in a secure and safe manner, free from wet or other injury, in a separate and convenient car, or apartment of a car, suitably fitted up, furnished, warmed and lighted, under direction of the Postoffice Department, and to the satisfaction of the Postmaster General, or of his authorized agent, at the expense of the contractor, for the assorting and safekeeping of the mails, and for the exclusive use of the department and its mail agent, if the department shall employ such agent, and such agent is to be conveyed free from charge. When there is no agent of the department, the railroad company shall designate a suitable person upon each train, to be sworn, to receive and take charge of the mails, and of way bills accompanying and describing them, and duly deliver the same. And the mail shall be taken from and delivered into the postoffices at the end of the route; and also from and into the intermediate offices on the route, or that may hereafter be established on the route, provided the latter are not over one-quarter of a mile from a depot or station."

The plaintiff having closed his case, the defendant, by its counsel, moved that the complaint be dismissed on the following grounds:

1. That the plaintiff has elected to bring his action on a contract for the recovery of money only, under the subdivision first of Section 152 of the Code of Procedure, and has shown a special contract between the defendant and a third party, viz., the United States government, for the breach of which special contract the United States alone has the right of action ex contractu.

*133

*2. That the plaintiff, whatever his right of action may be, has shown no privity of contract with the defendant.

3. That the cause of action set forth in the complaint is the alleged failure of the defendant to perform its special contract with the United States government to convey the plaintiff in a safe and secure manner, for hire and reward, while the proof is of a contract to convey a mail agent free of charge, and there is no proof of any contract to convey the plaintiff, or to convey him in a safe and secure manner.

4. That the complaint alleges that, by virtue of a special contract with the United States government, defendant became bound to the plaintiff, while the proof is of a contract whereby the defendant became bound to the United States government, and not to the plaintiff, according to the terms of the said contract.

4. That the plaintiff has failed to show in what particular defendant has neglected its contract duty.

The motion for dismissal of the complaint was refused and defendant excepted.

The defendant's counsel then opened its case to the jury, and, to maintain the issue on its part, offered testimony going to show that it had not neglected any duty, and that the plaintiff had not suffered damages at the hands of defendant; to which the plaintiff offered testimony in reply.

The cause was then summed up by the respective counsel, and the counsel for the defendant asked from the Court that the following instructions be given to the jury, viz.:

1. That the jury, in their verdict, are confined to the issues presented by the allegations in the plaintiff's complaint, which are controverted by the answer of the defendant.

2. The first issue is whether the contract set forth in the complaint is the contract

proven; and if the jury find that the contract proven between the United States government and the company is not fully set forth in all its particulars, the verdict upon that issue must be for the defendant.

3. That if the jury find that the defendant undertook, by its contract, to convey the plaintiff free from charge, and did not, under their contract, receive the plaintiff for the purpose of conveying him upon said railroad

*134

from Florence to Charleston, for *reward paid or agreed to be paid by the United States government, under their said contract, as especially alleged in the third paragraph of the complaint, then the jury must find on that issue for defendant.

4. That for the same reasons stated in the above points, the jury must find for the defendant, under the fourth paragraph of the complaint, on the issue whether defendant had or had not assumed the contract duty to the United States government to convey the plaintiff, as aforesaid, that is to say, for reward paid or agreed to be paid, and in a safe and secure manner, if they find such contract as is alleged not to have been made, and also upon the issue in the same paragraph, viz.: That, by virtue of said contract, "defendant became responsible to him (plaintiff) for any injury he might receive from any negligence or unskillfulness on the part of the defendant, its agents or employees," if the jury find no such clause of insurance in the contract proven.

5. That under the fifth paragraph of the complaint, the jury must find all of the following facts to sustain a verdict for the plaintiff:

First. That, at the time of the accident, the track of the defendant's road, over Mitten's Branch, was defective and unsound and unfit to be used for that purpose, and that defendant knew this.

Second. That, so knowing, it negligently suffered it to be used; and,

Third. That the trestle gave way and broke, and the track of the defendant was destroyed by reason of the said defect and unsoundness and the negligence of the defendant.

6. That under the sixth paragraph of the complaint, the jury must find for defendant, unless they are satisfied on all of the above points that plaintiff has proved his case; and must also find that, "by reason of the severe nature of the fracture, he is lame and crippled, and is prevented from actively pursuing his business."

7. That the plaintiff's complaint is an entire cause of action; and if the jury fail to find for the plaintiff on all the issues of law and fact set forth, they must find for defendant.

His Honor the presiding Judge refused the instructions, and charged the jury as follows:

The issue for you is, whether or not the railroad company was negligent in keeping in proper order that trestle over Mitten's

*135

*Branch. That is the question; that is the true issue. As to the contract with the United States government, so far as that is concerned, I do not think it has anything to do with the case. The question is, whether the railroad company injured Mr. Hammond through negligence. The railroad is bound to use proper diligence in keeping their railroad up in good condition. If they fail to do so, they are liable for any damages that may occur. If they do exercise reasonable care and diligence, then they are not liable. You are to judge of that by the testimony. If you believe the testimony of Mr. Jones, that he informed the company that the trestle was unsafe, and they neglected to fix it, then they are guilty of gross negligence.

As to damages, the rule is that a man who is injured by the negligence of another is entitled to all necessary expenses that he has incurred on account of such injury. He is also compensated for the pain and suffering he has endured. And if you find the company has been guilty of gross negligence, then you can punish them in your verdict.

Defendant excepted to the ruling of the Court in refusing to charge in accord with the prayer for instructions, and to the following portion of the Judge's charge, viz.: First, "that the only question for you is whether or not the railroad company injured Mr. Hammond through negligence;" and, second, "that the contract has nothing to do with the case." Which exceptions were taken before the jury had withdrawn from the bar.

The jury returned a verdict for the plaintiff for five thousand dollars.

The defendant appealed.

Simonton & Barker, for appellant.

Buist & Buist, contra.

April 20, 1875. The opinion of the Court was delivered by

WRIGHT, A. J. The exception made in the Court below that the action brought is one ex contractu, for a specific money demand, for the breach of the contract between the United States government and the appellant, and that the plaintiff was limited in his proof to the contract as alleged and the damages which may have resulted from a breach of it, cannot prevail. It is true that the

*136

*notice, both on the summons and complaint, as to the form of the judgment which the plaintiff will demand, applies, under the Code, to actions arising ex contractu, and not to those which are founded on tort, or where a recovery is sought on any other than a demand for the payment of a specific sum of money. It is plain that the summons and the complaint, between which there was no variance, should have concluded with a notice under the second subdivision of Section 152 of the Code.

The summons and the complaint were both served together. The form of the latter shows beyond dispute that the action was not brought for the breach of the contract between the government and the appellant, but for the money due to the respondent through the defect and unsoundness of their road and the negligence of their agents. It was impossible that the appellant could have been misled as to the nature of the action, for the form and phraseology of the complaint, while they clearly disclosed the claim to reparation in money for the injury received through the negligence of the appellant, sought no recovery for any breach of the contract to which it refers. The course, too, pursued in the answer and defense prevents even a presumption of its having been misled by the complaint. If, as the company avers, the action was on the contract, and that under it there was no privity between Hammond and itself, a demurrer would have been the most appropriate mode by which the question could have been raised. We do not see in the complaint any allegation on which the respondent founds his right to a recovery for the breach of the contract. It is not referred to as the foundation of his action. It may be that his complaint would not have been open to any exception if he had omitted all reference to it. It was introduced to show that he was not an intruder on the train of the company. It was merely preliminary to the statement of his real cause of action, and, if necessary to its support, he could have offered proof of it without setting it out in his complaint. The fourth paragraph of his complaint avers his reception on the train with the consent of the appellant, to be conveyed from Florence to Charleston; and, not regarding its duty to carry him safely and securely, it so negligently conveyed him as to cause personal injury and loss, for which he seeks compensation. If, by the terms of the contract, he was, as mail agent, to be carried without charge to the government, and erred by stating in his complaint that he was to be carried free of

*137

charge, it could in *no way debar his right to recover, if he proved negligence on the part of the company and injury to himself in the performance of the duty it assumed when it received him on the train to be transported between the points already named. We are by no means, however, satisfied that under the contract the company received no compensation for his carriage—for the services to be performed for the government, in consideration of the gross sum paid it, included not only his transportation but that "of the mail bags and post-office blanks and accredited special agents." The words "free of charge" must have been intended to mean that no additional compensation was to be claimed for these essential incidents of the contract. Further, whether he was to be carried with or without charge to the government cannot change the liability of the company if he was rightfully in the car supplied for the use of the government in the transportation of the mails, under his care and custody.

A liberal construction must be given to the form of pleading established by the Code, which was intended to simplify the system and free it from the nice and intricate distinctions which prevailed at common law, where the resort to amendment was but rarely allowed.

If the defendant has not been misled, and could not have been misled, in framing his defense to meet and counteract the allegations of the complaint by reason of their want of precision in presenting the real cause of action, then the plaintiff should not be prevented from submitting evidence to sustain the averments on which he relies for a recovery. In Chambers v. Lewis, 10 Abb., 266, affirmed 11 Abb., 270, it is said: "The allegations of the complaint determine whether the action is brought on the contract or on tort." In Scott v. Pilkington, 15 Abb., 280, it is said: "Under the Code, no trouble arises as regards the form of the action, whether it be on the case or on contract." "If the facts established in the complaint give a right of action, the plaintiff can recover on that complaint."—See Waits' Annot. Code, pages 182, 518. It is enough if the allegations show distinctly the cause of action. If, then, as it appears here, the appellant was well informed by the complaint of the nature of the action which it was required to answer, is the character of the relief which the respondent demanded, when not objected to by motion on the part of the appellant, to debar his re-

*138

covery because not claimed in con*formity with the language of the Code? It is not possible to suppose that the appellant was surprised by the nature of the evidence by which the respondent proposed to maintain his action. It was apprised by the complaint of the cause of action, and the testimony offered was in direct reference to it. The objection that the complaint and answer do not agree as to the cause of action cannot be raised at the trial.—Willet v. Stewart, 43 Barb., 98. With greater reason it would seem that, though they both conclude with a form applicable under the Code to a demand for a specific sum of money, yet when the complaint informs the defendant of the real nature of the cause of action, this should prevent an exception after the case has gone to trial. The Code, in regard to pleadings, allows a most liberal interpretation. Section 182 provides "that in the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view of substantial justice between the parties."

In the case of Ahrens v. State Bank, (3 S. C., 410,) the Court considered the Sections of the Code in regard to "mistakes in pleading and amendments," and expressed its conclusions as to their purpose and intent. In delivering the opinion of the Court, Mr. Justice Willard says: "Under Section 192, no variance is to be regarded material, unless it has actually misled the party; and in that case his remedy is to satisfy the Court immediately by proof by affidavit, that he has been misled. The effect of such proof is not to prevent the Court from allowing an amendment to such case, but to entitle the party prejudiced by such amendment either time or such other compensatory terms and conditions as may be reasonable. Section 194 was intended to guard against the application of Sections 192 and 193 to cases which are not, properly speaking, cases of variance, but where the party has proved on trial a state of facts foreign to the allegations of the pleadings, and having the effect to leave the facts alleged in the pleadings unproved in their 'entire scope and meaning.' It is obvious that variance involving nothing more than technical differences between the allegations and proof can only be made material in the mode pointed out in Section 192." That the appellant here could not have been misled as to the true character of the complaint, is evident from the fact that it was prepared with testimony "to show that it had not neglected any duty, and that the plaintiff had not suffered damage at its hands," and did actually offer testimony in aid of such defense.

*139

*The most of the instructions asked by the appellant, and refused by the Court below, have been disposed of by what we have already said.

In relation to the fifth, it is sufficient to say that the charge was substantially in accord with its requests.

In regard to the sixth, it was not necessary for the plaintiff below to prove every specific injury to his person because alleged in his complaint. Under the averment of being bruised and wounded, he was properly allowed to prove all personal injuries which were the consequence of the wrong complained of by the negligence of the respondent.

The exception to so much of the charge of the Judge, as stated, that the only question for the jury "was whether or not the railroad company injured Mr. Hammond through negligence, and that the contract had nothing to do with the case," is not well taken. In addition to what we have already said bearing on this point, it will only be necessary to refer to the case of Collett v. The London and North Wales Railroad Company, (Ad. & Ellis, 71 E. C. L., 984,) which in all particulars was similar to this. The declaration sets out the statute under which the conveyance of the mails by railways was required; that the plaintiff was an officer of the postoffice, whom the Postmaster General required of the defendant they should carry and convey in and upon the carriage containing the mails. That, therefore, it became, and was, the duty of the defendants to use due and proper care and skill in and about carrying the plaintiff. Yet, not regarding their duty, they did not use proper care and diligence in conveying him, but so negligently conducted themselves in and about conveying him that plaintiff became and was dangerously hurt, &c. A demurrer was filed, principally because it was not stated with certainty by what right or authority, or on what grounds, the Postmaster General had required of the defendants, as in the declaration mentioned. The demurrer was overruled.

Lord Campbell, C. J., said: "The duty to use due and proper care and skill in conveying does not arise in respect of any contract between the company and the persons conveyed by them, but is one which the law imposes; if they are bound to carry, they are bound to carry safely."

Patterson, J., said: "It has been contended that if there is any contract on the part of the defendants, it is with the Postmaster

*140

*General. But there is certainly a duty imposed upon them in respect of the plaintiff to convey safely; and it would be strange if the Postmaster General is to sue for injuries to the plaintiff caused by neglect of this duty. Such injury is properly the subject of an action on the case by the plaintiff."

The motion is dismissed.

MOSES, C. J., and WILLARD, A. J., concurred.

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6 S. C. 140

DEWITT v. ATKINSON.

(Columbia. Nov. Term, 1874.)

[*Appeal and Error* ⇐1022.]

In equity causes the Supreme Court will the more readily reverse the decree of the Circuit Judge upon a question of fact where he differs from a Referee who heard the witnesses, than in other cases.

[Ed. Note.—Cited in Perry v. Sullivan Mfg. Co., 6 S. C. 312; Pool v. Dial, 10 S. C. 445; Hughey v. Eichelberger, 11 S. C. 36, 50; Davidson v. Moore, 14 S. C. 266.

For other cases, see Appeal and Error, Cent. Dig. § 4018; Dec. Dig. ⇐1022.]

Before Townsend, J., at Darlington, ——— Term, 1873.

This was a bill in equity by Nancy F. Dewitt, administratrix, and heir at law of Samuel B. Dewitt, deceased, and others, heirs at law of the intestate, against Margaret Atkinson and others, heirs at law, and Erasmus G. Kirven, administrator de bonis non of

William H. Atkinson, deceased, for specific performance of a contract for the sale of land.

The case was as follows: On the 23d day of September, 1859, the two decedents made a contract for the sale of a tract of land by Dewitt to Atkinson. Atkinson gave to Dewitt his sealed note for $1,150, bearing that date, and payable, with interest, on the 1st January, 1862, and Dewitt gave to Atkinson his bond, bearing the same date, to make titles to the land when the note should be paid. Atkinson died on 6th January, 1863, and Dewitt died in June, 1864. The defense was payment—the defendants contending that, some payments having been made on the note, and Dewitt being liable to Confederate service, he agreed with Atkinson that he, Atkinson, should take his place in the service, and that upon his being received as his substitute the balance of the note should be regarded as paid.

On the 24th July, 1862, Atkinson left his home to enter the Confederate service as a substitute for Dewitt. He was received and

*141

*served as such substitute until his death. Before leaving for the army he executed his will, bearing date the 19th July, 1862, and and thereby devised a tract of land to his two sons on condition that they assist in paying for the land he had purchased from Dewitt.

The cause was referred to E. A. Law, Esq., "to hear and determine the issues of law and of fact raised in the case." A number of witnesses were examined on both sides upon the question whether the agreement between Dewitt and Atkinson was that the acceptance of the latter as Dewitt's substitute in the army was to operate as satisfaction of the note given for the land.

The Referee examined the evidence at length, and reported as his conclusion of fact that no such agreement as that alleged by defendants was made by Dewitt and Atkinson, and therefore that the note was unpaid.

The defendants excepted to the report on the ground that the finding of the Referee was clearly against the weight of the evidence.

His Honor the presiding Judge also reviewed the evidence at length, and came to the conclusion that it established the existence of the agreement alleged by defendants. He therefore overruled the report of the Referee, and decreed that the note of Atkinson be delivered up to be canceled, and that the Clerk of the Court do execute a conveyance of the land to the heirs at law of Atkinson.

The plaintiffs appealed.

Edwards, for appellants.

Spain, contra.

April 20, 1875. The opinion of the Court was delivered by

WRIGHT, A. J. The single question in the case is one of fact. Did Dewitt agree with Atkinson that upon the acceptance of the latter as his substitute in the Confederate army the note of Atkinson, held by him, should be discharged?

The Referee, to whom the issues were referred, after a full examination of the testimony, which he reported at length, filed his conclusions in favor of the plaintiffs. On exceptions by the defendants, his finding of fact was reversed by the presiding Judge, by a decree, in which the evidence is elaborately considered. Before presenting our views on the question of fact involved, it may be prop-

*142

er, lest *silence may lead to misapprehension, to say that the third exception to the report was not well taken.

We do not understand that the report, in weighing the relative strength of the testimony, failed to give whatever effect was due to that offered by the respondent, upon the ground that it was not admissible to contradict or alter a written contract by parol. On the contrary, while accepting the evidence with the view of showing that the note was discharged, he did not consider it of sufficient force for the purpose for which it was introduced. If the testimony from which the presiding Judge drew his conclusion had been heard by him viva voce, his decree on the facts would be in the nature of a verdict by a jury, with which we would not interfere, unless it was a manifest departure from the only result to which a proper estimate of the evidence could lead. When, however, from not having seen the witnesses, their manner on the stand, and thus deprived of the opportunity of judging of their relative intelligence, and obliged to draw his opinion from the evidence as reported by the Referee he has enjoyed no better opportunity of deciding on the facts in issue than we possess, obtaining our knowledge from the same source. If the evidence heard by the Chancellor involved much doubt, "that," as was said in Lord v. Lowry & Fagortie, (Bail. Eq., 510,) "furnishes, perhaps, the best reason why this Court should not review the Chancellor's determination of it."

But the same rule does not obtain where the testimony is altogether in writing, for, the reason of it ceasing, the rule itself must cease.—Green and Wife v. Hicks, Bail. Eq., 20.

Therefore it is said in the same case: "So where the Commissioner examines the witnesses, his decision on the facts should be generally adopted by the Chancellor; but he has the right to examine and correct the conclusions of the Commissioner where he thinks they are incorrect. In such cases of difference of opinion between the Chancellor and the Commissioner, upon the fact, this Court is bound to examine the Chancellor's decree, and either adopt or reject it, as the facts may appear to warrant."

As we have said in other cases, it is not our purpose, in expressing the conclusions which we reach on issues of fact, to enter into any discussion at large of all the evidence introduced, or to take up the testimony of every witness on the one side and compare it with that introduced on the other side to rebut it. We look at it as a whole, and justify our conclusion by the influence which its entire scope makes on our minds.

*143

*The note was proved. To discharge it, the onus was on the respondents to prove the contract between Dewitt and Atkinson, through which, they averred, it had been satisfied. If the testimony offered to that end failed to accomplish it, and left the terms of the alleged agreement between the parties doubtful, the fact on which the defense relies was not established.

It is not sufficient, in the language of the decree, that "the preponderance of evidence in the case is decidedly in favor of the defendants." The agreement relied on to operate as payment must be established by proof. If the testimony leaves it doubtful, then it has failed in its purpose. If the evidence had left the execution of the note by Atkinson doubtful, it could not have been set up against his estate: so, on the other hand, if the evidence offered in favor of its discharge left the conclusion doubtful, it cannot be said to have been made out. That it required an explanation to aid every circumstance adduced on the part of the defense by assumptions not always properly inferable, is at least indicative of the failure of the testimony offered to lead to a direct and positive judgment. The provision in regard to the land, for which the note was given, in the will of Atkinson, executed but five days before he left to enter the service, and after he had agreed to go as a substitute for Dewitt, is so inconsistent with the character of the contract set up by the defense that it is almost sufficient of itself to counteract the effect of the testimony which is offered to sustain it. The explanation that the contract was only to have force from the time when he might be accepted as a substitute does not at all modify the impression which it forces upon us. No man of ordinary prudence, under the same circumstances, about entering an army then engaged in a bitter war, executing the most solemn instrument by which he can dispose of his worldly estate, would have so referred to the land which, on his acceptance into the service which he was about to enter, was to vest absolutely in him by purchase. He not only refers to it as still unpaid for, but directs the mode through which he desires the payment for it to be made. He does not even allude in any shape or form to the contract, on the performance of which, as the defense asserts, his title was to depend. The will was executed and proved in due form of law, and it does not lie in the mouth of those who take under it to say that he signed it without a full knowledge of its contents. As the Referee says, "the inference to be drawn, from the execu-

*144

tion of the will, is greatly strength*ened and fortified by his repeated declarations after he had joined the army." The settlement, too, on the 13th September, 1866, between the administrator de bonis non of Atkinson and the administratrix of Dewitt, with a knowledge on both sides that the legatees of Atkinson claimed that the note had been paid by the contract under which he entered the service as the substitute of Dewitt, strongly confirms the conclusion which the Referee has reached, and in which, from the whole scope of the testimony, we feel bound to concur.

The motion is granted, the order of the Circuit Judge set aside, and the case remanded to the Circuit Court for such orders as may be necessary to carry out our judgment as herein expressed.

MOSES, C. J., and WILLARD, A. J., concurred.

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6 S. C. 144

LYNCH v. GOODWIN.

(Columbia. Nov. Term, 1874.)

[*Arbitration and Award* ⟸21.]

An agreement to refer a pending action to arbitration, which does not name the arbitrators nor provide for their number or manner of appointment, cannot be pleaded by the defendant as a discontinuance of the action after the death of the plaintiff, by whose administratrix it had been revived.

[Ed. Note.—Cited in Fore v. Berry, 94 S. C. 76, 78 S. E. 706.

For other cases, see Arbitration and Award, Cent. Dig. § 98; Dec. Dig. ⟸21.]

Before Cooke, J., at Greenville, September Term, 1874.

This was an action by William Lynch, plaintiff, against John H. Goodwin, defendant, commenced July 10th, 1872, to recover the amount due on a single bill.

On the 30th of August, 1873, the plaintiff and defendant signed an agreement in the following words: "We, the undersigned litigants, have mutually agreed to submit our case, (William Lynch v. John H. Goodwin,) now pending, for arbitration." Shortly after the agreement was made the plaintiff died, and Martha Lynch, his widow, sued out letters of administration on his estate. She refused to abide by the agreement, and, by order of the Court, continued the action. The defendant then filed a plea puis darrein con-

*145

tinuance, *in which he stated the agreement,

and demanded judgment of discontinuance, and that the case be submitted to arbitration.

His Honor overruled the plea and the defendant appealed.

Earle & Wells, for appellant.
Sullivan & Stokes, contra.

April 23, 1875. The opinion of the Court was delivered by

WRIGHT, A. J. It might be enough to say that the agreement of August 30, 1873, "to submit the case to arbitration," did not amount to an actual submission, and this alone would dispose of the appeal. An arbitration is the submission of the matter in dispute to the judgment of one or more persons named. If they are not designated, it is no submission.—Billings on Awards, 39; Russell on Arbitrations and Awards, 65. Here no persons are designated as Referees, nor was the manner of their appointment fixed by the agreement. The original parties were not bound by it, for it was not in such a shape as to put it in the power of the one to compel its performance by the other. The interest to be concluded by the decision of the Referees must appear in a submission.—Russell on Arbitration, 49. If an agreement of the kind before us could operate as a discontinuance of the action, it must be because, by the will and consent of the parties, another tribunal for the determination of the issues which it involves has been substituted.

But the agreement here did not name the persons who were to act as Referees, and in no way provided either for their number, appointment, or even their selection. It could not, therefore, bind the personal representatives of either of the parties who may have died before further action under it, because it contained no terms or conditions for the breach of which an action could have been maintained against the surviving party. We do not see how an agreement can operate as a discontinuance of a pending action when no stipulation to that effect is contained in it, nor by the widest implication can be inferred from it. The authorities all agree that if either of two parties to a submission die before the award is made, the power of the arbitration is gone.

That, however, is not the precise question here. As we have said, it is whether the agreement of itself discontinues the action,

*146

and, *in our judgment, it does not. By Section 144 of the Code, the action did not abate by the death of the plaintiff's intestate, and was continued in proper time and mode by the proceeding on the part of the administratrix.

The motion is dismissed.

MOSES, C. J., and WILLARD, A. J., concurred.

6 S. C. 146

RICHARDSON v. CHAPPELL.

(Columbia, Nov. Term, 1874.)

[*Wills* ⇐845.]

Under Statutes 3 and 4 W. and M., and 5 Geo. II, Chap. 7, lands purchased from a devisee are not liable for the debts of the devisor where the purchase was bona fide, for valuable consideration and without notice.

[Ed. Note.—Cited in Smith v. Grant, 15 S. C. 152.

For other cases, see Wills, Cent. Dig. § 2158; Dec. Dig. ⇐845.]

[*Appeal and Error* ⇐1001.]

The question whether the purchaser had notice is one of fact, and the conclusion thereon of the Circuit Judge will not be disturbed, unless he acts in the face and against the force of overbearing testimony.

[Ed. Note.—Cited in Aultman v. Utsey, 34 S. C. 568, 13 S. E. 848.

For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928–3934; Dec. Dig. ⇐1001.]

[*Wills* ⇐845.]

In considering the equity of a purchaser from a devisee for valuable consideration and without notice, the Court will not, where the purchase was bona fide, look into the amount or adequacy of the consideration paid. And where, in such a case, a large part of the purchase money was paid, notes of the purchaser given for the balance and a conveyance was executed: *Held*, That the sale was complete, and the purchaser entitled to the benefit of the defense.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2158; Dec. Dig. ⇐845.]

[*Wills* ⇐845.]

Where a bona fide purchaser from a devisee for valuable consideration and without notice has given his notes for part of the purchase money, the equity of a creditor of the devisor is not against the land in the hands of the purchaser, but against the notes as long as they remain assets in the hands of the devisee, and to compel the purchaser to pay them; but there is no lien on the land to secure their payment.

[Ed. Note.—Cited in Adger & Co. v. Pringle, 11 S. C. 545; Warren v. Raymond, 12 S. C. 9, 22; Warren v. Raymond, 17 S. C. 198.

For other cases, see Wills, Cent. Dig. § 2158; Dec. Dig. ⇐845.]

Before Moses, J., at Newberry, August, 1873.

This was a bill in equity, exhibited on the 16th day of May, 1867, by Sarah S. Richardson, plaintiff, against Thomas H. Chappell and John W. Chappell, qualified executors of John Chappell, deceased, Rosalie Simkins, Eldred Simkins and others, widow and children and heirs of John C. Simkins, deceased, John W. Payne and C. D. Spearman, executors, and Margaret S. Payne and others, heirs of B. F. Payne, deceased, defendants. All other persons interested in the subject matter of the suit were also made parties defendant.

The only questions made on the appeal related to what were called in the proceedings the Neck plantation and the Payne land,

*147

*and the case, so far as it related to those

lands, and as found in the pleadings, proofs, report of the Referee, James Hemphill, Esq., and decree of the Circuit Judge, is as follows:

On the 22d day of October, 1845, John Chappell was appointed by the Court of Equity for Edgefield District guardian of the plaintiff, and gave bond, with sureties, bearing that date. He received the plaintiff's estate, and died on the 23d day of May, 1857, before she had arrived at the age of twenty-one years. He left of force a last will and testament, of which his sons, Thomas H. Chappell, John W. Chappell, James B. Chappell and Stanmore B. Chappell, were appointed executors. The will was duly proved in the Ordinary's office, and on the 13th day of May, 1857, Thomas H. Chappell and John W. Chappell alone qualified as executors.

The testator, John Chappell, after directing that all his just debts and funeral expenses be paid, devised and bequeathed, inter alia, as follows: The Neck plantation he devised one-half thereof to his son James B. Chappell, in fee, and the other half thereof to his son Stanmore B. Chappell, during the life of his mother, Elizabeth S. Chappell, and at her death to his son John W. Chappell, in fee.

On the 11th day of February, 1859, James B. Chappell, Stanmore B. Chappell and John W. Chappell, for and in consideration of the sum of $16,434 to them paid, as recited in the deed, sold and conveyed the Neck plantation, containing 913 acres, more or less, to John C. Simkins. The deed contained the usual covenant of warranty, and Thomas H. Chappell was a subscribing witness thereto. Of the purchase money, the sum of $5,000 was paid in cash and the remainder secured by three sealed notes of John C. Simkins, each for $3,811, payable in one, two and three years, to James B. Chappell.

On the day of February, 1860, James B. Chappell, John W. Chappell, Thomas H. Chappell and Stanmore B. Chappell signed a written instrument whereby they agreed with John C. Simkins to cause to be paid all debts then outstanding against the estate of the said John Chappell, and to save harmless him, his heirs and assigns from all liability to pay the same. John C. Simkins died on the day of July, 1863.

The tract of land called the Payne land was devised by the testator to his son Thomas H. Chappell, in fee, who, after the death

*148

*of his father, sold it to R. M. Scurry. On the 8th day of February, 1861, Scurry sold and conveyed it to B. F. Payne, who died on the 14th day of February, 1867, leaving a will, of which J. W. Payne and C. D. Spearman were executors. His wife, Margaret S. Payne, and three children survived him.

The eleventh clause of the will of John Chappell directed that the personal property of the testator not bequeathed by him should be sold by his executors and the proceeds applied to the payment of his debts; and it was proved that Thomas H. Chappell, the acting executor, had sold of this property to the amount of $13,000, and had applied $10,000 thereof to the debts of the testator.

The plaintiff had no guardian after the death of John Chappell. She arrived at age on the 25th day of December, 1861, and on the 16th day of May, 1867, she exhibited this bill. The prayer was for a decree for the amount due her by the estate of her late guardian against his executors and legatees, and against the sureties on his guardianship bond, and to make the funds and property received by his devisees and legatees specifically liable for her claim; and, for that purpose, the bill asked that all deeds which had been made by the devisees of any real estate devised by the will of the testator be canceled and set aside, and for general relief.

The defendant, Rosalie M. Simkins, answered the bill and set forth at considerable length the circumstances connected with the purchase by her late husband of the Neck plantation. She relied for her defense mainly on the ground that John C. Simkins was a bona fide purchaser for value within the sense of the Statutes 3 and 4 W. and M. She also relied upon the equitable defense of purchase for valuable consideration without notice. An answer on behalf of the infant children of John C. Simkins was also filed. The representatives of B. F. Payne, deceased, relied substantially upon the same grounds of defense, so far as the tract of land they held was concerned; they also relied upon the Statute of Limitations as a further defense.

At the reference, it was proved that the plaintiff's demand against her late guardian had never been formally presented to his executors as a claim against his estate. No account thereof was taken, nor was the amount proved, but the Referee reported that the guardian had received a large sum of money for his ward which had not been paid to her. It was further proved that payments

*149

were made on *two of the sealed notes given for purchase money of the Neck plantation by John C. Simkins in his lifetime, and his representatives after his death, after he had notice that the estate of the testator was indebted to the plaintiff, and that one of the notes was still unpaid. Upon the question whether he had notice or knowledge of the plaintiff's claim before or at the time of his purchase, there was no direct evidence, but circumstances were proved from which a conclusion might be drawn one way or the other.

There was evidence tending to show that Thomas H. Chappell had possession of the Payne land, claiming it as his own, and that he paid taxes for it from October, 1847, until he sold it to Scurry after the death of the testator.

The Referee reported that he was satisfied from the testimony that the purchase by John C. Simkins of the Neck plantation was bona fide within the sense of the statutes 3 and 4 W. and M., 5 Stat., 534, and that said plantation was not specifically liable to plaintiff's claim. He cited Sporkman v. Timbrell, 8 Sim., 253, and Richardson v. Horton, 7 Bev., 124, as authorities directly in point.

He also reported that the Payne land was not liable to plaintiff's claim, on the ground that it was protected from such claim by the Statute of Limitations.

The plaintiff excepted to the report of the Referee on the following grounds:

1. That the Referee omitted to state as facts well and satisfactorily proved before him, that the Neck plantation was the property of John Chappell, deceased; that John C. Simkins, and those claiming under him, knew the source of title, and that it was at his death subject to his debts.

2. That the Referee omitted to include in his findings the facts well and clearly proved that the claim of the plaintiff was known to John C. Simkins in his lifetime, at least after the first payment made by him on the purchase of the Neck plantation, and was known to his heirs at law, his personal representatives and agents, after his decease.

3. That the Referee omitted to state as a fact, in his findings, that John C. Simkins, deceased, by written indemnity, secured himself against payments to be made and made upon the purchase money of the Neck plantation to this vendor.

4. That the Referee omitted to state, in his findings of facts, that, after all the knowledge set forth in the above exceptions,

*150

the per*sonal representatives of John C. Simkins, deceased, and John C. Simkins himself paid large sums of money on the purchase of the Neck plantation to their vendors, the Chappells.

5. That the Referee omitted to state that a part of the purchase money is still due on the Neck plantation, and unpaid by the personal representatives of John C. Simkins, deceased.

6. That the equity of the plaintiff being that of a creditor, was superior to that of the vendors, the Chappells, who were only volunteers.

7. That the Referee should have declared that J. C. Simkins, and those taking under him, should have held the Neck plantation as a trust, subject to plaintiff's claim, and clearly so after notice given to them of such claim, or knowledge thereof.

8. That the Referee should have held that the unpaid purchase money above set forth should be paid to the plaintiff.

9. That the Referee should have found the Neck plantation, or the proceeds of the Neck plantation, assets of the estate of John Chappell, deceased, and under the facts stated above, and found liable in the hands of the representatives and heirs of John C. Simkins, deceased, for payment of John Chappell's debts.

10. Because the Referee erred in deciding, as matter of law, that the land willed to Thomas H. Chappell, conveyed by him to B. F. Payne, was not liable to the plaintiff's claim, but was protected by the Statute of Limitations.

His Honor the presiding Judge reviewed the evidence upon the question whether John C. Simkins was a purchaser of the Neck plantation without notice, and his conclusion was that he had no notice of the debt due to the plaintiff at the time of his purchase. He ruled that Simkins was a bona fide purchaser, and, as such, was protected by the equity of Statute 3 and 4 W. and M., as to so much of the purchase money as had been paid before bill filed; but he decreed that the Neck plantation was specifically liable for so much of the outstanding sealed note as remained unpaid. He held, as to the Payne land, that the purchase money had all been paid; that the sale to Scurry was bona fide and without notice, and that the owners were entitled to the protection of the same statute above named, and he decreed accordingly.

The plaintiff and the defendants, representatives of John C. Simkins, deceased, both appealed—the former on the ground that the

*151

*whole of the Neck plantation, and also the Payne land, should have been held specifically liable for the plaintiff's claim, and the latter on the ground that it was error to decree that the Neck plantation was specifically liable for the amount due on the unpaid note given for the purchase money.

Thomson, with whom were Jones & Jones, and Addison, for plaintiff:

1. That the sale of the Simkins land was made by devisees only; the executors had no agency in it.

(a.) As a fact, the sale was by the devisees only.

2. That the debts were charged by the will on the land, and so as to authorize the executors to sell.—2 Jarm. on Wills, 368, et seq.; 1 Roper on Leg., 448, note L; 2 Williams on Executors, 1212, note L as to late cases; Hawkins on Wills, 282.

3. A sale by a devisee of lands subject to a testamentary charge, with debts of testator unpaid, will not bar executors having a power of sale from selling for payment of debts, nor prevent a sale by Court for such purpose.—Baldwin v. Cooley, 1 S. C., 261.

4. If the executors had a power of sale, the bond of indemnity does not take away the power of sale nor create an equitable right in the purchaser.

(a.) If available for any purpose other than notice, it disposes of assets without valuable consideration, and is thus void as to

creditors.—2 Spence Eq. Jurisprudence, 379; Pagett v. Hoskins, Gilbert Eq. Rep., 111.

5. A devise of lands, with no testamentary charge on realty or other full and sufficient provision for payment of debts, is fraudulent under the statute of W. and M., and the alienee of the devisee has no valid title.—2 Statutes at Large, 533, 534; Revised Statutes, 463; 1 Spence Eq. Jur., 313; Hughes v. Doulben, 2 Bro. Ch., 614; General Statutes, 444, § 15.

(a.) No proof of fraud required. The devise is of itself fraudulent where the debts are unpaid.—5 Fisher's Com. Law Dig., 9100.

6. A purchaser of lands sold by executors having power to sell, as well as by devisees, with knowledge of unpaid debts charged by the will upon the land, or with knowledge of unpaid debts generally, should regard himself as dealing with assets of the estate and pay money only to the executors. A payment to devisees is a willful misapplication of assets, whether done with or without the con-

*152

sent *of the executors. The principle is that the transaction itself gives the purchaser notice of the misapplication, and necessarily involves his participation in the breach of duty.—2 Williams on Executors, 674, note V.

(a.) And in such case the same principle applies to realty as personalty.—Watkins v. Cheek, 2 Sim. & Stu., 199.

7. In no sense was the deed to John Simkins the proper act and deed of the executors as such.

(a.) As a fact, the executors did not sell; only two of them qualified. One could not convey.

(b.) The deed purports to be act of persons for themselves.

(c.) The executors had no power by will to sell.—Revised Statutes, 469, § 1. Cases cited on margin.

Baxter, with whom was McGowan and Youmans, contra:

1. The deed of conveyance of the Simkins land can only be regarded as the act of a devisee aliening devised lands, and in no wise the act of the executors for any purpose contemplated by the will. The executor has no authority over a devise, unless by express authority under the will, or by clear implication.—Bacon's Abridgment, vol. 4, p. 76; Hull v. Hull, 3 Rich. Eq., pp. 66-96, and case reported in note; also, Bird v. Houze, Speers' Eq., 250, and Vernon v. Valk, 2 Hill Ch., 261. Neither such express authority nor clear implication is here found.

2. The first clause of the will, wherein the testator directs the respective payments of his debts, creates no charge upon the realty devised authorizing the executors to sell, nor is the same charged by operation of law as a primary fund. The expression is formal, merely a recognition of the law, intending at most to charge the executors with the duty of paying the debts; but not to charge the land devised, because in the eleventh clause of his will the testator expressly charges the residue of his personal estate with the payment of debts, thereby negativing all supposed intention to charge the land, and thereby following the law, which makes personalty the primary fund to pay debts. Substantially the same words were used in the will in Hull v. Hull as in Chappell's will, as to payment of debts. "If the testator directs a particular person to pay, he is presumed, in the absence of all other circumstances, to intend him to pay out of funds

*153

with which he is entrusted, and not *out of other funds over which he has no control."—Story's Eq., § 1247. There is an express charge upon the personalty to the exclusion of the land, sustained by operation of law. The residue of personalty was deemed ample—was ample, if applied to payment of debts.

3. In this case the executor under no circumstances could sell and convey, because no authority therefor can be found in the will. As the agent of the creditors, the executor could apply to the Court to enforce the liability of land devised, and before alienation by the devisee for payment of debts; but he could do nothing otherwise—nothing more than the smallest creditor could do in his own name.

4. The bond of indemnity is an isolated fact, without bearing in any way upon the proper adjudication of this case.

5. The sale in this case is clearly valid according to the authority of 3 and 4 W. and M., Statutes at Large, vol. 2, p. 533; also as recognized and expounded in Jones v. Wightman, which, modified in subsequent decisions as to the relative liability of certain classes of property and in other particulars, is still authority that after alienation bona fide by the heir, (and if by the heir certainly by the devisee,) before action brought, the creditor can only look to the heir or devisee, and hold him liable to the extent of the amount realized by the sale, but the land aliened goes free from liability. This construction is sustained by the English Courts in the construction of 3 and 4 W. and M., and a statute similar to our statute of II George, Statutes at Large, 570, as appears by cases cited on previous argument and still before the Court. A judgment against the executor or the administrator is invalid as against the devisee or heir, the devisee or heir not having been made a party.—Vernon v. Valk, 2 Hill Ch., 259; Gilliland & Howell v. Caldwell, 1 S. C., 194; Reeder v. Speake, manuscript.

6. In no possible view of this case can the alienee be held accountable for the application of the money paid for either the Neck plantation or the Payne land. Between the devisee's alienee and the creditor, there is no privity. Neither Payne nor Simkins, nor their heirs, rest under any obligation, legal

or equitable, to the creditors of John Chappell. The Statute of 3 and 4 W. and M. cuts off all connection whatever.

7. The Simkins deed was simply the deed of the devisees. The deed of the executors would have been worthless, because unauthorized alike by the will and by operation of law.

*154

*8. The claim of the plaintiff is not a bond debt against the heirs of Simkins and of Payne, if to be sustained at all, but merely an equity, open to the plea of the Statute of Limitations, which is sustained by the proof, (Wardlaw v. Buzzard, 15 Rich. L., 162,) of questionable authority, and to be considered.

9. The bona fide character of the sale of both the Simkins land and the Payne land is sustained by the proof.

10. The proper parties are not before this Court, nor were they before the Court below. The legal representatives of both Simkins and Payne should be before the Court to contest the right of the plaintiff, which is in conflict with the claims of the creditors of Simkins and Payne respectively, and to settle the question of conflicting equities which therein arise; and, therefore, the plaintiff's appeal should be dismissed.

11. The defendants are harassed herein to their great cost, where no judgment for any exact amount has been rendered in this suit against any one which these defendants have been allowed to canvass or controvert; and, therefore, the plaintiff's appeal should be dismissed.

12. The heirs of Payne have the protection of a perfected title in T. H. Chappell, their alienor, before the death of the testator —a fact established by the testimony, sanctioned by the report of the Referee, and tacitly sustained by the judgment below; all of which forms a complete protection, only to be overrruled on overbearing testimony.— Austin v. Kinsman, 1 S. C., 97; Blackwood v. Searles, ib., 116; Williams v. Beard, ib. This is a question of fact already adjudicated.

13. The defendants, the heirs of Simkins, as appellants, submit that the judgment should not require the estate of Simkins to pay the entire purchase money yet unpaid without regard to the marshaling of the assets of that estate, whereby the amount properly applicable thereto can be ascertained, which is the only amount for which Simkins' estate should be held liable in justice to other creditors, unknown as to number or amount, because unrepresented therein.

April 23, 1875. The opinion of the Court was delivered by

WILLARD, A. J. The ground of the plaintiff's claim is the liability of John Chappell, at his decease, as guardian for her estate unaccounted for. She now seeks to subject

*155

the former estate of his *guardian to her demand, after the lapse of many years,—after it has passed into the hands of devisees, and after third persons have acquired legal rights therein through alienations by devisees.

The questions relating to the Simkins tract will be first examined as arising upon the appeals on both sides.

John Chappell devised the tract here designated, the Simkins tract, with certain limitations. J. C. Simkins became the purchaser of this tract in 1859, taking title through such devisees. He made a cash payment of $5,000 at the time of the purchase, and gave three notes in equal amounts, payable in one, two and three years, for the balance of the purchase money.

The first question to be considered is, whether the plaintiff, as a creditor of the devisor, has a right, either at law or in equity, to subject to her claim the devised lands purchased by Simkins in the hands of those taking his estate at his decease.

Whatever right the plaintiff may have at law against the devisee or his alienee is founded either upon the statute of 3 and 4 W. and M., (2 Stat., 533,) or upon 5 George II, Chap. 7. The remedy conferred by the first mentioned of those statutes is assimilated to that of the action at common law against an heir by reason of assets descended. Bona fide alienation by the devisee defeats the right of the creditor to pursue the land, but leaves the devisee liable personally to the value of the devised land. The right of the plaintiff at law to follow the devised lands into the hands of the alienee of the devisee depends, so far as effected by 3 and 4 W. and M., upon the question whether the alienation was bona fide in the sense of that statute.

5 George II makes no change in this respect. This statute has in view three distinct objects—first, to render lands "in the plantations and colonies of America" "chargeable and liable" for all debts; second, to make such lands "assets" for satisfaction of all debts "in like manner as real estates are by the law of England liable to the satisfaction of debts by bond or other specialty;" and, third, to subject real estate to all the remedies, processes and proceedings for the recovery of debts, either at law or in equity, precisely as personal property is subject.

As it regards the first object, namely, the creation of a general charge or liability against real estate for debts of all classes, its provisions will be hereafter examined with special reference to the question of the equitable rights of creditors under it. The

*156

remedial *part of the statute is that embracing the second and third objects as above stated. It is to them that we must look for the remedies that are to be taken at law under this statute. The remedies pointed out

there reach to two cases—first, where the real estate thus charged is in the hands of an heir or devisee of the debtor, in which case the statute reaffirms the effect and operation of 3 and 4 W. and M., by declaring such estates "assets." As was said in Jones v. Wightman, (2 Hill, 579,) these two statutes must be construed together, from which it would result that the proper remedy at law, in cases of that class, is an action against the heir or devisee on the ground of assets descended or devised, and the exemption as to lands bona fide alienated would be applicable. The second case is where lands so charged are held by some person liable to some process or proceeding in law or equity for the collection of debts, and in whose hands personal property could be subjected to such process or proceeding. This provision is, in substance, that realty so charged shall be liable to like remedies and in like manner as personal estates "are seized, extended, sold or disposed of for the satisfaction of debts."—Martin v. Latta, 4 McC., 128, note.

A judgment recovered against the executor by the plaintiff would not have enabled her to seize the lands in question in the hands of the alienee of the devisee.—Bird v. Houze, Speers' Eq., 250. The only mode of reaching them at law would be by an action under the statute, in which the devisee would be entitled to show bona fide alienation as a defense quoad the land.

But it is clear that creditors acquire, under 5 George II, an equity to compel the application of lands subjected by the statute to their debts. Such an equity has been constantly recognized and acted upon, and has been enforced by statute provisions intended to facilitate the application of the real estate of decedents to the payment of their debts through the powers of executors and administrators acting as representatives of the interests of creditors.

It must be concluded that this action can be maintained either as in the nature of an action at law against a devisee, his alienee being joined on the ground of assets descended, or in the nature of a bill based upon the equity of 5 George II to reach the property in question as assets applicable to the payment of debts. Regarding it in either light, if the defendant can show that the alienation was bona fide and for a valuable

*157

consideration and without notice, the *suit must fail as it regards the lands under immediate consideration.

It is not claimed that there was actual fraud on the part of Simkins. It is alleged, however, that he cannot be regarded as a purchaser who has paid a valuable consideration before notice of the plaintiff's equity.

On the question of notice, the conclusions of the Circuit Judge appear to conform to the evidence. There was certainly evidence in the case from which a conclusion of fact could be drawn as to whether Simkins had, at the time of purchasing, knowledge of the existence of plaintiff's claim. Simkins was dead at the time of the trial, and direct proof that he had no such notice was not attainable. It does not appear that it was in the power of the defendants to produce additional proofs, and the question of notice was properly before the Circuit Judge as a question of fact to be determined from the testimony before him. There is no overbearing weight of evidence against his conclusions such as would justify this Court in setting them aside; and it must be concluded that Simkins purchased in ignorance of plaintiff's claim as an outstanding demand against the assets of the estate.

The conclusion of the Circuit Judge on the question of notice is not prejudiced by the fact that he considered, as part of the evidence bearing on the question of notice, the facts that the claim of the plaintiff was not brought forward during the period of time when, in contemplation of law, all demands against a decedent are presented; that at the time of the sale there were personal assets in the hands of one of the executors adequate to discharging all the debts of the estate, including that due to the plaintiff; and that the dealings of the plaintiff with such executor were such as might give rise to a conclusion that such executor was holding assets appropriated to the payment of her demand at her request, and for her convenience, and at her risk. These facts may have affected the mind of Simkins in a manner bearing on the state of his knowledge, for the existence of which the conduct of the plaintiff might be in equity responsible. We are not required to say what force these circumstances should have had in the mind of the Circuit Judge, for the duty of drawing such inferences rested primarily on him, and it is only where he acts in the face of and against the force of overbearing testimony that this Court can properly disturb his conclusions. Such a case is not presented here.

*158

*It is denied that Simkins is to be considered as having paid a valuable consideration. The fact that a part of the payments that have been made upon the purchase money notes was made after notice of the plaintiff's equity, is referred to as showing that Simkins was not in the position of a purchaser who had paid the consideration of the purchase before notice. The evidence establishes the fact that the consideration of the purchase was a cash payment of $5,000 and the giving of certain notes; that the cash payment was made and the notes given accordingly, and thereupon title was conveyed to Simkins. This was a complete and executed consideration. The notes were a personal obligation of the purchaser, their subsequent payment or non-

payment being immaterial as it regards the completeness of the consideration on which title was conveyed. It is not a case where the contract of purchase was inchoate by reason of the non-performance of some of the conditions or stipulations that entered into it.

In considering the equity of a purchaser for a valuable consideration without notice, the Court will not, where the purchase is bona fide, look into the amount or adequacy of the consideration paid.—Bassett v. Nosworthy, 2 Lead. Cases Eq., 1; Bush v. Bush, 3 Strob. Eq., 131 [51 Am. Dec. 675]. The equitable doctrine that affords protection to a purchaser is not based upon the idea that such protection is due to the extent only of the consideration paid, but rests on the idea that the character of an honest purchaser, who has parted with value, precludes his being subjected, as to his purchase, to equities by which his conscience is not affected.

It follows that the plaintiff had no equity as it regards the notes unpaid, as against Simkins or those who held his estate. The obligation arising on the notes was res inter alia as it regards the plaintiff, both legally and equitably. She might trace the notes so long as they remained assets of the estate indebted to her, and through the lawful holder of the notes reach satisfaction by compelling their payment; but in doing so she could not go beyond the rights of the holder of the note through whom she was compelled to work out satisfaction of her demand. As there was no lien on the purchased land to enforce the payment of the notes, the plaintiff can have no such lien. It follows that while the decree is correct in allowing the plaintiff to pursue whatever remedies may exist for the payment of the only note that remains due, yet it was erroneous in charging such payments upon the land specifical-

*159

ly, or hold*ing it as an equitable lien on the land. In this respect the decree should be modified. Subject to this modification, the decree is correct as it regards the Simkins tract.

The questions relating to the Payne tract were substantially the same as those that are presented in the case of the Simkins tract. The question of notice as a question of fact is the controlling one as it regards this tract. The conclusion of the Circuit Judge was adverse to the existence of notice. There is no clear and overbearing state of evidence affording ground for disturbing his conclusions in this respect.

It is unnecessary to consider the question of the effect of the clauses of the will directing the payment of debts, in creating a charge, generally, or in the case of lands devised to one made the executor under such will, for, whatever may be the nature of the plaintiff's equity, the defendant would stand in the same position under the plea of purchaser for a valuable consideration and without notice. If a charge was made out under the terms of the will, it would create an equity alone, and an equity no stronger than that arising under the statutes charging realty for debts of a decedent.

The decree should be modified in the manner already pointed out, and in all other respects affirmed.

MOSES, C. J., and WRIGHT, A. J., concurred.

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6 S. C. 159

HAYNSWORTH v. BISCHOFF.

(Columbia. Nov. Term, 1874.)

[*Executors and Administrators* ⇐152.]

Where an administrator loans money of the estate, taking as security notes of the borrower, and afterwards recovers judgment on the notes, and, at a Sheriff's sale, to enforce the judgment, purchases lands of the judgment debtor, the notes, judgment and Sheriff's conveyance being all in his individual name, the lands in his hands are assets and subject to a trust for the use of those beneficially interested in the estate.

[Ed. Note.—Cited in Smith v. Grant, 15 S. C. 152.

For other cases, see Executors and Administrators, Cent. Dig. § 623; Dec. Dig. ⇐152.]

[*Trusts* ⇐356.]

The trust under such circumstances follows the lands into the possession of a purchaser, unless he can protect himself under the defense of purchase for valuable consideration without notice.

[Ed. Note.—Cited in Warren v. Raymond, 12 S. C. 22.

For other cases, see Trusts, Cent. Dig. §§ 529–538; Dec. Dig. ⇐356.]

[*Vendor and Purchaser* ⇐236.]

A purchaser cannot protect himself under the defense of purchase for valuable consideration without notice where an antecedent indebtedness is the sole consideration of the purchase.

[Ed. Note.—Cited in Dearman v. Trimmier, 26 S. C. 509, 511, 512, 2 S. E. 501; Marsh v. Ramsay, 57 S. C. 124, 35 S. E. 433.

For other cases, see Vendor and Purchaser, Cent. Dig. § 570; Dec. Dig. ⇐236.]

[*Mortgages* ⇐153.]

A mortgagee of lands is a purchaser within the meaning of the rule which protects a purchaser for valuable consideration without notice.

[Ed. Note.—Cited in Simons v. Bryce, 10 S. C. 373, 374; Jones v. Hudson, 23 S. C. 502; Norwood v. Norwood, 36 S. C. 342, 15 S. E. 382, 31 Am. St. Rep. 875; Patterson v. Rabb, 38 S. C. 146, 147, 152, 17 S. E. 463, 19 L. R. A. 831.

For other cases, see Mortgages, Cent. Dig. § 344; Dec. Dig. ⇐153.]

[*Vendor and Purchaser* ⇐223.]

It is not necessary that one should acquire the full legal title to entitle him to the protection of the defense of purchase for valuable consideration without notice.

[Ed. Note.—Cited in Warren v. Raymond, 12 S. C. 9.

For other cases, see Vendor and Purchaser, Cent. Dig. §§ 467, 468; Dec. Dig. ⇐223.]

*160

*Before Townsend, J., at Darlington, Term, 1873.

Action by W. F. Haynsworth and others, plaintiffs, against Henry Bischoff & Co., and others, defendants.

The facts of the case are as follows:

J. M. McCall was administrator, with the will annexed, of J. L. McCall, deceased. On the 22d of October, 1866, a bill in equity was filed for settlement of the estate of the testator, to which the plaintiffs, as devisees and legatees of the testator and the administrator, were parties. Under the proceedings had in that cause, a final decree was rendered on May 10, 1871, in favor of the plaintiffs, against the administrator for $8,262.87. In the year 1866 the administrator loaned moneys of the estate to W. E. McCall, taking from him his promissory notes as securities for the loans. The notes were afterwards put in suit, and in 1868 judgment was recovered thereon. Execution was issued on the judgment, and on January 6th, 1868, the Sheriff sold, under the execution, a tract of land, the property of the judgment debtor. The administrator was the purchaser, at a price more than sufficient to satisfy his judgment, and he paid the balance of the price, after satisfying his own judgment, by giving to the holder of another judgment against W. E. McCall his note, secured by a mortgage of the land.

The notes of W. E. McCall to the administrator, the judgment thereon and the Sheriff's deed of conveyance were to him, not in his representative character, but as an individual.

After his purchase of the land, J. M. McCall contracted a debt with Henry Bischoff & Co. for goods bought of them, and on the 1st of September, 1869, he gave them his note, payable thirty days after date, for $619.80, the price of the goods. To secure the payment of this note, J. M. McCall, on the 11th of July, 1870, gave to Henry Bischoff & Co. his mortgage of thé land he had purchased at Sheriff's sale—the only consideration expressed in the mortgage, besides the nominal consideration of three dollars, being his indebtedness on the note, then past due. The mortgage was recorded on the same day it was given.

Some time after the mortgage was given, Henry Bischoff & Co. commenced action against J. M. McCall on his note to them, and on the 7th of March, 1871, obtained and entered judgment thereon. The mortgaged premises were levied on under the execution and advertised for sale by the Sheriff in June,

*161

1871, and thereupon *W. F. Haynsworth and others, plaintiffs, commenced this action against J. M. McCall and Henry Bischoff & Co. and other judgment creditors of J. M. McCall, for injunction to restrain the sale by the Sheriff of the said tract of land, and praying that the same be sold under the decree of the Court and the proceeds applied to the payment of the judgment in favor of the plaintiffs in the bill in equity for settlement of the estate of J. S. McCall, deceased.

Henry Bischoff & Co. were the only defendants who answered the complaint.

The case was referred to a Referee, and at the hearing before him numerous questions of law and fact were presented for his consideration, the principal question being whether Henry Bischoff & Co. were entitled to protection under their mortgage as purchasers for valuable consideration without notice.

The Referee held, inter alia, that the trust in favor of the plaintiffs could be shown by parol; that the defendants could not show by parol any consideration for the mortgage, (as forbearance, for instance, which in this case was attempted to be shown,) except that expressed upon its face; that Henry Bischoff & Co. were mortgagees in good faith for valuable consideration and without notice of the trust, but he held that, as a mortgagee by the statute law of this State held only a lien upon the land as security for the payment of his debts, they did not acquire the full legal title, and could not, therefore, be protected under a plea of purchase for valuable consideration without notice. And he declared it as his judgment that the plaintiffs were entitled to the injunction they demanded by their complaint, and to have the land sold and the proceeds applied to the payment and satisfaction of their claims under the judgment in the bill for settlement of the estate of J. S. McCall.

Henry Bischoff & Co. excepted to the report on a number of grounds, presenting for consideration by the Court the same questions of law which the Referee had ruled against them.

His Honor the presiding Judge overruled the exceptions, and made a decree in conformity with the recommendations of the report.

Henry Bischoff & Co. appealed to this Court.

A. C. Spain, for appellants, contended that the evidence had not established the alleged trust in favor of the plaintiffs; and, if it

*162

*had, the appellants were purchasers for valuable consideration without notice, and should be protected. That forbearance to sue was a valuable consideration, (Perry on Trusts, § 220; 1 Steph., N. P., 255; Thomas v. Croft, 2 Rich., 113; McCelvey v. Noble, 13 Rich., 330; Goodman v. Simonds, 20 How., 370,) and that the Referee had erred when he ruled that it was incompetent for the plaintiffs to shew in this case any consideration for the mortgage except that expressed on its face.—Garrett v. Sewart, 1 McC., 514; 1 Phil. Ev., 549; Hartop v. Hartop, 17 Ves., 184; The King v. Scammonden, 3 T. R., 474; Buckner v. Ruth, 13

Rich., 157; 1 Green. Ev., § 304, note 5. And that a bona fide mortgagee is a purchaser and entitled to protection.—Perry on Trusts, § 235; Willoughby v. Willoughby, 1 T. R., 769; Story Eq., § 1000; Legyard v. Butler, 9 Paige, 132; 1 Hill on Mort., 163, note b.

T. B. Fraser, contra, made numerous points, and contended that trust funds, as a general rule, may be followed by the parties interested in them, and no change of the state or form in which they originally existed can divest the property of its trust character.—McNeil v. Morrow, Rich. Eq. Cases, 172; Story Eq., §§ 1258-9-60; Rhame v. Lewis, 13 Rich. Eq., 269; Williams v. Hollingsworth, 1 Strob. Eq., 103. That appellants were not entitled to protection as purchasers for value. An antecedent indebtedness is not a valuable consideration. —Bassett v. Nosworthy, 2 Lead. Cases in Eq., 71, 72; Donaldson v. State Bank, 1 Dev., 103; Williams v. Hollingsworth, sup. The evidence was insufficient to prove that indulgence was a consideration of the mortgage; and, if it had been, it would not have sustained the defense of purchase for value. But whatever may be the rule in England and other States, a mortgagee of real estate in this State is not entitled to the defense of purchase for valuable consideration without notice. To sustain that defense, it is necessary for the purchaser to show that he acquired the legal estate. At common law he does acquire it, but our Act of 1791 converts the mortgage into a mere lien or security for the payment of the debt. There can be no foreclosure in the strict sense of that term. There can only be a decree for the sale of the mortgaged premises.—Brown v. Wood, 6 Rich. Eq., 167; Blake v. Heyward, Bail. Eq., 221; Perry on Trusts, § 218; Story Eq., § 1503; Laffan v. Kennedy, 15 Rich., 257; Beard v. Williams, 1 S. C., 324.

*163

*April 26, 1875. The opinion of the Court was delivered by

WILLARD, A. J. The pleadings are not set forth in the brief, nor is the precise character of the relief demanded by the complaint stated.

It appears that, before the commencement of this suit, defendants were seeking to enforce a judgment recovered upon a note of J. M. McCall, secured by a mortgage executed on lands of which the legal title stood in his name. It does not appear that defendants were attempting to enforce their mortgage. The injunction issued in the present action arrested the proceedings of the defendants to enforce their judgment. A copy of the injunction is not set forth, and it does not appear whether the defendants were restrained by it from asserting and proceeding to enforce their mortgage.

The case has been discussed by all parties as to the questions at issue related to the rights acquired by the defendants under their mortgage, and the questions raised by the present appeal will be considered upon the assumption that the defendants stand before the Court on the strength of their claims as mortgagees.

J. M. McCall was administrator, with the will annexed, of the estate of J. S. McCall, deceased, and as such held funds appertaining to that estate. The plaintiffs are legatees and devisees, their respective interests in the realized assets being established by a decree to which the administrator was a party.

Plaintiffs allege that the administrator acquired the lands in controversy through the use of the assets of the estate, taking, improperly, the title in his own name, and that the land became by substitution assets of the estate; and they seek to charge the lands accordingly as against the mortgage upon them held by the defendants.

The defendants claim, among other defenses, that, under their mortgage, they are purchasers for a valuable consideration and without notice of any trust or breach of duty on the part of the administrator, and they resist the claims of the plaintiffs to subject the mortgaged premises to their equities.

The first question to be considered is, whether the plaintiffs have an equity as against J. M. McCall to claim the land in controversy as assets of the estate. The facts bearing on this question, as found by the Referee, are, briefly, as follows: J. M. McCall, the administrator, loaned to W. E. McCall money of the estate, taking therefor

*164

*notes payable to himself individually. He recovered judgment on these notes, and, under that judgment, sold and became the purchaser of the lands in controversy as the estate of the judgment debtor.

The amount of the bid was settled in part by extinguishing J. M. McCall's judgment, and in part by a note of J. M. McCall, secured by a mortgage on the premises intended to satisfy a judgment affecting the premises outstanding in a third person. That need not now be particularly noticed. Title was taken by J. M. McCall in his individual name.

The notes, the judgment and the title to the land being thus in J. M. McCall as an individual and not as administrator, so far as it appeared on the face of the transaction, he possessed an apparent right to sell or mortgage the premises in question. The persons entitled under the will had an equity: First, to demand that the lands thus purchased should be applied to the purposes of the administration as assets, by substitution, of the estate. It was within the power of the administrator to make a loan of the moneys of the estate in hand. Indeed, un-

der the prevailing rule making it the duty of administrators to make interest on the realized assets in his hands, loans producing interest are necessary for the protection of the administrator.

At law, the notes of W. E. McCall were assets of the estate to the extent of rendering the administrator accountable for them under a plea of plene administravit, (Rhame v. Lewis, 13 Rich. Eq., 269,) inasmuch as they were taken in the due course of the office of administrator; nor was it material that they should bear evidence on their face that they appertained to the estate. Such evidence might be of importance when the question was that of notice to one dealing with the administrator as the individual owner of such securities, but in other respects they stood on the same footing as chattel property generally.

No question of the propriety of the loan is raised by the plaintiffs, who have the right to its advantages, even if, under the circumstances, it was injudiciously made.—McNeil v. Morrow, Rich. Equity Cases, 172.

In equity, the notes represented and stood in the place of the original assets.—Rhame v. Lewis, 13 Rich. Eq., 269.

The fact that the action on these notes and the judgment recovered thereon was in the individual name of the administrator

*165

*without mention of the official character in which he held them, is quite immaterial in ascertaining who was entitled to the benefit of the recovery. It was consistent with the duty of the administrator that he should prosecute the securities taken for assets of the estate disposed of by him in his own name.—Rhame v. Lewis. The judgment was in itself an asset and enured to the benefit of the estate. J. M. McCall having become the purchaser of the lands and taken title in his own name, to the extent that the consideration of such purchase was the money due on the judgment, he became in equity a trustee for the use of the estate. It was, in substance, the ordinary case of a trustee purchasing lands with trust funds and taking title in his own name, whence arises in equity a trust for those entitled beneficially to the trust funds. The fact that the trustee was also administrator does not affect the application of the equitable principles under which a resulting trust is raised; the trust is moulded to subserve the interests of the administration.—McNeil v. Morrow, Rich. Eq. Cases, 172.

It is, therefore, clear that, upon the facts found by the Referee, the plaintiffs are entitled as against the administrator to claim that the lands shall be applied in the course of administration as assets of the estate.

The next question is, whether the defendants are entitled to the protection afforded in equity to purchasers for valuable consideration without notice.

The facts bearing on this question are, briefly, as follows: J. M. McCall was indebted to the defendants on his individual account, and for some purpose was induced to give the defendants a mortgage upon the premises in question as security for his note representing such indebtedness.

The objections interposed to the allowance of protection to defendants as purchasers for a valuable consideration without notice are: First, that as mortgagees they are not entitled to such protection; and, second, that they have not paid a valuable consideration.

The Referee finds that they are not chargeable with notice of any equities of the plaintiffs or of any breach of duty on the part of the administrator.

The first point to be considered is, whether one having a lien on lands as mortgagee can claim protection in equity as a purchaser. It is settled in England that he can.—Wil-

*166

loughby v. Willoughby, *1 T. R., 763. This rule has been followed in this country.—Ledyard v. Butler, 6 Paige, 132; Pierce v. Faunce, 47 Me., 507; McFarlane v. Griffiths, 4 Wash. C. C. R., 585 [Fed. Cas. No. 8,790].

It is contended, however, by the plaintiffs that the authorities beyond this State are inapplicable as the law stands here; that, by statute, the mortgagee takes nothing in this State but a security for his debt, the mortgagor in possession remaining the owner of the land for all purposes, subject only to the right of the mortgagee to enforce his security by a sale of the land.

The statute law of this State merely follows, in this respect, the doctrines adopted in England and in this country prior to its passage, and conforms the legal idea of a mortgage to that which has obtained in the Courts of equity. The decisions in the English and American Courts of equity asserting the right of a mortgagee to the protection afforded to a purchaser for value and without notice are based upon the idea of the nature of a mortgage and of the right of a mortgagee held by the Courts of equity. Now that the Courts administering equity find the doctrine which they have always maintained in regard to the right of a mortgagee and the nature of a mortgage security sanctioned by the statute law, they find additional reason for adhering to their conclusions as it regards the right of the mortgagee to stand before the Court as a protected purchaser.

The argument on this point urged by the plaintiffs is based upon an erroneous assumption. It is contended that one cannot claim protection as a purchaser in respect of lands unless he holds the legal title. No support is found for this position in the adjudicated cases. The error has probably arisen from confusing the expression "legal right," often used in the cases on this subject, with that of legal title or estate.

The equitable doctrine as to purchasers springs out of the peculiar nature of equity as the administration of a settled rule of conscience. When it is sought to affect a party, or subject his rights or estate to some equity or state of equities, existing primarily between other parties, on the ground that he has acquired some property or right from one bound by such equity, and in whose hands the property or right previous to its transfer was specifically bound by such equity, it is necessary to show that the act of acquiring such property or right ought not in conscience to stand. If the dealing has been fair, and the purchaser has been at cost to

*167

*acquire the property or right, not intending or knowing of any injury to result therefrom to a third person, it is clear that a Court that proceeds on the ground of conscience cannot interfere with rights thus obtained. This idea is embraced in the more general proposition, constantly applied in equity, that, when equities are equal, he that has the legal title will be preferred. The expression "title," as just used, in its broadest sense, includes all rights capable of being enjoyed and secured under the law. One holding a legal title to lands is certainly included, but rights amounting to less than the full legal title are equally included within it.

We can find no reason for departing from the current of decisions that has recognized the mortgagee as among those who may claim, in equity, protection as purchasers.

The Referee finds that the defendants have not paid a valuable consideration. It is established that the debt secured by the mortgage was antecedent to the mortgage. It is not disputed that an antecedent debt is not a good consideration to entitle the defendants to protection as purchasers. But it is said that forbearance was the actual consideration that induced the giving of the mortgage.

It will not be necessary to consider whether forbearance alone is sufficient consideration to support the claim of a purchaser for value in equity, for the defendant has not established the existence of any such consideration.

The findings of the Referee in this respect are questioned. The Referee was in error in holding that parol evidence could not be introduced to prove an agreement to forbear. It appears from the Referee's report that the mortgage recited the antecedent debt as the sole ground of its being given, making no mention of forbearance.

The granting of forbearance is not at all inconsistent with the consideration stated, and might well have been attained by a separate contract, or stipulation or consent, in a pending cause or otherwise.

Thomas v. Croft (2 Rich., 113 [44 Am. Dec. 279],) permitted a party to show by parol a consideration to support a guaranty endorsed on a pre-existing bond without stating any consideration whatever. The consideration offered to be shown in that case was also forbearance. There, the legal effect of the guaranty itself was in question. Here, the validity of the mortgage is not in question. As far as the defendants' legal rights are concerned, they hold by undisputed title. The questions here are altogether as to substan-

*168

tial rights, *and not as to forms nor modes. The defendants allege that they have parted with value in an honest transaction, and ought not to be ensnared in the equities existing between parties wholly strangers to them. If such was the fact, the defendants were, in a Court of equity, entitled to show it by any means in their power.

But although this conclusion of the Referee was erroneous, it does not appear that the defendants were prejudiced by it. It does not appear that the defendants were actually prevented from placing on the record all the proofs in their possession on this point. The evidence shows no exception on the ground of excluded evidence. The Referee's report does not state that written evidence was excluded, but purports to set forth the evidence which was objected to as inadmissible. We must consider that all the evidence offered by defendant is before us.

It is not pretended that the evidence shows an agreement to forbear for any specific period of time. It was necessary then to show an agreement to indulge the debtors generally, attended by actual forbearance for a reasonable time.—Thomas v. Croft, 2 Rich., 113 [44 Am. Dec. 279]. We are satisfied that the evidence does not establish any agreement to forbear that would have prevented the defendants from proceeding at once to sue at law upon the promissory note which was due at the time the mortgage was given to secure it.

A portion of the exceptions taken to the Referee's report call in question the equities as existing between the plaintiffs and J. M. McCall; but the evidence does not present any ground for disturbing the findings of the Referee on this subject. The other exceptions, which are numerous, are substantially answered in the preceding.

As the exceptions are drawn out into much argumentative detail, it will not be possible to give them more detailed examination.

The appeal should be dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

6 S. C. *169

*SMITH & MELTON v. WALKER.

(Columbia. Nov. Term, 1874.)

[*Partnership* ⇐199.]

Where copartners sue, their individual names should appear in the title of the action, and not the name of the copartnership only.

[Ed. Note.—Cited in Lookout Mountain Medicine Co. v. Hare & Co., 56 S. C. 462, 35 S. E. 130.

For other cases, see Partnership, Cent. Dig. §§ 362-368; Dec. Dig. ⇐199.]

[*Attachment* ⇐143, 249.]

The date of a summons not being a necessary part of it, an attachment thereon is not irregular and void because it bears date two days before the date of the summons. The existence of the summons at the date of the attachment may be shown by evidence aliunde.

[Ed. Note.—Cited in Butler Bros. v. Welch, 76 S. C. 131, 56 S. E. 668.

For other cases, see Attachment, Cent. Dig. §§ 398, 861; Dec. Dig. ⇐143, 249.]

[*Attachment* ⇐113.]

Where the application for an attachment is based on the ground that the debtor has absconded or concealed himself, or has assigned, disposed of or secreted his property, or is about to do so, with intent to defraud his creditors, the affidavit must state the facts upon which the application is founded; but where the ground is that the defendant is a non-resident of the State, it is enough to state that fact, without other facts and circumstances.

[Ed. Note.—Cited in Brown v. Morris, 10 S. C. 469; Yates v. Gridley, 16 S. C. 500; Darby & Co. v. Shannon, 19 S. C. 530; Ivy v. Caston, 21 S. C. 588; Myers v. Whiteheart, 24 S. C. 202; Kerchner & Calder Bros. v. McCormac, 25 S. C. 465; Monday v. Elmore, 27 S. C. 131, 3 S. E. 65; Baum v. Bell, 28 S. C. 209, 5 S. E. 485; Wando Phosphate Co. v. Rosenberg, 31 S. C. 307, 9 S. E. 969; Sharp v. Palmer, 31 S. C. 448, 10 S. E. 98.

For other cases, see Attachment, Cent. Dig. §§ 308, 309, 311; Dec. Dig. ⇐113.]

[*Attachment* ⇐143.]

In the case of a non-resident defendant, a summons may be considered as issued within the intent of § 250 of the Code as soon as it is made out and an application founded on it for an attachment.

[Ed. Note.—Cited in Little v. Christie, 69 S. C. 60, 48 S. E. 89.

For other cases, see Attachment, Cent. Dig. § 397; Dec. Dig. ⇐143.]

[*Attachment* ⇐107.]

That the affidavit on which an application for an attachment is made does not state the time from which interest on the claim is to be computed, is not such an irregularity as avoids the attachment.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 289; Dec. Dig. ⇐107.]

[*Attachment* ⇐156.]

Nor is it such an irregularity that the warrant recites the causes of action as consisting of two notes and the affidavit shows one to be an open account.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 445; Dec. Dig. ⇐156.]

[*Process* ⇐111.]

Where the service of the summons is by publication, the defendant, in the absence of proof to the contrary, must be presumed to have had notice of the pendency of the proceedings.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 138, 139; Dec. Dig. ⇐111.]

[*Attachment* ⇐157.]

A party desiring to have an irregularity corrected must proceed at the first opportunity or offer a reasonable excuse for not having done so.

[Ed. Note.—Cited in State v. Norton, 69 S. C. 460, 48 S. E. 464.

For other cases, see Attachment, Cent. Dig. § 450; Dec. Dig. ⇐157.]

[This case is also cited in Yates v. Gridley, 16 S. C. 496, and distinguished therefrom, and in Darby & Co. v. Shannon, 19 S. C. 531, as an example of the procedure by motion to dismiss in attachment cases.]

Before Mackey, J., at Chester, January Term, 1874.

This was a motion to vacate and set aside an attachment and judgment recovered in an action by Smith & Melton against Jerre T. Walker.

The summons in the action bore date the 4th December, 1871, and the judgment was entered February 22d, 1872. The complaint set forth two causes of action—one an open account and the other a promissory note.

The affidavit upon which the application for an attachment was founded bore date December 2d, 1871, and is as follows:

"Personally appeared George W. Melton, one of the firm of Smith & Melton, who, being duly sworn, deposeth and saith that Jerre T. Walker is justly indebted to them, on account for goods, wares and merchandise furnished, in the sum of $3,539.56, besides interest on the same, and $154.50 on a certain promissory note, besides interest on the same; and that a good cause of action exists in the plaintiffs against the said Jerre T. Walker for the said sums of money; and that the said Jerre T. Walker is not a resi-

*170

dent of *this State, and has departed therefrom to avoid the service of a summons, and has disposed of his property with intent to defraud his creditors."

The warrant of attachment bore date December 2d, 1871. It recited that "whereas George W. Melton, one of the firm of Smith & Melton, upon oath, complained that Jerre T. Walker is justly and truly indebted to them in the sums of $3,500 and $150, besides interest, by his certain notes, and that the said Jerre T. Walker is not a resident of this State, and has departed therefrom to avoid the service of a summons, and has disposed of his property with intent to defraud his creditors," and was levied on defendant's property on the same day it bore date.

The affidavit to obtain an order for publication and the order for publication made by the Probate Judge were dated December 4th, 1871.

On the 18th December, 1871, two creditors of Walker—W. H. Carter and G. D. Heath—sued out warrants of attachment against him, and on the 28th December, 1871, they moved His Honor Judge Thomas to vacate the plaintiffs' attachment, on the same

ground now taken before His Honor Judge Mackey. The motion was refused.

On the 3d day of May, 1872, Jerre T. Walker was adjudicated bankrupt, and on the 24th September, 1872, J. S. R. Thomson and T. S. Jeffreys were appointed his assignees.

The plaintiffs submitted an affidavit made by their attorney, in which he stated that the summons was made out on the 2d December, 1871, and dated on that day, and that he afterwards changed the date to the 2d December, 1871, the day on which the order for publication was made, and that he kept the summons in his possession because he knew the defendant was out of the State.

It further appeared that on the 20th November, 1872, G. D. Heath moved a second time, before His Honor Judge Mackey, for an order vacating the attachment, on the same ground as that on which the motion was made before Judge Thomas, and that the motion was refused.

The motion now made was made by J. S. R. Thomson and T. S. Jeffreys as assignees of Walker. It was refused, and the following opinion and order filed by His Honor:

*171

*Mackey, J. J. S. R. Thomson and T. S. Jeffreys, as assignees of Jerre T. Walker, bankrupt, on the 2d day of January, 1874, gave notice to Smith & Melton, plaintiffs above, that on the day of January, 1874, they would move before me for an order vacating the attachment and judgment in the above entitled case, upon the ground that the Court had no jurisdiction in the cause, and for such other and further relief as may be just.

This motion came on to be heard before me on the day of January, 1874. The counsel for the assignees of Jerre T. Walker submitted in evidence the summons and complaint in the above action, the affidavit of George W. Melton to obtain warrant of attachment, the attachment bond, warrant of attachment, the affidavit of George W. Melton to obtain order for publication of summons, affidavit of James T. Wells, clerk of the printer of the Phœnix, with copy summons as published, return of Sheriff as to property levied upon under attachment, the order for judgment, judgment, the order in the United States Court adjudicating Jerre T. Walker a bankrupt, the assignment of the estate of the said bankrupt to the assignees, J. S. R. Thomson and T. S. Jeffreys. The respondent put in evidence the certificates of W. I. Clawson, Register in Bankruptcy, that Jerre T. Walker was adjudicated a bankrupt on the 3d May, 1872, and finally discharged on the 18th December, 1872. That no creditors had ever proven any debts against the estate of the above named bankrupt. In reply, the counsel for the assignees introduced in evidence the schedules of debts due by the bankrupt and the amount of his assets.

The counsel for the assignees, upon the records and papers submitted, contended that the attachment issued and judgment rendered thereupon were absolutely void.

Whatever may have been the force of the objections to the attachment, it will not be necessary for me to consider here, as my decision upon this motion will rest upon grounds which seem to me to be a complete bar to the right of these assignees to litigate these matters in this proceeding. It is proposed by them to set aside proceedings in attachment and the judgment of the Court, rendered February 22, 1872.

It appears by the testimony that no creditors have ever proved their debts against the bankrupt, and that he has been finally discharged. Assignees are trustees for the general creditors of the bankrupt; and if it appears that there are none such, then they

*172

rep*resent no one and are functus officio. Without first going into the Bankrupt Court, and by petition reopening the whole case, upon motion of certain creditors, I do not see how they have any capacity whatever to carry on any proceedings in this Court. But if they had, I do not think they would be permitted to question the executed contracts of the bankrupt, or to assail a judgment of a Court of competent jurisdiction against the bankrupt, rendered prior to his being adjudicated as such. This matter, in different guises, has twice before been passed upon by this Court.

On the 26th December, 1871, in this identical case, W. Harper Carter and G. D. Heath, junior attaching creditors, on motion, were heard before the Hon. Wm. M. Thomas, upon a motion to vacate and declare void the attachment herein for irregularities. Judge Thomas, after arguments heard, dismissed the motion by an order of record in this case dated and filed January 20th, 1872. Subsequently, on the 20th November, 1872, G. D. Heath made a motion, after notice given, to vacate and declare void the attachment and judgment in the case of Smith & Melton v. Jerre T. Walker, which judgment the said Smith & Melton had obtained from the Court on the 22d February, 1872, for their debt, interest and cost. Upon hearing that motion, I then decreed that, as the objections then urged to the attachment were the same as appeared to have formed the subject matter of the motion before Judge Thomas and between the same parties, I was bound by his decision and order; that the matters were res judicatæ—to which effect my order of the date of 20th November, 1872, was made. In the present motion, I see not the slightest change either in the parties or subject matters of the objection. The motion is made in the case of Smith & Melton v. Jerre T. Walker. The assignees of Jerre T. Walker, who afterwards became bankrupt, are as much bound by the two former decisions as

he would have been himself. He was a party to the record, and bound by every adjudication in the cause, and his assignees can have no better right than he had.

It is, therefore, ordered that the motion of J. S. R. Thomson and T. S. Jeffreys, assignees of Jerre T. Walker, the bankrupt, be dismissed, and that Smith & Melton have the costs of this motion.

J. S. R. Thomson and T. S. Jeffreys excepted to the order and appealed on the grounds:

*173

*1. Because it decides that the question of the validity of the attachment and judgment in this action is res adjudicata, when the defendant has never appeared in the action, and neither the defendant nor these assignees have ever been parties to any proceedings to vacate said attachment and judgment.

2. Because it decides that the assignees have no interest in this matter, whereas they are the legal owners of all the bankrupt's estate, rights and credits, and are required and empowered to collect and recover the same for the benefit of creditors who have or may establish their claims before the distribution of assets; or, if no such claims should be established, then for the benefit of the bankrupt himself.

3. Because it does not decide that the attachment and judgment in this action are invalid and void.

Patterson & Gaston, for appellants.

Hamilton, contra.

April 29, 1875. The opinion of the Court was delivered by

WILLARD, A. J. The plaintiffs are not properly named in the title of the appeal. Their individual names should appear, and not the copartnership name under which they transact business. A partnership, as such, cannot sue or be sued. The individuals constituting the copartnership may sue jointly, but their names must individually appear on the record. The objection was not made by the parties, and is only mentioned to check a practice inconsistent with technical accuracy of procedure.

The appeal brings up the question of the regularity of an attachment and a judgment based upon it. The attachment was issued December 2, 1871. Judgment was entered on the 22d of February, 1872.

The defendant, J. P. Walker, was adjudicated a bankrupt by an order of the United States District Court, made May 2, 1872, and his estate assigned to Thomson and Jeffreys, September 24, 1872.

The motion below was made by the assignees in bankruptcy. The defendant appears to have been a non-resident of this State, and has not appeared in the action or joined in the present motion.

No question is presented to this Court involving the effect of the defendant's discharge in bankruptcy upon the judgment;

*174

nor is *there any attempt made in the present motion to give effect to the discharge as against the judgment. The only question raised by the appeal relates to the regularity of the proceedings upon the attachment in the Circuit Court.

The conclusions of the Circuit Judge in refusing to set aside the judgment and attachment appear to be correct. The right of the assignees to contest the regularity of the attachment and judgment was contested on the ground that no debts had been proved in bankruptcy, and that the bankrupt had been discharged.

It will not be necessary to consider how far the Circuit Court can look into the state of proceedings in the Bankrupt Court to determine whether the authority of the assignees over the assets had ceased, for it is clear that no irregularity has occurred of which advantage can be taken, assuming the full right of the assignees to represent the defendant in the attachment and judgment. The attachment and judgment were both in force prior to the adjudication in bankruptcy.

It is claimed that the attachment is irregular and void, because it bears date December, 2, 1871, whereas it appears on the face of the summons that it was issued December 4, 1871, two days after the attachment was issued. This objection is taken under Section 250 of the Code of Procedure. That Section authorizes the issuing of a warrant, in certain cases, "at the time of issuing the summons, or at any time afterwards." It also adds as follows: "and for the purposes of this Section, an action shall be deemed commenced when the summons is issued." It also contains the further provision that "personal service of such summons shall be made, or publication thereof shall be commenced, within thirty days." The attachment issues either in an action on contract for the recovery of money only, or in action for the wrongful conversion of personal property.

The cases in which it issues are: First, where the defendant is a foreign corporation; second, where the defendant is a non-resident of this State; third, where he has absconded or concealed himself; fourth, where a corporation or person has assigned, disposed of or secreted his property, or is about to do so, with intent to defraud his creditors. Had the validity of the present attachment rested wholly on the sufficiency of the statement contained in the affidavit on which it was founded, to the effect that the defendant "has departed therefrom to avoid the service of a summons, and has disposed of his property

*175

with intent to defraud his creditors," a *serious question of irregularity would have been presented; for charges of this nature should be supported by a statement of the facts on which they are founded. But the additional

ground stated for the issuing of the attachment, namely, that the defendant is a nonresident of this State, is sufficiently stated in the affidavit by merely setting forth that fact, without other facts and circumstances.

The facts disclosed on the motion to set aside the attachment and judgment were, that the summons was actually made out at the time the application was made for the warrant of attachment, but was afterwards altered, as it regards the date, to a time two days after such application.

The date placed upon a summons is not a necessary part of the summons, and is not enumerated as such among the requisites of a summons by Section 151. The effect of the summons on the defendant's rights depends wholly on the day of its service, and not in any respect upon the date usually placed on the summons itself. It would not be an irregularity if the date was omitted, nor can an error committed in dating affect the regularity of the summons. This results from the fact that the defendant cannot be prejudiced by such error, his time to plead being governed by the day of service, and the time of the commencement of the action depending on when it was lodged or delivered for service.

It is apparent that there was a summons in existence at the time the application for the attachment was made. But the parties contend that such summons was not issued in the sense of Section 250 at the time of the application for the attachment. In order to construe the meaning of the term "issue," as applied to the present case, we must inquire whether there was any act to be performed by the plaintiffs' attorney after he had made out the summons and previous to his making his application for an attachment. He was not bound to place it in the hands of the Sheriff for service. The service of a summons may be made by any person not a party to the action.—§ 156. When the defendant is known to be a nonresident, and actually absent from the State, it would be useless to go through the forms of placing the summons in the hands of any person for service, and the Code does not require it. The proper mode of service in that case is by publication —an act performed under the direction of the attorney for the plaintiff in accordance with the order of publication. There is no

*176

good reason why the *attorney may not retain the summons in his own hand in order that it may be attached to and filed with the proof of service by publication.

In the case, then, of a non-resident, the summons must be regarded as issued, within the intent of Section 250, as soon as it is made out and an application founded on it for an attachment.

The objection that the affidavit did not state the time from which interest should be computed, is not substantial. If the plaintiff does not sufficiently state one of the several items that go to make up the amount of his demand, he is liable to have the effect of his attachment limited to that portion of his claim which is capable of computation. It is, therefore, the interest of the plaintiff, rather than of the defendant, that the amount of the plaintiff's claim should be distinctly stated. It does not appear that the amount attached was excessive, and there is no ground to interfere with the proceedings.

The objection that the recitals of the warrant of attachment are not conformable to those of the affidavit on which it was granted, cannot prevail at the present time. The attachment states the two causes of action as separate sums demanded, as both arising on notes, while the affidavit states that one of these causes of action was on account of the sale of goods, &c. This variation was, at most, an irregularity, of which advantage could only be taken by a motion made in due time to the Court issuing the warrant, on the ground of irregularity.

The warrant was issued in December, 1871, and the judgment was entered in February, 1872. The notice of motion to set aside the attachment and judgment was given in January, 1874. In the absence of proof to the contrary, it must be assumed that the defendant received actual notice of pendency of the proceedings from the publication of the summons under the order of publication, that being the mode of giving notice prescribed by law. The notice must be held sufficient to put him on inquiry as to what proceedings had taken place, and, therefore, to charge him presumptively with notice of the attachment. The date of publication is not stated, but it may properly be assumed to have followed immediately after the order of publication, which bears date December 4, 1871.

Under these circumstances, it would appear that due diligence had not been exercised in order to take advantage of the irregularity

*177

*of the attachment. A party desiring to have an irregularity corrected must proceed at the first opportunity, or offer a reasonable excuse for not having done so. This does not appear to have been done.

The appeal should be dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

6 S. C. 177

MONAGHAN v. SMALL.

(Columbia. Nov. Term, 1874.)

[*Executors and Administrators* ⟸388.]

One who purchases land at a sale ordered by the Court in an action for settlement of the estate of a decedent will not be compelled to accept a conveyance unless it appears that the title is good to a moral certainty.

[Ed. Note.—Cited in People's Bank of Greenville v. Bramlett, 58 S. C. 485, 36 S. E. 912, 79 Am. St. Rep. 855.

For other cases, see Executors and Administrators, Cent. Dig. § 1577; Dec. Dig. ⟸388.]

Before Graham, J., at Charleston, August, 1874.

John J. Monaghan died, intestate, on the 20th December, 1872. At the time of his death, he was in possession, as owner, of a lot of land on the South side of George street, in the city of Charleston. Elizabeth Monaghan, his widow, and one of his distributees, became his administratrix, and on the 19th of June, 1873, she commenced action in the Court of Common Pleas against the other distributees of the intestate, alleging that there were no personal assets of the estate, that there were debts to be provided for, and praying that the said land be sold and the proceeds applied to the payment of the debts, and the surplus, if any, distributed.

It was referred to a Referee to report upon the facts, and in July, 1873, he made his report recommending a sale, and a few days afterwards made a supplemental report, wherein he stated that John J. Small had submitted an offer in writing to purchase said land at the price of $4,900, and recommending that he, the Referee, be authorized to accept the offer and convey the land to the purchaser. In August, 1873, the supplemental report was confirmed and the Referee ordered to make the sale.

John J. Small having refused to accept the title, a rule to shew cause was issued against him, and upon his return being made, it was referred back to the Referee to report upon the title.

*178

*In April, 1874, the Referee reported that on the 5th of November, 1838, Alfred R. Drayton executed a deed whereby he conveyed to the late Judge Edward Frost four slaves in trust for the sole and separate use of his wife, Martha S. Drayton, for life, and at her death to the use of such persons as she, by her last will and testament, might bequeath the same; and in default of such appointment, "in trust for the next of kin of my said wife who by law may be entitled thereto," with power, on the application in writing of Mrs. Drayton, to sell all or any of said slaves and reinvest the proceeds in other property subject to the same uses, "and the same to do with other property that may be substituted in a sale of any part thereof as often as may be required." This deed was recorded in the Secretary of State's office, in Charleston, in Miscellaneous Records VVVVV, p. 225.

On the 28th January, 1853, Otis J. Chafee, in consideration of $7,500 to him paid by "Edward Frost, trustee of Martha S. Drayton, under a certain deed of trust, bearing date 5th of November, 1838, and recorded in the Secretary of State's office, in Charleston, Miscellaneous Records, page 226," conveyed the lot of land in question in his case to "the said Edward Frost, trustee, his heirs and assigns, forever." In this deed no trusts were declared.

Alfred R. Drayton died in or before July, 1860, and on the 16th of June, 1863, Martha S. Drayton, in consideration of $15,000, conveyed the lot to John J. Monaghan in fee simple. On the back of his deed Edward Frost wrote and executed a release as follows: "Know all men by these presents, that I, Edward Frost, trustee of Mrs. Martha S. Drayton under a certain deed of trust, bearing date the 5th of November, 1838, and recorded in the Secretary of State's office, in Charleston, in Miscellaneous Records VVVVV, page 225, do hereby assign and release to the said Martha S. Drayton, her heirs and assigns, all the right, title, interest and estate which, by the said deed of trust, was vested in me in and to the lot of land and building within described as conveyed by the said Martha S. Drayton to J. J. Monaghan."

The Referee further reported that on the 13th of July, 1839, George Buist, executor of the will of Mrs. Drayton's father, executed, under an order of the Court, another deed of trust, whereby he conveyed to the said Edward Frost, trustee, $10,000 in bonds, cash and negroes, to be held for the use of the said Martha S. Drayton for life, with such

*179

limitations that if she should survive *her husband, Alfred R. Drayton, the fund would be hers absolutely; that Mrs. Drayton had survived her husband; that part of the purchase money paid to Otis J. Chafee for the same lot of land under the conveyance of January, 1853, was derived from the funds held of trust executed by George Buist, and part was paid out of the money paid by J. J. Monaghan in 1863, and that no part of it came from the proceeds of property held under the deed of the 5th November, 1838.

The case came before the Circuit Court on exceptions by John J. Small to the report of the Referee, and his Honor the presiding Judge held that the title was at least doubtful, and not such a one as the Court would compel a purchaser to accept, and he ordered that the exceptions be sustained and the rule dismissed.

Elizabeth Monaghan, the plaintiff, appealed on the following grounds:

1. Because J. J. Monaghan, under the deed from Martha S. Drayton and the release to her endorsed thereon by E. Frost, trustee, delivered to him as one and the same conveyance, took a fee simple title to the land in question.

2. Because the execution of the said title to J. J. Monaghan by Martha S. Drayton, followed by the release to her from E. Frost, trustee, endorsed on said title deed, whether said release was executed at the same time as said deed, or subsequent to the delivery thereof, was a valid execution of the power of sale under the deed of 5th November, 1838.

3. The purchase money paid to O. J. Chafee by E. Frost, trustee, in consideration of the conveyance from the former to the latter, having been taken from funds embraced in the deed of 13th July, 1839, and J. J. Monaghan having had the legal estate vested in him by the conveyance from Martha S. Drayton and the release thereon endorsed, and being also entitled to the equitable estate, no suit at law for the recovery of said land can ever prevail; and, under any proceedings which may be had in equity, a Court would reform the conveyance from Chafee to Frost, trustee, in accordance with the terms of the deed of 13th July, 1839.

4. Because under the deed of 5th November, 1838, Mrs. Drayton, upon the death of her husband, took an absolute estate in the personalty, and hence a fee simple estate under the deed from Chafee to Frost, trustee.

*180

*5. That if, by the conveyance from M. S. Drayton to J. J. Monaghan, the latter took but a life estate, he was in possession as life tenant, and the release by E. Frost, trustee, to Mrs. Drayton enured to his benefit and vested in him a fee simple estate; having the one estate, a simple release was sufficient to carry the fee.

6. Because the title tendered by R. S. Duryea, Referee, to J. J. Small was a good title, which would have conveyed a fee simple estate.

Ficken and McCrady, for appellant.
Simons & Seigling, contra.

August 8, 1875. The opinion of the Court was delivered by

WRIGHT, A. J. The question is to be considered as if raised by a complaint on the part of the administratrix and distributees of the late John J. Monaghan, the intestate, to require the respondent, Small, specifically to perform his contract for the purchase of the premises referred to in the pleadings. He declines to accept the title tendered under the order for sale, because the intestate, at the time of his death, did not have such an interest in the property as will allow his distributees to make a good and absolute title in fee, or, at least, one which will be free from doubt.

In passing on the several deeds by which the title is claimed to have vested in the intestate, we are not at liberty to depart from the language expressed on their face, nor are we permitted to receive evidence to change their terms, for the purpose of reforming them, so as to give them effect through the real intention which the parties had in view at their execution. We must pass upon them as they are. When they are reformed, by proceedings proper and adequate therefor, they will not be the deeds upon which we are called upon to pass in determining the question now before us.

The conveyance of Otis J. Chafee, of 28th January, 1853, is to Edward Frost, trustee of Martha S. Drayton, under a certain deed of trust, dated November 5, 1838, which is referred to as recorded on certain stated pages in a given volume of the records of the office of the Secretary of State, in Charleston. The deed of Mrs. M. S. Drayton to J. J. Monaghan, the intestate, is dated 16th June, 1863, and is endorsed with a release by Edward Frost, as her trustee, under a certain deed, executed on a stated day, and record-

*181

ed in a *named volume of records in the office of the Secretary of State. The day of the execution of the deed and the date and place of its record correspond in every particular with those expressed on the deed of Chafee to the said Mrs. Drayton. It is the deed that Monaghan accepted on his purchase from her, and he neither holds nor claims under any other. If he has been misled by recitals which materially affected his deed, can they who now claim under him require Small to accept a title to perfect which he must encounter expense, and, most likely, litigation?

It is due to the counsel for the respondent to say that he did not press upon the Court the point which was taken before the Circuit Judge, and is referred to in his decree, that the recital in the deed of Chafee to Mrs. Drayton and the endorsement of Frost, the trustee, on that from Mrs. Drayton to Monaghan could be referred to the deed of Mr. Buist to the said trustee, of date 13th July, 1839, under which Mrs. Drayton, it is claimed, took an absolute interest in the property thereby conveyed. Not pressing that view, the counsel contended that the conveyance of Mrs. Drayton, with the release thereon by her trustee, constituted together a valid execution of the power of sale created by the deed of November 5, 1838, and vested in Monaghan a fee simple estate.

The argument was able and exhausting, evincing not only great research, but learning. It, however, has failed to convince us. The pressure on our time prevents a discussion of the various propositions it so forcibly presented. It proceeded upon the principle that the words "next of kin of my said wife who may by law be entitled thereto," in con-

nection with the trusts established by the deed of November 5, 1838, must be held to be words of limitation, and, in default of appointment by Mrs. Drayton by will, the absolute title to the property included in the deed, or that purchased with the proceeds of it, under the rule in Shelley's case, vested in Mrs. Drayton. Without pursuing the argument of the counsel step by step, it might be enough to say that, admitting the existence of the rule, which, according to Mr. Jarman, is "one of law and not of construction," and must, therefore, be applied where the words of the instrument, after limiting a freehold estate to a person, by the same conveyance limits an estate mediately or immediately to his heir in fee or in tail, whereby the ancestor takes the whole estate, it has no application to the deed before us. Although the words "next of kin," particularly

*182

when followed by the words *"who may by law be entitled thereto," will generally denote those who would take under the Statute of Distributions, (and whether a widow or those claiming under the statute by representation are included, it is not necessary now to decide,) yet they are not, in the general or technical sense, to be considered, in all particulars, as synonymous with heirs. But heirs may take as purchasers where words of explanation, or fresh words of limitation, are superadded by which a new inheritance is grafted upon the heirs to whom the estate is given.—4 Kent, 22. In McLure v. Young, 3 Rich. Eq., 559, after a devise of real estate to a daughter for life, it was given absolutely and forever to her lineal descendants; and should she die without lineal descendants, one or more, living at her death, then over, the words were held to convey an absolute estate in remainder to the lineal descendants as purchasers. It was considered that the testator had in view the Statute of Distributions, and intended that, on the death of his daughter, those were entitled who would take as her distributees.

In Bailey v. Patterson, (3 Rich. Eq., 156,) it is said: "It is always open to inquiry whether the testator used the word 'heirs' according to its strict and proper application, or in a mere inaccurate sense, to denote 'children,' 'next of kin,' and so forth."

But is the rule in Shelley's case applicable here? It is not, because it has no relation to personalty.—Austin v. Payne, 8 Rich. Eq., 9. But, even if it should be admitted that the property purchased of Chafee was with the proceeds of that conveyed by this deed and subject to the disposition which it directs, then, according to the reasoning in the opinion of the Court in McLure v. Young, (3 Rich. Eq., 559,) and the authority of that case, it would not be affected by the said rule. Those entitled in remainder, under this deed, must be in existence at the termination of the life estate, and are looked to "as a class to take at a particular period." The idea of the creation of a perpetuity is entirely precluded by the words employed. That the grantor had in view those who, at the death of the wife, would be entitled as her next of kin, is manifest by the mode and proportions in which they are to take, from the words "who may, by law, be entitled." It is tantamount to a gift to the distributees of the wife, at her death, in the manner and proportions prescribed by the statute. The objects are not pointed out as holding under or through her, but they derive their title under the deed, as to "an original estate."

183

*Even if the conveyance by Mrs. Drayton to Monaghan, with the release to her by the trustee, Frost, could be considered a valid execution of the power, under the deed of 1838, to sell and reinvest, still the property thus substituted by the purchase from Chafee would be subject to the original trusts created by it, and Monaghan, under his conveyance, would have but an interest in the premises during the life of his grantor. In Laurens v. Lucas, (6 Rich. Eq., 222,) Chancellor Dunkin, in adverting to the principles by which the Court is governed in compelling the specific performance of contracts for the purchase of land, says: "A purchaser cannot be compelled to take a doubtful title. But on this subject the Court acts on moral certainty, and a purchaser will not be permitted to object to a title on account of a bare possibility."

Bearing in mind the principles by which we must be governed in the determination of this question, we cannot affirm the title to be free from such defects as must most probably affect it. To bind the proposed purchaser, it should, at least, be clear of all such doubts as preclude the Court from affirming that, to "a moral certainty," it is valid. This we do not feel justified in saying.

The motion is dismissed.

MOSES, C. J., concurred.

WILLARD, A. J. I concur in the foregoing judgment, but do not deem it necessary to pass upon the validity of the title involved. It is enough to defeat the present proceeding if the questions affecting the title are of sufficient gravity to render it proper that all the parties in interest should be brought before the Court.

Questions of that character, involving both legal and equitable principles, present themselves in the present case, while parties essential to their proper solution are not before the Court.

6 S. C. *184

*SULLIVAN v. HELLAMS.

(Columbia. April Term, 1875.)

[*Bills and Notes* ⇐443.]

The payee of a sealed note cannot maintain an action thereon where he sues for the use of another. Only the real party in interest could maintain the action.

[Ed. Note.—Cited in Carroll v. Still, 13 S. C. 433.

For other cases, see Bills and Notes, Cent. Dig. § 1378; Dec. Dig. ⇐443.]

Before Cooke, J., at Greenville, January Term, 1875.

This was an action by "G. W. Sullivan for the use of Hewlett Sullivan, holder, plaintiff, against William Hellams, defendant," as the summons and complaint were entitled.

The action was upon a sealed note payable to G. W. Sullivan, the plaintiff, and he alleged in the complaint that the action was brought for the use of Hewlett Sullivan.

The defendant demurred on the ground "that the plaintiff has not legal capacity to sue, since it appears by the complaint that Hewlett Sullivan is the real party in interest."

His Honor overruled the demurrer, and the defendant appealed.

Earle & Blythe, for appellant.

Sullivan & Stokes, contra.

June 3, 1875. The opinion of the Court was delivered by

WRIGHT, A. J. The Code was adopted March 1, 1870. This action was commenced by filing a complaint on the 22d day of November, 1871; therefore it was commenced after the adoption of the Code, and should have been brought as declared by Section 134, which is as follows: "Every action must be presented in the name of the real parties in interest, except as otherwise provided for in Section 136," &c. The portion referred to of Section 136 is as follows: "An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with the person for whose benefit the action is prosecuted."

The respondent in this action sued for the use of another, and does not occupy, in this case, any of the positions within the exceptions as made by Section 136 of the Code.

He not being "the real party in interest, neither executor nor administrator, a trustee of an express trust, nor a person expressly authorized by statute" to sue in his own name for the use of Hewlett Sullivan, had no authority of law to bring the action as he did.

*185

*Such an action would have been maintained before the adoption of the Code, under the Act of 1798, commonly called the Statute of Ann, but that statute was repealed by the Code—the Code having been continued of force since its adoption. The demurrer should have been sustained.—Cummings v. Morris, 25 N. Y., 625; Thompson v. Railroad Company, 6 Wallace's R., 134 [18 L. Ed. 765].

The motion is granted.

MOSES, C. J., and WILLARD, A. J., concurred

6 S. C. 185

THE STATE v. COLEMAN.

(Columbia. April Term, 1875.)

[*Homicide* ⇐286.]

On a trial for murder, where all the circumstances of the homicide are disclosed by the evidence for the prosecution, it is error to charge the jury with the general rule that the law presumes malice from the mere fact of killing, such rule being inapplicable to the case as made by the proof.

[Ed. Note.—Cited in State v. Hopkins, 15 S. C. 153, 157; State v. Brown, 34 S. C. 48, 12 S. E. 662; State v. Ariel, 38 S. C. 223, 16 S. E. 779; State v. Rochester, 72 S. C. 200, 201, 51 S. E. 685.

For other cases, see Homicide, Cent. Dig. § 590; Dec. Dig. ⇐286.]

Before Cooke, J., at Abbeville, June term, 1873.

This was an indictment against Jerry Coleman for the murder of Adam Hackett.

Two witnesses were examined for the prosecution. They testified that Adam Hackett was killed by the prisoner by striking him a blow with a stick on the back of the head, and in their examination in chief and cross-examination, all the circumstances connected with the killing, beginning with a quarrel between the parties, which commenced several hours before the blow was struck, were disclosed.

The jury found the prisoner guilty, and he appealed.

Thomas & Noble, for appellant.

Blythe, Solicitor, contra.

June 4, 1875. The opinion of the Court was delivered by

WILLARD, A. J. The prisoner was convicted of murder. The Circuit Judge charged as follows: "That all homicide is presumed to be malicious, and amounting to murder

*186

until the contrary *appears from circumstances of alleviation, excuse or justification; and that it is incumbent upon the prisoner to make out such circumstances to the satisfaction of the Court and jury, unless they arise out of the evidence produced against him."

The authorities undoubtedly support the proposition that the law presumes malice from the mere fact of homicide.—4 Black.

Com., 201; State v. Toohey, MSS. But this presumption is not applicable where the facts and circumstances attending the homicide are disclosed in evidence so as to draw a conclusion of malice or want of malice as one of fact from the evidence. Presumptions of this class are intended as substitutes in the absence of direct proofs, and are, in their nature, indirect and constructive. The best evidence of the state of mind attending any act is what was said and done by the person whose motive is sought for. The motive that impels to the taking of human life is no exception to this rule, and the importance of the consequences that depend on the accurate ascertainment of its nature in such cases affords the strongest ground for limiting indirect and constructive proofs to the narrow grounds within which they belong.

In the present case, the evidence disclosed the fact that the deceased came to his death by a blow, from a stick in the hands of the prisoner, falling upon the back of his neck. It appears from the record before us that the proofs embraced a statement of the origin of the difficulty between the parties; their conduct towards each other down to the time of the killing, and, to some extent, the subsequent conduct of the prisoner. When the evidence is of such a character, it must be presumed sufficient to enable the jury to draw from it a conclusion of fact one way or the other. Under such circumstances, there was no necessity, and, therefore, no propriety, in resorting to any general presumption arising by operation of law. If the evidence did not warrant the conclusion of malice, the jury should have so found, uninfluenced by any presumptions from the naked facts of a homicide. If an obscurity as to the motive of the party arose from the circumstances detailed in the evidence, it was not competent to resort to the presumptions in order to solve the obscurity.

It was material to the solution of the question of malice, as one of fact under the evidence, to ascertain whether the stick employed was a deadly weapon. In determining this fact, regard should be had to the character of the weapon, the mode of its use, and

*187

the *strength and position of the person against whom it was used. If, considering all these circumstances, death was a consequence reasonably to be apprehended, then the jury are warranted in drawing the inference of malice, if that inference be in harmony with the other proofs.

The size, form and weight of the stick and the amount of force employed by the prisoner in giving the blow do not appear by the record, but it is to be presumed that some evidence on these points was submitted to the jury.

The charge of the Judge, quoted above, failed to present to the jury the nature of their duties as to the issue of fact involved, and may have led them to conclude that they might disregard uncertainties in the evidence and place their conclusion on the ground of the legal presumptions alone. Although the charge allows them to seek for ground for rebutting such presumptions in the evidence of what took place, still it left their minds in a position to conclude that the benefit of a reasonable doubt arising from the evidence ought to be given to the State instead of the prisoner.

Where the circumstances preceding and attending an act of this character, are full, as in the present case, the prisoner is entitled to the benefit of any doubt that may arise, and cannot be deprived of such benefit by any presumption of guilt arising by operation of law from the naked fact of a homicide. A charge may be erroneous, although the propositions of which it is composed may severally be conformable to recognized authority, if in its scope and bearing in the case it was likely to lead to a misconception of the law.

An objection was taken on the argument to the panel of grand and petit jurors; but it does not appear that such question was raised or an exception taken upon it in the Court below. We are not called upon to decide at the present time whether matters can be alleged as grounds of appeal in circumstances that were not the subject of exception in the Circuit Court, for under no circumstances would this Court pass upon a question that was not raised in the Circuit Court, where such question was not indispensable to the appeal. It appearing that the prisoner is entitled to a new trial on the ground of a misdirection, the object of the appeal is accomplished, and it is not essential that the question as to the legality of the panel should be considered.

There should be a new trial.

MOSES, C. J., and WRIGHT, A. J., concurred.

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6 S. C. *188

*CREIGHTON v. CLIFFORD.

(Columbia. April Term, 1875.)

[*Husband and Wife* ⇐119.]

Before the adoption of the Constitution of 1868, a wife could exercise no powers over property settled to her use except those conferred upon her by the instrument creating the trust estate.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 424–429, 447; Dec. Dig. ⇐119.]

[*Husband and Wife* ⇐31; *Powers* ⇐20.]

Under a marriage settlement, executed in 1838, by which property of the wife was conveyed to a trustee for the joint use of husband and wife during their joint lives, with limitations over, and with power, at the request of husband and wife, to sell, for the purpose of reinvestment to same uses, a bond and mortgage of the settled property given by the trustee, with

the consent of husband and wife, to secure the payment of a debt contracted by the husband in the purchase of property for his individual benefit, is neither a valid execution of the power, nor will they be enforced as amounting to a covenant to execute the power in favor of the creditor.

[Ed. Note.—Cited in Manning v. Screven, 56 S. C. 86, 33 S. E. 22.

For other cases, see Husband and Wife, Cent. Dig. § 192; Dec. Dig. ⇦31; Powers, Cent. Dig. § 59; Dec. Dig. ⇦20.]

[*Husband and Wife* ⇦31.]

The estate or interest of a husband in property settled to the joint use of himself and wife will be subjected, in equity, to the claims of his creditors, although it is objected that this will destroy the scheme of the settlement, prejudice the interests of the wife and impair her equities.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 188; Dec. Dig. ⇦31.]

[*Mortgages* ⇦476.]

Where a trustee for the joint use of husband and wife gives a mortgage of the property held in trust under such circumstances as to create a lien thereon of the husband's interest and no more, the equities of the mortgagee and those of the wife may be adjusted in an action by the former to foreclose the mortgage by sale as if it were a mortgage of the whole property.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1392; Dec. Dig. ⇦476.]

[This case is also cited in Manning v. Screven, 56 S. C. 78, 34 S. E. 22, and distinguished therefrom.]

Before Graham, J., at Charleston, June, 1874.

Action by Ann Creighton and others, plaintiffs, against Loftus C. Clifford and wife and others, defendants.

The case was referred to Samuel Lord, Esq., Referee, from whose report it will be fully understood. The report is as follows:

By an order of this Court, made on the 24th April, 1873, this case was referred to me to take testimony and to report upon all the issues of law and fact involved in the pleadings, with leave to report any special matter.

I respectfully report that, under this order, I have held numerous references, which have been attended by the solicitors of the parties, plaintiff and defendant, and have taken the testimony hereto annexed as a part of this report. The following facts have been established by the evidence adduced before me:

Mrs. Ann Creighton and her sister, Mrs. Susan Graves, owned each one undivided half of two plantations in Colleton District, known as Pringlefield and Newton. In January, 1829, a partition was made and one-half of Pringlefield and one-half of Newton was set apart to the trustees of Mrs. Graves and the other half of Pringlefield was set apart to Mrs. Creighton, individually, and of Newton to the trustees of Mrs. Creighton,

*189

under her marriage settlement. *Mrs. Graves died, leaving one child, Caroline, who, in April, 1838, intermarried with Loftus C. Clifford. Upon her marriage all her property, including one-half of the Pringlefield and one-half of the Newton plantations, which she had derived from her mother, was conveyed by deed of marriage settlement to James R. Pringle and Henry A. DeSaussure, as trustees. By this deed the property was limited to the joint use of the said Loftus C. Clifford and Caroline, his wife, during their joint lives, without impeachment of waste, and without being subject to the debts or engagements of the husband; and after the death of either of them, to the survivor for life, and after the death of the survivor, to the issue of Mrs. Clifford living at the time of her death. If there was no issue living at the time of her death, and Clifford survived her, the deed provided that one-half of the property should go to him in fee, and the other half to such persons as Mrs. Clifford might appoint by will; and in default of such appointment, to her next of kin on her mother's side. If there was no issue, and Mrs. Clifford survived her husband, the trusts of the deed were to terminate and the whole property was to revert to her absolutely. Clifford and wife have never had issue. The deed contained the following provision: "And it is further stipulated that in case the said Caroline M. Graves and Loftus C. Clifford shall, at any time hereafter, during their joint lives, or the survivor of them, according to the respective estates hereinbefore limited to them, shall think it beneficial to his, her or their interest to have the aforesaid real and personal estate, or any part thereof, sold, disposed of, invested or exchanged for other property, real or personal, and the sale moneys invested in other property, or placed at interest, that then the trustees, or the survivor of them, on being thereunto requested in writing by them, the said Caroline M. Graves and L. C. Clifford, jointly, or the survivor of them, shall absolutely sell, dispose, convey, invest or exchange the same or any part thereof, as the case may be, and invest the purchase money in such other property, real or personal, or vest it at interest, as may be required by the said Caroline M. Graves and Loftus C. Clifford, jointly, or the survivor of them; and such purchased, exchanged or substituted property, or invested funds, stock or choses in action, shall be held by the same trustees, their heirs, executors, administrators and assigns, subject to the same trusts, &c., as were limited and declared of and concerning the hereinbefore granted premises."

*190

*The deed also contained the power for the substitution of trustees, and provided that the substituted trustees should have all the powers given to those originally named in the deed. Under this power Amelia Clifford was, on the 6th March, 1849, appointed

trustee. Mr. Pringle, one of the trustees, having died before that time, and Mr. DeSaussure, the other trustee, having, with the consent of the cestui que trust, resigned his trusteeship, on the 28th December, 1852, Loftus C. Clifford contracted with Mrs. Creighton to purchase the one-half of the Newton plantation, then held by James R. Pringle and George M. Coffin, as trustees under her marriage settlement, and also fifty-seven slaves belonging to the trust estate. By the terms of sale, Clifford was to pay for the land $28,025, and for the negroes $30,-210. No part of the purchase money was to be paid in cash, but the purchaser was to give his bond for the entire amount, payable in four equal annual instalments, secured by a mortgage of the land and slaves. This arrangement did not meet the approval of the trustees, who were advised by several members of Mrs. Creighton's family, interested in the property, to require additional security. They accordingly refused to execute the contract of sale made with Mrs. Creighton and to convey the property to Mr. Clifford unless cash was paid or such additional security was furnished. To obviate this difficulty, Clifford proposed that Amelia Clifford, the trustee under his marriage settlement, should execute a bond of indemnity to secure the payment of the first instalment of his bonds to Coffin & Pringle, and a mortgage of the real estate held by her as trustee. This proposal having been accepted by Coffin & Pringle, they, on or about the 1st February, 1853, conveyed to Clifford one-half of the Newton plantation, and took his bond for the purchase money, to wit, $28,025, payable in four equal annual instalments, and a mortgage of the land conveyed to him. At the same time they executed to him a bill of sale of the fifty-seven slaves which also belonged to the trust estate, and took his bond for the purchase money, amounting to $30,-210.

Cotemporaneously with these transactions, or nearly so, and in pursuance of the agreement made between Loftus C. Clifford and the trustees of Mrs. Creighton, Amelia Clifford executed to Coffin & Pringle a bond indemnifying them against any loss they might sustain in consequence of the failure of Clifford to pay the first instalment of the above mentioned bonds or conditioned for the payment of the same, and, with the consent of

*191

Clifford and wife, signified *by their joining in its execution, also executed a mortgage of that part of Newton and Pringlefield which stood in her name as trustee. The first instalment not having been paid when due, and the second instalment having nearly matured, the trustees notified Clifford that they would require as a condition for further indulgence additional security for this instalment also. Accordingly, about the 1st January, 1855, Amelia Clifford gave a second bond and mortgage of a similar character to the first, for an amount equal to the second instalment of the bonds, held by the trustees. Large payments were subsequently made by Clifford to Coffin & Pringle, partly by money remitted to them and partly by consignments of rice made to them as his factors. In making these payments, Clifford gave no instructions as to their appropriation, and they were applied by the trustees to the payment of the $30,210 bond given for the negroes, to the payment of the interest upon the bond now sued on, up to February, 1864, and to certain other bonds given at the same time by Clifford to Mrs. Creighton, for other property purchased from her, and which bonds were held by Coffin & Pringle, as her agents. The accounts rendered to Clifford from time to time showed how the payments had been appropriated. He himself testified that he was told by Coffin that the payments had been applied to the negro bonds, because he considered the bonds secured by the real estate as the best security.

In this disposition of the funds he acquiesced at the time, and up to the commencement of this suit, and it is now too late for him to question it.

I annex hereto, as Exhibit A, an account showing the money received by Coffin & Pringle from Clifford, and the appropriation made of the same. I have computed the amount of principal and interest due on the bond for $28,025 up to the 4th February, 1874, and find that there will then be due the sum of $53,816.50. For the particulars of this computation I beg leave to refer to the statement herewith filed as Exhibit B. No defense has been attempted to the plaintiffs' suit, in so far as it seeks to foreclose the mortgage given by Clifford to the trustees of Mrs. Creighton to secure this bond. But the plaintiff claims that the half of Pringlefield and Newton belonging to the trust estate of Clifford and wife, and mortgaged by Amelia Clifford, trustee, as above recited, is also responsible for the first and second instalments of the bond and the interest due thereon. This claim is resisted

*192

by the defendants upon the *ground that the trustees had no authority to make the mortgage. It will be seen, by reference to the settlement, that it does not expressly give the trustee the power to mortgage. It is contended, however, that this power is included under the various powers specified in the deed. In the view which I have taken of the case, it is unnecessary to discuss this question, for I am of opinion that the validity of this mortgage could not be sustained even had the power to mortgage been expressly conferred on the trustee. Such a power would have authorized the trustee to mortgage the trust property for the purpose of changing the investment of the trust funds, or of securing debts contracted by the

trustee in the due course of her administration. But the debt for which this mortgage was given was contracted by Clifford in the purchase of a plantation in his individual name and for his individual benefit.

The mortgage was, therefore, an attempt to pledge the trust property either to secure the private debt of Clifford or to indemnify the mortgagees against the consequences of their improvidence in selling trust property to Clifford upon insufficient security. In either respect, it was given for purposes wholly foreign to those for which the powers conferred on the trustee were created, and its execution was a clear breach of trust. Of this the mortgagees must, from the very nature of the transaction, have had full notice. They, therefore, participated in the breach of trust, and cannot avail themselves of the plea of being bona fide purchasers for value.

It was very earnestly urged on behalf of the plaintiffs that, even if the mortgage is not good as a mortgage, the transaction between the parties amounted to a covenant on the part of Amelia Clifford, made with the assent of Clifford and wife, to exercise any and all powers given to them by the deed, to hold Coffin & Pringle harmless from any loss they might sustain by the failure of Clifford to pay the first and second instalments of his bond; that, having the power to do so, through the agency of their unlimited authority to sell and invest as they please, they are bound in equity to execute that power for the purpose of fulfilling the obligation, in the faith of which other parties have parted with their property, and that upon their failure to do this the Court will order a specific performance of the covenant by requiring them to execute the power of sale and investment. Conceding, for the sake of argument, that Amelia Clifford, with the consent of Clifford and wife, might have bound the trust estate by an express covenant to sell the trust property and in-

*193

vest *the proceeds in the bond of Clifford in case of his inability to meet it at maturity, I am still of opinion that the plaintiffs are not entitled to the relief. It is a well-settled rule that a Court of equity will not decree a specific performance of a contract unless it be certain, fair and just in all its parts.

An agreement on the part of a married woman to sell property belonging to her trust estate and invest the proceeds in the bond of her husband given to a third person, in case he should be unable to pay it, would be such an improvident exercise of the power conferred on her that a Court of equity would scarcely feel itself bound to enforce it specifically.

But, apart from this, the plaintiffs have, in my judgment, wholly failed to establish the covenant on which they rely. The papers executed by Amelia Clifford and her cestui que trust have been lost or destroyed, and no witness has undertaken to prove their contents with anything like precision. Indeed, it is impossible not to be struck with the great variety of opinions expressed by the witnesses even as to their general character. Mr. Pringle, one of the trustees, for whose protection they were intended, only recollects that the security was a bond and mortgage, in which he thinks Mr. Clifford's trustee was concerned. Mr. DeSaussure, the attorney, in whose office the papers were drawn, is of opinion that they were intended to secure the first instalment of the negro bonds alone. Mr. Clifford and Mr. Mathewes think that the security was intended to secure the first two instalments of both the land and negro bonds. Mr. Clifford's testimony, however, is of little value, as he states that he had never read the bond.

Mr. Coffin, the deceased trustee, writing to Mrs. Creighton, in reference to the additional security, on the 10th March, 1855, speaks of an additional mortgage having been taken, but is wholly silent as to the bond of indemnity. This is all we know upon the subject. To find in this testimony proof of an agreement on the part of Amelia Clifford and her cestui que trusts to exercise any and all powers given to them by the deed of settlement to hold Coffin & Pringle harmless, or to sell the trust property and invest the proceeds in the bond of Clifford, requires, to say the least of it, the exercise of more than ordinary ingenuity. Certainly no Court of equity will decree the specific performance of a contract, even if unexceptionable in other respects, the terms of which are involved in so much doubt. Then it is

*194

said that Clifford and wife, having *united in the mortgage, cannot dispute its validity. It is settled law in this State, that without the aid of a Court of equity a married woman cannot dispose of or charge her separate estate except in the execution of powers conferred by the instrument creating such estate. In the present case, we have seen, no power is conferred on Mrs. Clifford to mortgage the trust property for her husband's private debt. If she could not, in consequence of coverture, do so by her direct act, her act of concurrence or acquiescence cannot, in the absence of fraud, have such effect; but it is equally clear that Clifford is estopped from disputing the validity of the mortgage. He was sui juris, and, having united in the act of the trustee, cannot question its propriety. Under the marriage settlement he has a joint interest for life in the trust estate and a right to one-half of the fee of both plantations in case he survives his wife. To the extent of this interest the mortgage is valid.

The plaintiffs and some of the defendants excepted to the report on the following grounds, viz.:

1. Because the Referee erred in holding that the giving of the bonds and mortgages by the trustee of Mrs. Clifford, with the assent and upon the requirement of her husband and herself, under the circumstances of the case and the powers of the marriage settlement deed, involved a breach of trust; and even if such was the case, he erred in holding that the mortgagees were cognizant of the breach of trust in such manner as to deprive them and their beneficiaries of the equity which belongs to bona fide purchasers for value.

2. Because the Referee further erred in his conclusions drawn from the evidence in the cause, that the character of the transaction was uncertain, it being manifest, as a matter of fact, that it was in form a covenant on the part of the trustee, Amelia Clifford, Mrs. Clifford and Mr. Clifford to pay the whole of the first and second instalments of both bonds in question, or such parts thereof as Mr. Clifford failed to pay;—in substance and intent a covenant to pay the trustees of Creighton the first and second instalments of the bonds, or any balance thereof, which Clifford failed to pay, by the exercise of their powers under the marriage settlement deed, the performance of said covenant being secured by a mortgage of the property covered by the power, which latter in itself was an execution of the power, as it conveyed in terms the property which was the subject of the power.

*195

*3. Because the Referee erred further in holding that such a transaction cannot be sustained in equity, the intent of the parties to execute their power being undeniable, and the covenant and mortgages being an execution of the power, and it being the duty as well as the invariable practice of Courts of equity to aid an execution of a power in accordance with the intent in all cases where the execution is unobjectionable in substance but defective in form.

The judgment of the Circuit Court is as follows:

Graham, J. After hearing the report of the Referee and the exceptions thereto, and after full arguments, I am of opinion that the report is erroneous, in so far as it holds the trustee, Amelia Clifford, to have committed a breach of trust in giving the bonds and mortgages in question, and that the mortgagees were cognizant of it, whereby the transaction is invalid and incapable of being enforced in equity. I think the report also erroneous in representing the character of the transaction as uncertain, the evidence, to my mind, establishing clearly and beyond reasonable doubt the fact that it was, in substance and intent, an agreement under seal, secured by a mortgage of the trust property on the part of the trustee, Amelia Clifford, and Mr. and Mrs. Clifford, to pay the whole of the first and second instalments of Mrs. Clifford's bonds for the purchase of Mrs. Creighton's half of the tract, or so much thereof as he failed to pay, and by the exercise and through the agency of the powers contained in the marriage settlement deed of Mrs. Clifford to the trustees of Mrs. Creighton, in consideration of the purchase set forth in the report being completed. Is not such a transaction within the reach of equitable relief, when the intent is manifest, although in some respects it be objectionable in form? It is impossible to doubt, in view of the facts, that Mr. and Mrs. Clifford, upon the fullest advisement, executed these papers with reference to the powers of the marriage settlement deed, and intended, by virtue of each and all of the powers and authorities with which they were invested by that instrument, to give the trustees of Creighton a valid and satisfactory security. This conclusion is inevitable, unless Mr. and Mrs. Clifford and their trustee designed to commit a willful fraud, for the express purpose of obtaining the property which the trustees of Creighton had refused to convey excepting upon receiving additional security. There is no indication of such intent.

*196

*The only inquiry, therefore, is whether a Court of equity is not competent to enforce the manifest intent of parties acting under powers undoubtedly sufficient to enable the acts done. The powers in the deed before us are of the fullest scope—the widest comprehension. In cases where the form pursued in execution of the powers is objectionable or defective, I think Courts of equity are invested with such authority, and that it is among the most valuable of their capacities. The case in hand is one in which such authority should be exercised. If ever Mr. and Mrs. Clifford have had the possession and enjoyment of the property in question for years, they got it solely and entirely upon the faith of those bonds and mortgages; they have paid little or nothing for its enjoyment since the war. There are no infants or known remaindermen to be injured by their loss of it; no one can be hurt but themselves, and it is contrary to the justice and the principles of equity that they should obtain property and enjoy it at the expense of others for years, and then question the legality of their solemn obligations which for all that period of time had remained undisputed. It is, therefore, ordered that the report of the Referee be overruled in the foregoing particulars.

It is further ordered that the mortgage of L. C. Clifford to the trustees of Creighton, set forth in the pleadings, be foreclosed and the property sold upon the terms of one-third cash, balance in one, two and three years, the credit part to be secured by the

bond of the purchaser, with legal interest and mortgage of the property sold, and the proceeds of sale applied in payment first of the interest due on his bond to the trustees of Creighton, and next on the principal thereof; and in case the proceeds of sale under said mortgage, appropriated as above mentioned, shall fail to pay the first and second instalments due on said bond in full, then it is further ordered that the mortgages of the trustee, Amelia Clifford, established in the case be foreclosed, and the property sold upon the terms of one-third cash, balance in one and two and three years, and the proceeds of sale applied to the payment of any deficiency which may remain unpaid upon the first and second instalments on the bond due by L. C. Clifford to the trustees of Creighton. Any surplus remaining after said instalments are paid in full, to be paid over to the trustee, Amelia Clifford, for the uses of the trust of the marriage settlement deed of Mr. and Mrs. Clifford. It is further ordered that the parties have leave to apply at the foot of this decree for any further order which may be deemed requisite.

*197

*The defendants, Loftus C. Clifford, Caroline Clifford and Miss Amelia Clifford, trustee, excepted to the foregoing decision, and appealed therefrom on the following grounds:

1. Because His Honor decided that the report of the Referee is erroneous, in holding that the trustee, Amelia Clifford, committed a breach of trust in giving the bonds and mortgages in question, and that the mortgagees were cognizant of it, whereby the transaction is invalid and incapable of being enforced in equity. On the contrary, these defendants submit that the report of the Referee in this respect is correct, and that the bonds and mortgages given by the trustee of L. C. Clifford and wife, under the circumstances, in the manner and form in which they were given, were executed by the said trustee in breach of her trust, to the knowledge of the mortgagees, and were and are invalid and of no effect.

2. Because His Honor decided that the report of the Referee is erroneous, in representing the character of the transaction as uncertain. These defendants submit that the report of the Referee in this regard also is correct, because, from the evidence, it is uncertain whether the bonds and mortgages given by the said trustee were intended to indemnify the trustees of the plaintiff from the consequences of their sale upon credit, or whether they were intended as collateral security for the first and second instalment of the bonds and mortgages of the defendant, L. C. Clifford, given for his purchase; and the transaction, being so uncertain, should not be enforced.

3. That if His Honor is correct in holding that the said transaction was, in substance and intent, an agreement under seal, secured by a mortgage of the trust property on the part of the trustee, Amelia Clifford, and Mr. and Mrs. Clifford, to pay the whole of the first and second instalments of Mr. Clifford's bonds, or so much as he failed to pay for the purchase of Mrs. Creighton's half of the tract, still these defendants except to his decision that the powers in the deed of marriage settlement were sufficiently large to enable the act done; and also to the decision of His Honor that a Court of equity is competent to enforce such an agreement, so executed, under such a deed as the said marriage settlement.

4. That these defendants except to the decision of His Honor that this is peculiarly a case demanding equitable interposition. They submit that the purchase of Mr. Clif-

*198

ford was of land and slaves; *that he has paid a much larger amount than the first and second instalments of his bonds for the land, but that said payments have been applied to his bonds for the slaves, and that it is inequitable for the surety, if the bond and mortgage by the said trustee be a collateral security for the first and second instalments, under the circumstances of this case, to be prejudiced by such appropriation.

5. For the said reasons, these defendants except to the decision of His Honor that the mortgage on the trust property be foreclosed and that the land be sold.

Brewster, Spratt, Burke, Porter & Brawley, for appellants.

Rutledge & Young, Tracy, De Treville, Gayer, Pringle, contra.

June 4, 1875. The opinion of the Court was delivered by

MOSES, C. J. The opinion of the Referee, as embodied in his clear and able report, so fully expresses the views and conclusions of the Court on the principal question involved in the case that it could well be adopted as its judgment without the addition of a single word.

The rule which prevailed in this State to the adoption of the Constitution of 1868, in regard to the powers of a married woman over her separate estate, has been too long recognized to admit of controversy. If any difficulty ever attends its application, it arises from the doubtful language of the settlement, and not from any want of certainty in the principle by which it is to be regulated when its terms, by proper construction, are made clear. While in England a femme covert may, as to her separate property, exercise any right of disposition except when restrained by the deed creating it, in South Carolina she is deprived of all power over it except such as she is permitted to assert by the very terms of the instrument.

What change has been effected in these particulars by the Constitution, it is not necessary now to consider.

Without an extension of the authority allowed and reserved by the deed before us to purposes not only at variance with the design, but actually destructive of the intention which the makers of it had in view, it is impossible to refer the act of Miss Clifford, the trustee, even with the consent of Clifford and his wife, to the powers expressed in the deed, or which, by the most forced con-

*199

*struction, could be implied from any of its terms. All the powers conferred were either for the preservation of the property conveyed, or its conversion into other property, subject to the same uses and limitations. The power which was exercised was to encumber and fetter it with burthens, which would, most probably, in the end entirely divest it from the trusts which were intended for its protection. The transaction itself discloses its own purposes. It was not to sell the estate with a view to reinvest its proceeds or exchange it for other property, to be affected by the conditions of the settlement, but it was to hamper it with a lien for the benefit of the husband as purchaser of real estate, of which the legal title was to vest, not in the trustee for the uses of the trust, but in him. Nor can the transaction be sustained as a covenant by Mrs. Clifford, under the powers secured to her by the settlement, to pay the first and second instalments of the said bond of her husband out of her separate estate. Her disability prevents any such liability at common law, and where, notwithstanding her coverture, she is permitted to exercise the rights and powers and to be affected by the liabilities of a femme sole, it must be in conformity with the right conferred by some written instrument or allowed by statute. In either case, to avail, the act must be executed in strict compliance with all the requisitions as to form and manner prescribed by the authority which permits it.

The interest, however, of Clifford in the trust property conveyed by the deed must be held liable to the payment of the bond and mortgage executed by Miss Clifford, the trustee, with his consent and that of his wife. It is no objection, as was urged by the counsel for the appellants, that this would destroy the scheme of the settlement, prejudice the interests of the wife and impair her equities. Whatever consequences follow from the enforcement of the settlement must be attributed to those who consented to be bound by it. It was in the power of Mrs. Clifford to suggest and dictate the conditions on which, after marriage, she was to hold and enjoy her own property, and she must abide by her act. The same objection was interposed in Rivers v. Thayer, (7 Rich. Eq., 168,) but the Court said: "It must deal with such difficulties as they present themselves, and according to the means at their disposal."

While it will protect to the fullest extent all the equities of the wife, it will not debar the creditor from subjecting the interests of the husband to the payment of his debt. The

*200

case is in a forum *which can so mould its judgment that, while the wife may enjoy the full protection of her settlement, it shall not shield the interest of the husband from a liability to meet the just demands of his creditors.

It is objected, too, that the plaintiffs, in seeking relief through their complaint by a foreclosure of the mortgage, executed by the trustee, Amelia Clifford, cannot avail themselves of the lien created by it to subject the interest of the husband Clifford in the trust property to the satisfaction of the debt due by him to Mrs. Creighton; that such interest can only be reached by a creditor's bill framed with an aspect to that particular end. But the rights of the general creditors of Clifford (if any such there be) must be subordinate to the equity of Mrs. Creighton to have whatever interest Clifford, the husband, is entitled to in the property mortgaged to her at his request and for his use and benefit, separated from that of the wife and applied to the satisfaction and removal of the lien thus created. The relief so extended comports with the justice and equity of the transaction between the parties by requiring that whatever obligation it imposed should be met by reaching the interest of the husband, for whose benefit the mortgage debt was contracted.

This Court, however, does not feel itself competent to adjust the equity of the wife in the mortgaged premises without a better knowledge of the actual condition of the property than has been afforded. It must, therefore, seek for more light through the aid of a Referee.

It is ordered that so much of the decree of the Circuit Court as directs a foreclosure of the mortgage of the trustee, Amelia Clifford, established in the case, be reversed.

That on its appearing by the sale ordered in said decree of the property mortgaged by the said L. C. Clifford to the trustees of the said Mrs. Ann Creighton that it has not brought enough to pay in full the amount due on the first and second instalments of the bond it was given to secure, the case shall be remitted to the said Samuel Lord, Esq., the Referee. He will thereupon report a scheme or mode by which the interest of the said L. C. Clifford in the property conveyed by the said marriage settlement should be appropriated to the payment of any balance remaining due on said instalments after such sale, with the least possible prejudice to the interests of the said Mrs. Caroline M. Clifford therein.

*201

*The report of the Referee to be made to the Circuit Court, to which the case is remanded for any further orders which may be

necessary to carry out the views of the Court as herein declared.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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6 S. C. 201

SULLIVAN v. THOMAS.

(Columbia. Nov. Term, 1874.)

[*Appeal and Error* ⇐1189.]

Where a judgment of the Circuit Court dismissing a complaint is, on the plaintiff's appeal, wholly set aside by the Supreme Court, and the cause returned to the Circuit Court, the case stands as if no judgment of dismissal had been pronounced, and parties defendant having claims similar to those of the plaintiffs may establish them against their co-defendant, in whose behalf the judgment of dismissal had been pronounced.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4658; Dec. Dig. ⇐1180.]

Before Cooke, J., at Greenville, April Term, 1874.

This was the same case of Sullivan v. Thomas reported on first appeal.—3 S. C., 531.

To understand the points made by the present appeal, it is only necessary to publish the notice and grounds of appeal given on the first appeal, dated November 6th, 1871, and the proceedings which took place after the judgment of the Supreme Court on that appeal was returned to the Circuit Court.

The notice and grounds of appeal are as follows:

"James M. Sullivan and all the other plaintiffs in this case give notice to the defendants and their attorneys, and to William A. McDaniel, Esq., Clerk of said Court, that the plaintiffs appeal from the decree of His Honor James L. Orr in this case, filed 16th of October, 1871, and will make their motion at the next sitting of the Supreme Court in Columbia to modify the same so far as it disallows their claim to rescind the receipts given by the said James M. Sullivan to the defendant, Wm. M. Thomas, and to hold the obligors of the bond given by George W. Tolbert, R. R. Tolbert and John R. Tolbert responsible for the full share of the said James M. Sullivan in his own right and as guardian of his said children in said bond, to wit, one-fourth part of one-half of the principal and interest of said bond amongst them, on the following grounds:

*202

*"1. Because the said Wm. M. Thomas, whilst Commissioner in Equity, executed, without any authority whatever, the pretended and fraudulent assignments endorsed on said bond respectively, first to S. Thomas, then to Wm. M. Thomas, and again to Wm. M. Thomas, as attorney of S. Thomas; and said assignments, being in fact and law fraudulent, could confer no rights whatever on the respective assigns; nor could they authorize the obligors of said bond to pay any portion of said bond to said assigns, or either of them; and that, in fact, the said obligors never paid said Wm. M. Thomas, whilst Commissioner, any part of said bond, except the two first credits endorsed thereon, to wit, one of $676.70 and the other of $322; and the said obligors are liable to pay the entire balance of said bond, deducting the $300 they paid to T. Henry Stokes and wife.

"2. Because the allegation of the bill, that Wm. M. Thomas falsely and fraudulently misrepresented to the complainants and the other parties entitled to the proceeds of said bond that the Tolberts paid him the said bond in Confederate money, was fully proved by the testimony in the cause, and the said obligors, with a full knowledge that they had not made said payments, and had not authorized him, adopted the fraud of said Wm. M. Thomas, and, in fraud of plaintiff's rights, proceeded to make payment to him to the extent of $2,600 in gold and four bales of cotton after Thomas was out of office; and they should have been held liable for said payments, as well as the balance of said bond, less the $300 paid T. Henry Stokes and wife.

"3. Because the said bond, in law and fact, to the extent before indicated, should, under the proof in the case, have been regarded and treated by the Court as due and unsatisfied and the obligors liable therefor.

"4. Because it is respectfully submitted that the decree of the Court, to the extent complained of, is not only without evidence, but is in opposition to it and the law of the case."

On the 26th March, 1874, after the judgment of the Supreme Court had been returned to the Circuit Court, James M. Sullivan, one of the plaintiffs, addressed a communication to the attorneys of the defendant, John R. Tolbert, which is as follows:

*203

*"State of South Carolina, County of Greenville. } Court of Common Pleas.

"J. M. Sullivan et al., plaintiffs, against G. W. Tolbert et al., defendants.

"To Messrs. Perrin & Cothran and Earle & Blythe:

"Gentlemen—The defendant, John R. Tolbert, having settled with me the amount due to me individually and as guardian, together with the costs, in pursuance of the decree of the Supreme Court in the above stated case, I hereby authorize and empower you, on my behalf and on behalf of my wards, to take such legal steps as you may deem best to have the bill dismissed and the proceedings ended. James M. Sullivan.

"26th March, 1874."

On the call of the cause in the Circuit Court, the above letter was presented to the Court, and an order to dismiss was moved, which, after argument, was refused by the

Court, and the following decree passed, to wit:

Cooke, J. On hearing the report of James P. Moore, Special Referee in this case, bearing date and filed 22d of November, 1872, and on motion of Sullivan & Stokes, complainants' solicitors, and solicitors for Micajah B. Harrison and his infant daughter, Sarah Harrison, and Anna R. Child, now Ware, defendants, and G. G. Wells and Sullivan & Stokes, solicitors of the defendants, Hickson and wife and G. W. Collins, it is ordered that said report be confirmed and made the judgment of this Court. It is further ordered and adjudged that the complainants and defendants before mentioned, respectively, have leave to issue their executions against John R. Tolbert individually, and as administrator of George W. Tolbert, deceased, and as executor of Robert R. Tolbert, deceased, for the respective amounts ascertained by the report of said Referee to be due to them, to wit: To complainants as follows: James M. Sullivan, $881.97; and to his children, including Micajah B. Harrison and his infant daughter Sarah, $1,750.50, with interest from the 22d of November, 1872; to Wm. Hickson and wife, defendants, $3,610.49, with interest from 22d November,

*204

1872; to *George W. Collins, defendant, $1,203.49, with interest from 22d November, 1872; to Anna R. Child, now Ware, defendant, $2,406.99, with interest from 22d November, 1872; and also for the costs and disbursements before mentioned, to be taxed by the Clerk of this Court, and inserted in said execution, subject, however, to a credit for such payments as the defendant Tolbert may have made to James M. Sullivan individually and as guardian.

The attorneys of the defendant, John R. Tolbert, gave notice of appeal as follows:

"Please take notice that we appeal from the order of His Honor Judge Cooke, made at the March Term, refusing to grant our motion to dismiss the bill herein on the behalf of the defendant, John R. Tolbert, as administrator of George W. Tolbert, one of the defendants, and as executor of Robert R. Tolbert, one of the defendants, and in his own right,—said motion having been made by the authority of James M. Sullivan, and those whom he represented, who were the complainants in the cause, on the following grounds, to wit:

"Because the said John R. Tolbert, having paid and satisfied the complainants, who were the only appellants, and having paid the costs as required by the Supreme Court, and the appellants having authorized the dismissal of the bill, it is respectfully submitted that His Honor erred in refusing to grant the motion, the Supreme Court clearly having been misled in the supposition that any others than the said complainants had appealed."

Perrin & Cothran, Earle, for appellant.

Sullivan & Stokes, contra.

June 18, 1875. The opinion of the Court was delivered by

WILLARD, A. J. The present appeal is from an order refusing to dismiss the complaint, it appearing that the plaintiff's demand had been satisfied by the defendant, Tolbert, and that he consented to such dismissal. Hickson and others, joined as defendants to the original complaint as having claims against the defendant, Tolbert, similar to those set up by the plaintiff, resisted the motion to dismiss the complaint, claiming that under the decision of this Court on the former hearing in this case, re-

*205

ported in 3 S. C., 531, *they were entitled to retain the complaint for a decree based on their claims. The defendant, Tolbert, claimed that Hickson and the other defendants were not entitled to the benefit of the judgment rendered by this Court, inasmuch as they were not before this Court as appellants from the judgment which was set aside in this Court, the appeal having been taken by the plaintiffs alone.

The Circuit Court arrived at a correct conclusion in deciding to retain the cause for a decree in favor of such of the other defendants as, according to the decision of this Court, were entitled to decrees.

The judgment originally brought into this Court, and which was set aside, as reported in 3 S. C., was a judgment dismissing the complaint upon grounds equally applicable to the plaintiff and certain of the defendants joined with Tolbert. That judgment was set aside on the appeal of the plaintiff, and, as a consequence, the action was before the Circuit Court for a proper judgment. No other judgment could, under the circumstances, have been rendered by this Court. It was impossible, from the nature of the judgment appealed from, to merely modify it or to set it aside only as affecting the interests of the plaintiff, leaving it of force as against the defendants who had not appealed. The complaint having been dismissed, it was for this Court to do one of two things—either to affirm the judgment of dismissal or to set it wholly aside. The last named was the judgment of this Court.

The effect of this judgment was to return the case to the Circuit Court wholly unadjudicated, except so far as the principles of a decree were embodied in the judgment of this Court. Under such circumstances, there was nothing to prevent Hickson and the other defendants having rights the same as his from demanding decrees for such amounts as might be found due to them.

The judgment of the Circuit Court dismissing the complaint was wholly gone, and no interlocutory judgment or order stood in

their way so as to bar their demand. Finding this case thrown open upon the plaintiff's appeal, there was nothing in their way to prevent them from asking such a decree as should result from the principles settled by this Court.

The appeal should be dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

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6 S. C. *206

*ALLEN v. FAGAN.

(Columbia. Nov. Term, 1874.)

[*Evidence* ⇐460.]

Upon a question of location, under a deed of conveyance calling for a certain street as a boundary, evidence of user tending to show the exact location of the corner of the street is competent, although the location which it tends to show is different from that established by deeds and other records.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2122; Dec. Dig. ⇐460.]

Before Carpenter, J., at Richland, May Term, 1874.

This was an action of trespass to try title by M. C. Allen, trustee, plaintiff, against J. Fagan and others, defendants.

The case and exceptions, upon which the appeal was heard, are as follows:

"The estate of Mary Glaze, deceased, being possessed of a lot at the Southwest corner of Gates and Gervais streets, in the city of Columbia, measuring in front, on Gervais street, sixty-one (61) feet, the same was sold by the Sheriff of Richland County for partition, and, for the purposes of the sale, was divided into two lots; the first extending from the said corner of Gates and Gervais streets, and fronting on Gervais street thirty-five (35) feet, was bought by the defendant; the second, consisting of the remainder of the lot, and which contained twenty-six (26) feet front on Gervais street, was bought by the plaintiff. The Sheriff of Richland County made titles, measured off the lots, put the purchasers into possession thereof, and both parties improved them.

"The contract of the sale was held by the Court to be the printed notice by the Sheriff, which was produced in evidence by the plaintiff to which the plaintiff excepted.

"This notice called for 'the Southwest corner of the intersection of Gervais and Gates streets' as the point from which the purchasers—the Fagans, who were the first purchasers,—were to commence the measurement of their purchase. In fixing the quantity of land so purchased by them, the Fagans employed the then City Surveyor, B. F. Jackson, to determine the true point according to the contract, and from that point, as fixed by said surveyor, they measured thirty-five feet, and erected their fence within the line. The evidence at the trial, as to the true corner of Gates and Gervais streets, was conflicting. B. F. Jackson, the then City Surveyor, and Mr. Murdoch, a civil engineer, were examined as witnesses on behalf of defendants, and by

*207

survey they fixed a corner. Major *Mahon was examined as a witness on the part of the plaintiff, Allen, and he, by survey, fixed a corner. There being a difference of nearly nine inches between the surveys, his honor ruled, as matter of law, that the Fagan line commenced at the true corner of Gates and Gervais streets, and not from the corner of any encroachment that may have been made upon the street, and left the fact as to what was the true corner to the jury, to be decided upon the evidence. To which the plaintiff excepted.

"And the jury, by their verdict, established the corner fixed by B. F. Jackson and Mr. Murdoch as the true corner, and upon this based their verdict.

"The plaintiff did desire to put up witnesses to prove some adverse possession of Mary Glaze to some encroachments on Gates street, to which evidence objection was made on part of defendants, as being outside of the contract of sale. This objection His Honor sustained upon the ground that the contract and sale by the Sheriff called for the corner of Gates and Gervais streets, and that must be fixed, not by where an old building happened to stand, but by the true corner of the streets as established by evidence, which evidence was left by the Court to the jury, as already stated. To which plaintiff excepted.

"And the evidence as to any adverse claim of the said Mary Glaze was excluded from the jury by the Court, upon the ground that he could not throw the burthen of setting up that right against the city upon a purchaser who had purchased under the terms of the notice and the sale by the Sheriff, more especially when the suit is brought, as in this case, by a party who subsequently purchased the second parcel of land under the same notice, and in his complaint has neither made the city a party, nor alleged any title by adverse possession. To all of which the plaintiff excepted.

"That His Honor erred in excluding the testimony offered to show the adverse possession of Mary Glaze, as aforesaid."

The jury found for the defendants, and the plaintiff appealed.

Monteith & Banskett, Melton & Chamberlain, for appellant.

Pope & Haskell, contra.

*208

*June 26, 1875. The opinion of the Court was delivered by

WILLARD, A. J. The precise character of the evidence, the rejection of which by the

Circuit Judge forms the subject of the principal exception, is not clearly presented.

It is to be assumed, however, that the facts intended by the appellant to be laid before the jury were substantially as follows: That a building had been for several years standing at the corner of Gervais and Gates streets, the point on which the respective deeds under which both plaintiff and defendants rely rest.

The object of offering this testimony is somewhat obscure, but it may have been either to fix the location by user or to aid in settling this conflict that existed between the surveys that were introduced in evidence, based, as we may assume, on evidence afforded by deeds or other records. It is also possible that it may have been intended as bearing upon the actual intent of the parties to the respective deeds as derived from all the attending circumstances.

As the record does not present to us the distinct object in view, nor the definite grounds on which the evidence was excluded, we have only to look into the case far enough to see whether, under any aspect of the case as presented, there is reasonable ground to assume that the evidence was pertinent to the issue.

In determining the true boundaries of a highway, evidence of user is generally an important element of the proofs. If that were of sufficient duration, it is conclusive, although the actual location differs from that intended as evidenced by deed or other matters of record. What duration of user, as a general rule, or under the circumstances of a particular case, may have been sufficient to fix the boundaries as against clear evidence afforded by deeds or records, we are not called upon to determine at the present time, as it does not appear that that question was discussed in the Circuit Court.

It does appear, as already stated, that there was a conflict between the surveys offered in evidence, supporting on the one hand and on the other the respective demands of the plaintiff and defendants. Under such circumstances, the proof of actual location, as defined by user, was clearly competent.

Whether we are bound to go to the extent to which the Court went in Falls Village W. P. Co. v. Tibbitts, (31 Conn., 165,) and declare that the parties must be presumed, in

*209

the absence of *evidence of any other intention, to have meant by the terms of the deeds the actual location of the corner as determined by user, we need not here determine, for it does not appear that the question of presumed intent was discussed or decided at the Circuit.

The case just cited, and that of Tibbitts v. Eaton, (52 Me., 566,) which latter case applies the same idea in discovering the intention involved in a transfer by judicial process, both sanction the resort to the actual state of the occupation and user of a highway as a means of fixing its boundaries as between parties dealing with it as an existing fact.

The evidence of a building standing at the corner in question, conformably to the plaintiff's demand, should have been admitted at all events. The effect of such evidence can only be properly determined when its nature is fully known.

There should be a new trial.

MOSES, C. J., and WRIGHT, A. J., concurred.

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6 S. C. 209

FLINN & HART v. BROWN.

(Columbia. April Term, 1875.)

[*Equity* ⇐381.]

A "case in chancery" is triable by the Court, and although, under § 277 of the Code the Judge may submit the whole issue made by the pleadings, or any specific question of fact involved therein, to a jury, yet he does so only that he may be aided or enlightened by their verdict. He is not to be controlled thereby, and may even disregard it altogether, for the decree must be in conformity with his own conclusions of fact as well as law.

[Ed. Note.—Cited in Gadsden v. Whaley, 9 S. C. 148; Sloan v. Westfield, 11 S. C. 445, 446; Charlotte, C. & A. R. Co. v. Earle, 12 S. C. 54; Ivy v. Clawson, 14 S. C. 273; Brownlee v. Martin, 21 S. C. 402; Meetze v. Charlotte, C. & A. R. Co., 23 S. C. 16; Rynerson v. Allison, 28 S. C. 85, 5 S. E. 218.

For other cases, see Equity, Cent. Dig. § 816; Dec. Dig. ⇐381.]

[*Appeal and Error* ⇐171.]

Where an issue not made by the pleadings is tried in the Circuit Court without objection, as if it had been so made, the respondent will not be allowed on the appeal to object on the ground that the issue was not contained in the pleadings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1056, 1057; Dec. Dig. ⇐ 171.]

[*Alteration of Instruments* ⇐11.]

An alteration, in a material part, of a deed of trust by the trustee, who holds for the benefit of others, does not avoid the deed.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. § 67; Dec. Dig. ⇐ 11.]

Before Townsend, J., at Darlington, November, 1872.

This was an action by Henry K. W. Flinn, and Robert L. Hart as administrator of Ellen M. Brown, deceased, plaintiffs, against James M. Brown, Sr., and Joseph T. Brown, defendants, to set aside a deed of trust made by the intestate, Ellen M. Brown, on the 28th day of November, 1870, whereby she conveyed her personal property, consisting of bonds and stocks, to the defend-

*210

ant, *James M. Brown, Sr., in trust for the

donor for life, and after death to the use of the defendant, Joseph T. Brown, infant son of the trustee. The grounds, as alleged in the complaint on which it was sought to have the deed vacated and set aside, were that the intestate was insane when it was executed, and that it was procured to be executed by the trustee by fraudulent means and undue influence. There was no allegation in the complaint that the deed had been altered after its execution. The answer denied the allegations of insanity, fraud and undue influence.

The deed, in consideration of one dollar, conveyed to "the said James M. Brown the choses in action and stocks following, as well as any other personal property not named," (followed by a long and particular description of the choses in action and stocks intended to be conveyed, "to have and to hold the said choses in action and stocks and other property not named, and every part thereof, unto the said James M. Brown, his executors, administrators and assigns, forever. In trust, nevertheless, to, for and upon the uses and trusts hereinafter expressed and declared of and concerning the same, that is to say, in trust to receive and pay over the interest, dividends, income and profits arising therefrom to the said Ellen L. Brown, for and during her natural life as the same shall accrue, or as she shall direct, and from and after the death of the said Ellen L. Brown, upon trust to transfer, assign and deliver, free from all trusts, the said choses in action and stocks, and every part thereof, to Joseph T. Brown, youngest son of the said James M. Brown, or his legal heirs if he shall predecease the said Ellen L. Brown. And it shall and may be lawful for the said James M. Brown, trustee aforesaid, and he is hereby authorized, from time to time, and at all times hereafter to sell, dispose of or exchange all or any part of the said choses in action and stocks, and the proceeds arising therefrom to invest in such other property, real or personal, as he, the said James M. Brown, trustee aforesaid, may deem most beneficial to the parties in interest."

The case was tried by a jury, to whom the whole issue involved in the cause was submitted. Much testimony was introduced on both sides, and James M. Brown, Sr., testified that the words "as well as any other personal property not named," and also the words "and other property not named," were inserted by him in the deed after its execution.

*211

*His Honor instructed the jury "that if the additions to the deed were made by James M. Brown, Sr., after its execution, under all the circumstances, it would render it void." To this instruction the defendants excepted.

The jury found a verdict as follows: "We find for the plaintiffs, and that the paper purporting to be a deed from Ellen L. Brown to James M. Brown, dated the 28th November, 1870, is void."

A motion for a new trial was made on the ground of error in the instruction to the jury. The motion was denied, and judgment ordered to be entered for the plaintiffs.

The defendants appealed.

Spain, Edwards & Dargan, for appellants.
McIver & Boyd, Warley & Dargan, contra.

June 26, 1875. The opinion of the Court was delivered by

MOSES, C. J. Ellen L. Brown, a widow, departed this life without issue on the day of April, 1871. On the 28th day of the preceding November she conveyed, by deed, certain named personal securities to James M. Brown, Sr., her father-in-law, in trust, to receive the dividends, income and profits thereof, and to pay the same to her during her natural life, and from and after her death to transfer, assign and deliver, free from all trusts, "the said choses in action and stocks to Joseph T. Brown, the youngest son of the said James M. Brown, Sr., or his legal heirs if he shall predecease her," with power to the said trustee at all times to dispose of or sell any of the said securities and invest the proceeds in such real and personal property as he may deem most beneficial to the parties in interest.

On the 29th April, 1871, Henry K. W. Flinn, a brother and distributee of the said Ellen L. Flinn, filed a complaint, in which, after asking the interposition of the Court for the protection of the property covered by the said deed, as well as any other belonging to the deceased in the hands of the said James M. Brown, Sr., he prayed that the said deed might be declared to be fraudulent, null and void. It presented two grounds upon which it claimed to avoid it:

1. That the said Ellen L. Flinn was of unsound mind at the time of its execution.

*212

*2. That it was executed by force of the undue influence of the said Brown, operating on a mind so weakened and affected by the excessive indulgence in spirituous liquors and anodynes as to be incapable of resisting it. On the 20th of May following, an answer was filed in due form by the said Brown, denying the material allegations of the complaint. On the 4th of August succeeding, the plaintiff amended his complaint by stating that R. L. Hart, on the 7th of June preceding, took out letters of administration on the estate of the said Ellen L. Flinn, and joined in the charges and prayer of the said complaint, a previous order having been passed to allow him to be made a party. An answer was also filed for and on behalf of the infant defendant, Joseph T. Brown. Thus stood the pleadings, when, after the usual notice, the parties proceeded to trial at the spe-

cial term of the Common Pleas for Darlington, held in November, 1872.

The relief sought by the plaintiffs in their proceeding is through the equitable jurisdiction of the Court. It is of that character which can only be claimed in a Court of chancery, where such a Court exists as a separate and distinct organization from the Common Pleas. If the Constitution of 1868 had not conferred equity jurisdiction on the Court of Common Pleas, but had retained the Court of Chancery, with all the high and exclusive power of administration which had before attached to it, the plaintiffs could have had no remedy in any other jurisdiction. The subject matter of the suit, looking to the end it proposed and the character of the relief which it claimed on behalf of the plaintiffs, constituted it "a case in chancery," as distinguished from one at law, and its mode of trial must be in conformity with the rules and course of procedure prescribed for the trial of "cases in chancery."—See Sullivan v. Thomas, 3 S. C., 547.

The issues made by the pleadings were triable by the Court, which, however, under Section 277 of the Code, had the power "to order the whole issue, or any specific question of fact involved therein, to be tried by a jury." By the decree it appears "that the case was submitted to a jury," and we are, therefore, to conclude that it was by the order and direction of the presiding Judge.

As the case was one in chancery, it was determinable by the Court, and the parties were entitled to its judgment, both on the questions of fact as well as of law involved in the issues. The verdict of the jury is not to be accepted as the conclusion which is

*213

*to govern and control the case, and through the medium of which the judgment is to be pronounced in favor of the one side or the other. The judgment in such a case must be the result of the conclusions of the Judge, both on the law and the facts. We must regard, then, the reference as only seeking the verdict of a jury to satisfy the conscience of the Court on the facts to which it was to apply the law. It was not to govern and control the rights of the parties. The presiding Judge was at liberty to conform his conclusion from the evidence to that which was to be inferred from the verdict as the result of the belief of the jury; still the issues were for his determination. It was within his power entirely to have disregarded the verdict and decreed in the face of it. But when he adopts it, not because it concurred with his own views of the testimony, but simply because it is the verdict of the jury, and must therefore control him, if he has erred in his instructions as to the law on a point made material by the effect which was given to it in his charge as an element necessary for the consideration of the jury, the verdict cannot be allowed to stand.

No objection appears to have been submitted on the part of the appellants as to the new issue allowed to be made by the introduction of evidence as to alterations and additions to the deed. If there had been no error in the charge of the jury in regard to the effect they were to have upon the deed, the appellants would have been without remedy in this Court. We are, therefore, to consider the issue in relation to them as if it had been made directly through the pleadings.

The words in the deed which did not appear to be in the handwriting of the original draftsman, and which were the additions referred to, were, after the words "stocks following," "as well as my other personal property not named," and in the habendum, after "and stocks," these words: "and other property not named." The Judge charged, in regard to them, as follows: "If the additions to the deed were made by James M. Brown, Sr., after its execution, under all the circumstances, it would render it void." It will be remembered that it is a trust deed, of which the said Brown is the trustee, and the question involved, and the only one we propose to pass upon, is, whether additions by a trustee to a deed conveying property to him for the benefit of another, even with a contingent interest to him, avoids the deed ab initio?

*214

*The deed was an executed contract, vesting a legal title in the trustee for those who were to enjoy the beneficial interest in the property which it conveyed. He holds for and on behalf of his cestuis que trust, and cannot, by his act, avoid the effect of the instrument through which alone he can claim and have possession of the subject matter of the trust. It would introduce a new principle into the Court of Equity, which has exclusive jurisdiction in the matter of trusts, and one for which no authority or precedent can be found, to affirm that the destruction by the trustee of the deed which creates the trust renders it void ab initio, and thereby revests the title to the property in the donor. If a mere addition by the trustee after the execution can avoid it, his cancellation or entire destruction by fire or otherwise would be of equivalent effect; and yet who would contend that by burning the deed the trustee extinguishes the trusts and the property reverts to the person who conveyed it? What he could not do by the most formal instrument he would thus be allowed to accomplish by his mere addition to the words of a deed made for the benefit of others, whose interests it was his duty to protect, not to destroy.

The familiar principle upon which equity sometimes proceeds to raise a constructive trust is here actually interposed to effect the destruction of an express trust.

Where an executor conceals or destroys a will, the legatee may compel him to answer for the interest which was bequeathed to

him; or where a deed is destroyed and the contents proved, the party shall have the benefit of it.—Hill on Trustees, 151.

Here it is claimed that the wrong of the trustee of an express trust can defeat the interests of those for whose benefit the property was conveyed to him. The proposition is altogether inconsistent with the object intended to be accomplished by the deed and with the duty of the trustee, whose province it is to execute its expressed terms and conditions.

The conclusion which we have reached on the question directly raised as to the avoidance of this deed by the act charged against the trustee is not affected by the general rule applicable to an alteration of an instrument in a material part by a party to it. Brown is not a party to this deed in the proper sense of the rule. The beneficiary here was the donor for her lifetime, with remainder of the whole property to one then and still an infant. A party may lose all his interest by making an alteration in a deed with a

*215

*view to increase the benefit which he may take under it; but he cannot impair the rights to which others may be entitled by the force of its execution who had no connection with his tortious act.

Whatever contingent interest Brown may possibly have had during the lifetime of the said Ellen L. Brown is lost by her death, Joseph T. Brown surviving, and it is not necessary, therefore, to consider what he is to forfeit, or who is to be benefited by the alterations in the deed charged to have been made by him.

The instruction to the jury was erroneous. It affirmed that the additions to the deed, if made by the said James M. Brown, Jr., after its execution, under all the circumstances, would render it void, and then the verdict of the jury, that it "was void," is accepted by the Court as equivalent to its never having been valid, never existing, and never conveying any title from the donor. How can we undertake to say that the verdict was not in direct response to the proposition of law involved in the charge as to the additions to the instrument?

The particular issue was submitted to the jury as a material one for their solution, and if there was error in law in the instruction in regard to it, the verdict should have no controlling influence on the judgment of the presiding Judge. That "the verdict should be regarded as a response to the allegations in the pleadings, and there is no allegation of any alteration," as contended for by one of the counsel for the respondents, would not be consistent with justice and right.

The respondents (the plaintiffs below) preferred the charge—insisted on it as avoiding the deed—and the Judge submitted it to the jury as a point in issue on which they were to pass, precisely as if made by the complaint and answer. To say now that it could not have entered into the verdict because not of the issues raised by the pleadings, would be to use it while it promised benefit and to discard it when it could not render more.

It is ordered that the judgment below be set aside and the case remanded to the Circuit court for hearing.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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6 S. C. *216

*REEDER & DAVIS v. FLINN.

(Columbia. April Term, 1875.)

[*Husband and Wife* ⇐49¾.]

In 1851 a number of slaves were conveyed in trust for the sole and separate use of wife for life, with the right, at her discretion, to possess and use or hire out the same. From 1852 to 1863, inclusive, husband purchased, from time to time, six adjoining tracts of land, constituting, as a whole, the plantation on which he and his wife resided, which he cultivated with the slaves held in trust, and paid for out of the proceeds of the crops made thereon by their labor. The husband managed and controlled the slaves, and disposed of the proceeds of their labor as he saw fit, and all this was done with the full knowledge, acquiescence and consent of the wife. The title to the lands was taken by him in his own name, and in 1870 he mortgaged them to a creditor: *Held*, That the income derived from the labor of the slaves must be regarded as a gift from the wife to her husband; that the title to the lands was in him, as an individual, unaffected by any trust, and that the mortgage was a valid lien thereon.

[Ed. Note.—Cited in McKenzie v. Sifford, 48 S. C. 469, 26 S. E. 706.

For other cases, see Husband and Wife, Cent. Dig. §§ 249–255, 257; Dec. Dig. ⇐49¾.]

[*Husband and Wife* ⇐49¾.]

Where a wife permits her husband to manage her separate estate for a number of years, and dispose of the income as he sees fit, equity treats it as gift to him.

[Ed. Note.—Cited in Reeder & Davis v. Dargan, 15 S. C. 182; Dunlap v. Garlington, 17 S. C. 572; McLure v. Lancaster, 24 S. C. 282, 58 Am. Rep. 259; Martin v. Jennings, 52 S. C. 381, 29 S. E. 807; Sanders v. Standard Warehouse Co., 101 S. C. 386, 85 S. E. 902.

For other cases, see Husband and Wife, Cent. Dig. § 257; Dec. Dig. ⇐49¾.]

[*Husband and Wife* ⇐144.]

A wife, by negligence or acquiescence, may forfeit her right to equities against her husband, which, otherwise, she might have asserted.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 35, 545–553; Dec. Dig. ⇐144.]

Before Townsend, J., at Darlington, October Term, 1874.

This was an action by Reeder & Davis, originally against H. K. W. Flinn, for foreclosure of a mortgage given by the defendant to the plaintiffs, dated April 23, 1870. The summons and complaint were afterwards amended by making Ann D. Flinn, his wife,

and A. F. Edwards and Evander R. McIver parties defendant.

The case was referred to J. H. Hudson, Esq., as Referee, who submitted a report, filed April 2, 1874, which fully and clearly states the facts upon which the judgment of the Court was founded, also his conclusions of law. The report is as follows:

"The case was fully and ably argued on both sides, and the only labor left to the Referee is to arrive at his conclusions of the law from the full collection of authorities furnished him.

"The Referee finds the following to be the facts of the case:

"1. That Henry K. W. Flinn and Ann D. Ervin intermarried on the 6th day of March, A. D. 1851, the husband owning but very little property, while the wife was possessed, in her own right, of a handsome personal estate, consisting principally of negro slaves, forty in number, in the hands of her guardian, A. L. Scarborough.

"That on the 26th day of July, A. D. 1851, the husband, H. K. W. Flinn, by deed, duly executed, conveyed these slaves to Thomas J. Flinn, upon the following uses and trusts.

*217

viz.: 'To and for the *sole and separate use of the said Ann D. Flinn for and during the joint lives of her said husband and herself, with remainder to her if she should be the survivor: with remainder to her issue if he should survive her; remainder to him if he should survive her and there should be no issue; with the right, at her 'discretion, either to possess and use the said slaves, or hire the same out." This deed was duly recorded in the offices designated by law. Of the said marriage, issue was born—Dozier Flinn. On the 3d day of January, A. D. 1872, Dr. H. K. W. Flinn departed this life intestate, leaving his wife and child him surviving.

"3. That in the year A. D. 1851, Dr. Flinn purchased in Darlington a tract of land, known as the Hill place, on a credit, and took the titles in his own name, for about $5,000, and shortly afterwards sold it for a larger amount than he contracted to pay for it, Batson Jordan being the purchaser. On the 16th of July, 1852, he purchased the McCown land, of five hundred and fifty-three acres: on the 23d of July, 1852, the Stewart tract, of two hundred acres; on February 1, 1854, the Poindexter tract, of one thousand one hundred and four acres; on the 14th of January, 1856, the Zimmerman tract, of four hundred and one acres, and November 20, 1863, the Hudson tract, of one hundred and fifty-six acres. These tracts of land are all adjacent to each other, and make a single body, aggregating two thousand four hundred and fourteen acres, and throughout the testimony is, for convenience, called the Home place. These successive land purchases were all made by Dr. H. K. W. Flinn, and the titles thereto all taken in his name. In the beginning of the year 1854, Dr. Flinn and family moved on this land, and began the cultivation of it, and so continued up to the time of his death. His surviving widow and child are yet residing on the homestead.

"4. That Dr. Flinn purchased these lands in his own name, uniformly used the territory as his own property, claimed it as his own, and seems never to have doubted his right and title thereto until the institution of this action.

"5. That the negroes, conveyed in the deed aforesaid, were the separate property of Ann D. Flinn, which, according to the terms of the trust, she had a right, at her discretion, either to possess and use or hire them out. That they were accordingly, by the trustee, turned over to Ann D. Flinn for her use; that they were kept together and worked on

*218

the land aforesaid by Dr. Flinn, who *received the incomes or proceeds of their labor from year to year until emancipation, and applied the same to the comfortable support of himself, wife and child, and also to the payment of almost all, if not the whole, of the purchase money of the tracts of land aforesaid. A fair conclusion from the testimony is that the lands were entirely so paid for, and this is the finding of the Referee.

"7. That the husband's management of the negroes and the plantation, and his receipt, use and appropriation of the income of their labor, was with the knowledge and consent of his wife, resident with him.

"8. That all contracts made with factors and merchants in Charleston for plantation and family supplies, including the debt contracted with the plaintiffs, were made by Dr. Flinn in his own name, and it was extended alone to him; that the claim of the plaintiffs is upon a bond given for an account contracted mainly for plantation and family supplies.

"9. That before the plaintiffs took the bond and mortgage, the subject of this action, one of them had sufficient notice of the claim of Mrs. Flinn to the land conveyed thereby to have put him upon inquiry: that inquiry was actually made, in consequence of this notice to one of the members of the firm, which was notice to both.

"10. That the mortgage to A. F. Edwards is in the hands of the assignee, E. R. McIver, a valid debt against the estate of Dr. Flinn, and, being anterior to that of the plaintiffs, will take precedence as a lien on the right, title and interest of Dr. Flinn in the Home place, provided his title be superior to the equities of the wife, set up in her defense to this action.

"11. That there is now due and unpaid upon the bond and mortgage given to A. F. Edwards the sum of two thousand three hundred and ninety-five ($2,395) dollars, with in-

terest at the rate of fifteen per cent. per annum, payable annually from December 8, 1868.

"12. That there is due and unpaid upon the bond and mortgage to the plaintiffs the sum of five thousand five hundred dollars, with interest at one per cent. per month, calculated from April 23, 1870, to the first day of March, A. D. 1871, and then an amount found, which said amount of principal and interest will bear interest from March 1, 1871, to the present time or day of payment.

*219

* "Conclusions of law:

"The fundamental inquiry in this action is, what right and title did Dr. H. K. W. Flinn acquire in and to the land covered by the two mortgage deeds, as against his wife, Ann D. Flinn? Because a creditor can stand on no higher grounds than Dr. Flinn, unless it be one who stands in the position of an innocent purchaser or creditor without notice. And in this action to foreclose their mortgage, the plaintiffs, whatever may be their equities in the matter of the original debt, in the opinion of the Referee, do not occupy the position of creditors or purchasers without notice, their mortgage deed having been taken after inquiry and information.

"To the aforesaid fundamental inquiry, we will, therefore, direct our attention, upon the basis of the facts as found above for our guidance.

"It is the settled law of this State that when property is given or settled to the separate use of a married woman, she has no power to charge, encumber or dispose of it, unless in so far as power to do so has been conferred on her by the instrument creating her estate, which power must be strictly pursued, in contradiction to many English cases, in which it has been held that she is a femme sole with respect to her separate property, and may charge or dispose of it as she pleases, unless in so far as she is expressly restricted by the instrument.—Reid v. Lamar, 1 Strob. Eq., 27.

"Such has been the settled law of our State since the case of Ewing v. Smith, 3 DeS., 417 [5 Am. Dec. 557] when the doctrine of the English Courts was departed from, and a safer, wiser and better rule established, which has met with the sanction and approval of all the Courts of last resort in this State, including the present Supreme Court.—See Dunn v. Dunn, 1 S. C., 350, and Charles v. Coker, 2 S. C., 123.

"Prior to the adoption of our present Constitution, a married woman was never, in the proper sense of the term, a femme sole as to her separate estate, but could only execute the powers expressly delegated to her by the instrument creating the separate estate; while in England, and many of the States of the Union, she is, as to her separate estate, a femme sole, with unlimited power to bind and dispose of the same, except in so far as she is expressly restricted in so doing by the terms of the instrument creating it. By this firmly fixed rule of law, the present case must be governed.

*220

*"The question, therefore, naturally arises, how far does the deed of H. K. W. Flinn to Thomas J. Flinn give to the wife, Ann D. Flinn, power and control over the property therein conveyed to her sole and separate use?

"It gives her no power of disposition whatever over the property itself, and no contract of hers could, therefore, bind or affect it; but upon the joint request of husband and wife, the trustee is authorized to substitute other negro slaves for those mentioned in the deed. Over the income and usufruct of said slaves, the deed does give Mrs. Flinn free control in the following language:

" 'The said Thomas J. Flinn and his heirs shall hold the said slaves, and the increase thereof, in the further trust and confidence that the parties interested in the same, for the period during which they may be entitled to receive the income, may, at their discretion, either possess and use the said slaves or hire out the same.' She is here clearly given the right, the trustee consenting, to possess and use the said slaves during her life, or to hire them out and receive the hire; and she unquestionably had the right, at her discretion, to dispose of the proceeds of these negro slaves, or of their hire, when turned over to her by the trustee for that purpose, in obedience to the terms of the deed of trust. Having this privilege, she could make her husband the beneficiary of the income. If she did this, she can neither in law or in equity have reclamation upon his estate for their use or hire, nor can she follow the property which he acquired by this usufruct and stamp it with the trusts of the deed or with the character of a trust resulting to her.

"When a married woman is resident with her husband, and suffers him, without objection, to receive the income of her separate estate, or to appropriate any annual payments, such as pin money directed to be paid to her, it will be intended that these payments were made to or appropriated by the husband with her consent; consequently, even as against the husband, the wife or her representatives will not be entitled to an account for more than one year's arrears. * * *

"When the wife has allowed the husband to receive the income of her separate estate during his life without objection or interference it will be presumed that the fund was placed by her at his absolute disposal, and all past accumulations from that source will belong to him absolutely, and go to his personal representatives at his death.—Hill on Trus-

*221

tees, *425. Note 1 to this page says: *'It is well settled that when a wife, living with her

husband, permits him to receive the rents and profits of her separate estate, the presumption is that it is with her assent and by way of gift.' In Smith v. Camelford, (2 Ves., Jr., 698 to 716,) the Court declared that if the wife permitted her husband to receive the rents of her separate estate, he was not afterwards accountable to her for it. The same decision was pronounced in Milms v. Rusk, (2 Ves., Jr., 488,) the wife having expressly empowered her husband to receive the rents of her separate estate during her life. Powell v. Hanky (2 P. Will., 82,) is a case where a similar decree was pronounced upon her permission and acquiescence in her husband receiving the produce of her separate property. And in Squire v. Dean, (4 Bro. C. C., 326,) the husband received the interest of his wife's separate estate and applied it to the use of the family; her assent to the receipt and application was presumed, and she was not permitted to claim anything on account of it out of her husband's assets.

"The foregoing English cases are referred to in Roper on Husband and Wife, *220-221, and the author proceeds to say: 'It cannot escape the observation of the reader that the principle that pervades the cases on this subject is this: either express gift by the wife to the husband, or an implied gift to him (when it can be raised) of her separate estate, resulting from cohabitation and her acquiescence. Upon this presumption it is that if the wife, without any intermediate claim, suffered her husband to receive the annual income of her separate estate, a Court of equity will permit her, surviving him, to charge his assets in account with no more than the amount of one year's arrears, or for one year of his receipts preceding his death, according to some cases, and not even with one year's receipts or arrears, according to others.'—Roper on Husband and Wife, *221.

"If the wife direct the income of her separate estate to be 'paid to her husband, it can never be reclaimed to her separate use.'—Redfield on the Law of Wills, vol. 3, 173. In Charles v. Coker, 2 S. C., 136, the present Supreme Court of South Carolina reiterates the same doctrine. A careful and impartial review of the testimony satisfies my mind that H. K. W. Flinn used and appropriated the proceeds of the labor of these slaves according to his own judgment and discretion, and with the full knowledge, consent and acquiescence of his wife. He

*222

was the sole manager of *the property, and claimed and used the profits as his own. With the income he supported himself and family in excellent style, and purchased horses, mules, farming implements, negroes and land, all of which he uniformly claimed as his own, in the presence of his wife and the outside world. She certainly was cognizant of this—permitted it—never objected to it, and never took steps to prevent it, which she had the right and power to do had she so desired. She states in her examination that she never objected to her husband managing the estate and using the income. Dr. Flinn, in his answer, says, in substance, that he had no doubt as to his perfect title to the land until about the time this action was to be commenced, when a legal opinion to the contrary was given. All his previous declarations, which were offered and received in evidence, where declarations of his right to the land. He claimed and used the income from the labor of the negroes as absolutely his own, and was careful not to pay for the land in question with money belonging to his wife in the hands of A. L. Scarborough.

"The declaration of Mrs. Flinn to her husband and Mr. Cannon, in 1857, at the Home place, after the shooting match, and the advice which she asked and received of her brother, E. P. Ervin, a lawyer, touching her rights under the deed of trust, and the result of which she made known to her husband, cannot weigh against her long acquiescence in her husband's use of the estate both before and subsequent to that time, and his outspoken claims of right consequent therefrom.

"In the Methodist Episcopal Church v. Jacques, 3 Johns. Ch., 80, Chancellor Kent says, in reference to this question, 'that as between strangers a more strict and severe proof would be required; but the books teach us that the greatest liberality is shown, and the most favorable presumptions indulged, when the husband is permitted by the wife to be concerned in the management of the income of her separate estate as it accrued.'

"For nearly twenty years Dr. Flinn was allowed by his wife to appropriate to his own use without objection the income of her separate property, and not until the institution of this action has she seen fit to interpose in a definite manner a legal objection to his title to the accumulations therefrom and claim them as her own.

"The vicissitudes of time, the ravages of war and great distress of our people, which have doubtless had much to do in giving rise to the present contention, render it un-

*223

pleasant to the Referee to *pronounce the judgment which the law directs him to render in this case. But the preservation of the broad principles of law and equity that underlie and govern the business transactions of men and constitute the rules of property is of the last importance and does not readily admit of exceptions to meet individual cases.

"1. It is the judgment of the Referee that the title to the lands conveyed by Dr. Flinn to the plaintiffs, in the mortgage deed of April 23d, 1870, is in the said H. K. W. Flinn in fee simple; that the surviving widow, Ann D. Flinn, has no right or title thereto

by virtue of the deed of trust of July 26, 1851, arising from payment of the purchase money of said land by her husband, from the proceeds of the labor of the slaves in said deed of trust mentioned, in derogation of the rights of the plaintiffs.

"2. That the plaintiffs are entitled to their judgment for the amount of the said bond, and for the foreclosure of their said mortgage, and sale of the mortgaged premises upon such terms as the Court may direct.

"3. That the mortgage to A. F. Edwards, assigned to E. R. McIver, is a prior valid lien upon the same land, and the sale under the plaintiffs' mortgage must be subject to this prior incumbrance.

"Other questions of interest were pressed with earnestness in the argument of counsels for the plaintiffs and defendants, but, being in effect disposed of by the aforesaid findings of fact and conclusions of law, their discussion is rendered unnecessary, e. g., whether the plaintiffs had notice of Mrs. Flinn's claim, and the effect of that notice becomes of no consequence under the aforesaid judgment, which decides her claim to be unfounded. The same is to be remarked of the question whether mortgagees occupy the position of purchasers for valuable consideration, and whether the plaintiffs, whose demand is for supplies furnished for the family and plantation, supposing it to be trust property, have not a right to subject it to the payment of their claim. The judgment dispenses with the consideration of these questions."

The defendant, Ann D. Flinn, excepted to the report of the Referee, by her attorneys, upon the grounds:

1. That the Referee misconceived the testimony as to her supposed acquiescence in the use by her husband of the incomes from the trust property.

*224

*2. Failing to distinguish between her acquiescence in the purchase of supplies and in the purchase of the mortgaged property.

3. That he misreported her testimony and that of the witness Gannon.

4. That the Referee drew no distinction between the case of a husband receiving the incomes from the trustee, with knowledge and implied assent by the wife, and his receiving the incomes directly from the property, insisting that in the latter case he was the agent of the wife and that there was no presumption of gift.

5. There was no presumption in favor of plaintiffs, who had notice of the alleged trust.

6. That the land was the wife's, and it was error to recommend a foreclosure of the mortgage.

The plaintiffs also filed exceptions:

1. Because it was error to admit the declarations of Flinn to Mrs. A. D. Flinn as to payment of the lands with incomes of the slave property.

2. It was error in fact to find that the lands were so paid for.

3. The notice of Mrs. Flinn's claim insufficient to bar the plaintiffs' claim as purchasers or creditors without notice.

4. It was error to hold that the Edwards mortgage was a prior existing lien to the plaintiffs', inasmuch as it appeared that Mrs. Flinn purchased said mortgage with trust funds applicable to the debts of H. K. W. Flinn. Her purchase was payment. At all events this debt draws seven per cent. only after maturity.

On hearing the report and exceptions, it was ordered, 10th October, 1874, that the report be recommitted to the Referee to ascertain whether, through mistake or inadvertence, Mrs. Flinn's testimony had been misreported. On the 12th of October the Referee reported that his notes of testimony were full; that he was unable from memory to make corrections, but his recollection of the testimony confirmed his notes as to the language of Mrs. Flinn.

Townsend, J. This action was originally instituted by the plaintiffs against the defendant, H. K. W. Flinn, for the foreclosure of a mortgage. In the answer of the defendant, certain supposed equitable claims to the mortgaged premises by Ann D. Flinn are set up against the plaintiffs' right to

*225

the judgment of foreclosure and *sale. By order of the Court, Mrs. Ann D. Flinn was made a party, as well as A. F. Edwards, who it was alleged, held a senior mortgage upon the lands described in the complaint.

The issues of law and of fact raised by the pleadings were submitted to a Special Referee, who has made his report to the Court. Exceptions are taken thereto by the plaintiffs and defendants, and these suggest the questions for the decision of the Court.

The exceptions of the plaintiffs will first receive consideration. The first exception is that the Referee erred in admitting as testimony the statement of H. K. W. Flinn in reference to the payment of the purchase money of the land in question with the incomes or proceeds of the labor of the slaves conveyed by the post nuptial deed.

In Snelgrove v. Martin, 2 McC., 241, the Court says: "The declarations, acts, &c., relating to the matter in dispute, made by a person while he was interested, is good evidence against a party claiming subsequently under such person."

In Land v. Lee, 2 Rich., 168, it was held that the declarations of the vendor of personal property, made before the sale, are competent evidence against his vendee.

In Floyd v. Mintsey, 5 Rich., 374, Frost, J., says: "The plaintiff claims under the heirs of Isabella Floyd, and her declarations against her interest, respecting her title, or the character of her possession, or of the defendant's possession, as adverse to her right

to the land, were competent for the defendant."

The same rule has been laid down in other cases.—Simmons v. Parsons, 1 Bail., 63; 1 Greenleaf's Ev., § 97, 190; McCord v. McCord, 3 S. C., 579.

The plaintiffs claim under H. K. W. Flinn, and his declarations made while he was interested in regard to the land in question are clearly competent evidence against the plaintiffs.

The first exception of the plaintiffs is overruled. The second exception alleges error in the finding of the Referee that the lands in question were paid for with the incomes or proceeds of the labor of the slaves. I cannot discern any error in the finding of the Referee on this point. A careful review of all the testimony conducts my mind to the same conclusion. The second exception is overruled. The third exception complains that there is error in the finding of the Referee that the plaintiffs had sufficient notice

*226

of *the equitable claim of Ann D. Flinn to defeat their claim as purchasers or creditors without notice.

The plaintiffs had actual notice of the existence of the equitable claim. In consequence of it, inquiry was instituted and information obtained. Notwithstanding this, the plaintiffs accepted the mortgage deed. The notice, in my opinion, was such as to defeat the claim of the plaintiffs, and there is no error in the finding of the Referee. The third exception is overruled.

The fourth exception alleges error because the Referee decided that the mortgage of A. F. Edwards was a prior existing lien to the mortgage of the plaintiffs. I can perceive no fault in the finding of the Referee on this point. This exception suggests another question which does not seem to have been presented in the argument before the Referee. It relates to interest. The debt due to A. F. Edwards, according to the terms of the contract, will bear interest at the rate of fifteen per cent. per annum up to the time of its maturity, and after that date interest should be made up at the rate of seven per cent.

The fifth exception is overruled, with the exception of the part relating to interest.

The exceptions of the defendant will next be considered.

The first exception complains because the Referee has totally misconceived the testimony of the defendant in reference to her acquiescence in the appropriation by her husband of the proceeds of the plantation to his own use. Is the conclusion of the Referee that the use and appropriation by H. K. W. Flinn of the incomes of the labor of the slaves of his wife, with her knowledge and consent, unsupported by the evidence? The impression made upon my mind in reviewing the evidence is, that Mrs. Flinn was willing and fully acquiesced in the appropriation by her husband of the income derived from the labor of her slaves to the payment of plantation and family expenses. I am not, however, impressed, as the Referee has been, that she expressly or impliedly consented that the incomes should be appropriated in the way of making purchases of land or for the payment of lands already conveyed to her husband. There does not appear to have been a silent acquiescence on her part in the action of her husband and in paying the purchase money of the "Home tract" out of her incomes.

Mrs. Ann D. Flinn testifies that she was not distinctly informed of her rights until some time in 1857 or early in 1858. At that

*227

*time she appears to have had a consultation with her brother, Erasmus P. Ervin, who was a lawyer, in relation to her rights under the post nuptial settlement. This act on her part indicates a disposition to become conversant with her rights and to assert them in every possible way. At some time, either prior or subsequent to this conversation, she made efforts to see the post nuptial deed, but failed to procure an inspection of it until after the death of the trustee, when it was exhibited to her by his widow. After the conversation with E. P. Ervin, Mrs. Ann D. Flinn stated to William Zimmermann and Dr. Zimmermann that the land was hers. To her husband, H. K. W. Flinn, and in his presence, she asserted her right to the land, and declared that she did so in consequence of the information received from her brother. To Zimmermann Davis, one of the plaintiffs, she likewise asserted her claim to the land, which had been paid for with the incomes of her separate estate. All this was before the execution of the mortgage deed to the plaintiffs by her husband and the institution of this suit. In 1870 she consulted attorneys as to her rights, and received a written opinion from them. In consequence of the advice therein contained, a declaration of trust was made, the subject matter of which was the land now in question, by her husband, and immediately thereafter placed on record. Objection was made to the execution of the mortgage to Edwards, but the husband's importunities caused her to waive it afterwards. Mrs. Ann D. Flinn says she took no steps to legally assert her rights until advice was sought from attorneys in 1870, because there was no necessity for doing so. She did advertise the plaintiffs of her rights after her husband commenced his dealings with them, and this evinced a disposition to prevent her husband from asserting a claim to the land in opposition to hers.

H. K. W. Flinn did take the titles to the land, and Mrs. Ann D. Flinn testifies that she did not object, for the reason that she was ignorant of title deeds and the legal effect of placing title to the lands in her husband.

This was very natural for a female, inexperienced in business transactions, and particularly for a confiding wife. Under the circumstances, most wives would have acted as Mrs. Ann D. Flinn, and no objection would have been urged to any arrangement suggested by the husband relating to a business transaction professedly for the benefit of the family. Notwithstanding this, we find Ann D. Flinn afterwards asserting her rights, and claiming the land as her own, not only to her husband,

*228

but to other *parties. H. K. W. Flinn, by his acts and declarations, evidenced that he recognized the rights of his wife. When the title deeds to the various tracts of land are executed to him, they are quietly laid away and never spread upon the records in a public office. Such publicity of the character of the deeds may have invoked an interference on the part of some of Mrs. Ann D. Flinn's relatives, and, an apprehension of something of this kind, may have prompted him not to record them; or he may have felt that the rights of his wife could be asserted, even though the legal title to the land was in him, and it was unnecessary to put them on record. A disposition not to mislead creditors may have actuated him in what he did. The fact is significant, and the inference fair from it that H. K. W. Flinn himself recognized the claim and rights of his wife to the land when it had been paid for by her annual incomes.

In 1870, H. K. W. Flinn executed a declaration of trust, in which he acknowledged the rights of his wife and recognized her claim to the land now in question, which was duly recorded. This act of his shows that, in 1870, he thought the land was his wife's, and the fair inference from the act and his former conduct is that he had never doubted the fact before, although he may have made declarations to the contrary. If such was not the case, why did he make the declaration of trust?

I am of the opinion that there was error in the finding of the Referee that Mrs. Ann D. Flinn consented to the appropriation by her husband of the incomes from the labor of her slaves to the purchase of the land or payment of the purchase money of the same.

The second exception of the defendant has been anticipated in the consideration of the first.

The third exception was heard and disposed of at the hearing.

The fourth exception alleges error on the part of the Referee in the application of the law. It insists that a distinction has not been drawn between the cases of a husband receiving the annual incomes from the trustee of the wife and the receipt of them by himself while engaged in the management and control of the separate estate. The Referee has construed the post nuptial deed, and no objection is urged against his construction. He says Mrs. Ann D. Flinn was clearly given the right by the deed, the trustee consenting, to possess and use the slaves during her life, or to hire them out and receive the hire; and she unquestionably had the right, at her discretion, to dispose of the proceeds of

*229

the labor of the negro slaves, *or of their hire, when turned over to her by the trustee, as she saw fit. Mrs. Ann D. Flinn, then, had free control over the income and usufruct of said slaves. She was authorized to make her husband the beneficiary of them. The question then arises, did she do so? It has already been announced, as a conclusion of fact, that Ann D. Flinn did not object, but acquiesced, rather, in the appropriation by her husband H. K. W. Flinn of the annual incomes to the support of the family and the preservation of the trust estate, but did not assent to or acquiesce in the appropriation of them by him to the purposes of purchasing land for which he had taken titles in his own name.

Is the distinction contended for in the exception drawn by the authorities? The doctrine is well established "that when the husband has been permitted to receive the incomes of the separate estate of his wife during his life, without objection or interference, the accumulations from that source will belong to him absolutely, and at his death will go to his personal representatives. This arises from the presumption that the fund was placed by her at his absolute disposal. The right of the husband to receive the wife's separate estate rests solely on her assent, expressed or implied, and when such assent does not expressly exist, or cannot be properly implied, the trustee would not be justified in making payments to him."—Hill on Trustees. "It is well settled that when a wife, living with her husband, permits him to receive the rents and profits of her separate estate, the presumption is that it is with her assent and by way of gift."—Hill on Trustees, 421. In Methodist Church v. Jacques, it is held "that, as between strangers, a more strict and severe proof would be required; but the books teach us that the greatest liberality is shown, and the most favorable presumptions indulged, when the husband is permitted by the wife to be concerned in the management of her separate estate as it occasionally accrues."

These doctrines seem to apply to the case of a wife having a trustee appointed under the deed who has the management and control of the separate estate and pays over the annual income or profits. When the husband receives them without objection or interference on the part of the wife, the presumption is it is with her assent and by way of gift. The accumulations in such a case, whether appropriated by the husband to the payment of family expenses or otherwise, would be considered the absolute property

of the husband, for which neither the trus-
*230
tee or the husband would *be accountable. They do not apply to the case of a husband who is in the possession of the separate estate, managing it and controlling it and appropriating the accumulations to whatever purposes he sees fit. He is then the agent of the wife, and is subject to the same rules and remedies which obtained as to other constructive trustees. "The husband who has charge of his wife's separate estate comes within the ordinary rule which prevents the trustee from taking advantage from the management of trust property, and he cannot, therefore, traffic therewith by encumbrances or the like, except for her benefit."—Tiffany and Bullard on Trustees, 671. "The accumulations or savings of the wife's separate estate, or purchases with them, belong to the wife, and are subject to the same rule as the principal."—Hill on Trustees, 425. If the husband deals with the separate estate as his own, he will be treated in equity as a trustee for the benefit of his wife.—Hill on Trustees.

In the case of Methodist Church v. Jacques, it is held that if the husband assumed and executed a considerable agency in the management of the separate property of his wife and her money transactions, then such trafficking for his own benefit under the mask and the performance of his trust as agent was altogether unwarrantable.

It will be observed, then, that there is a distinction to be drawn between the case of a trustee managing and controlling the separate estate and the husband doing so, as to the effect of the appropriations by the husband of the annual incomes.

When the annual incomes are paid to the husband by the trustee, with the consent of the wife, either express or implied, the trustee is not held accountable for the accumulations. As between the husband and wife, the accumulations become the absolute property of the husband when there is a gift either actual or constructive. In such cases the favorable presumptions spoken of in the case above cited can be legitimately indulged. But when the husband controls the separate estate, and appropriates the annual incomes, with the assent of his wife, express or implied, he will not be accountable for the amount appropriated for family supplies and for the protection of the trust estate, but for the excess above this applied to his own purposes, or in the purchase of property, he will be accountable; and the property thus purchased will be stamped with the character of the trust, unless there has been a direct gift of the excess to the husband by the wife.

*231

*The trustee, when he manages the estate, is held accountable for all incomes above that necessary for family support and the preservation of the trust estate; and when he invests or appropriates this, the property so purchased belongs to the separate estate. So with the husband when he controls the estate, except that the wife can make a direct gift of the incomes to her husband if she desires so to do.

The case of Charles v. Coker, 2 S. C., 122, establishes the doctrine that when the husband is in possession of the separate estate, and receive the annual incomes, and devotes it to the purpose of obtaining family supplies and the preservation of the trust estate, without complaint or objection on the part of the wife, he is not accountable to the wife for the proceeds so received by him.

This case further establishes a distinction between the appropriation of the incomes by the husband for family supplies and the preservation of the trust estate and the use of it in purchasing property. The same distinction is drawn in the case of the Methodist Church v. Jacques, and some of the other cases cited by the Referee.

In the one case, when the incomes are used for family purposes and for the benefit of the trust estate, the wife consenting, on the presumption of consent arising, the husband is not accountable for the incomes received. But when they are employed in purchasing property by the husband, while he is controlling and managing the separate estate, without the express consent of his wife or a direct gift, the property so purchased belongs to the trust estate. In such a case there can be no presumption of assent by way of gift.

When the husband claims the incomes appropriated by him in purchasing property by way of gift, the fact of the gift must be established.

"A direct gift from the wife to the husband will be supported, although the Court looks with jealousy on such transactions; and if there be any improper influence exercised by the husband, they will refuse to give effect to it."—Hill on Trustees, 424.

In Methodist Church v. Jacques, it is said: "Though Courts of equity look with jealousy and suspicion at gifts from a wife to her husband, yet they will be supported if done freely and voluntarily."

In Leading Cases in Equity, in note, it is held: "But the concurrence of the wife in her husband's receipt of a legacy is not a gift."

*232

*In this case, if the husband claims by way of gift, it was incumbent on him to establish the gift. There is no proof that there was a direct gift of the incomes employed by H. K. W. Flinn in purchasing the land by his wife. In the absence of proof, it cannot be held that there was such a gift. Suppose a constructive gift is sufficient in such a case as that now under consideration, the evidence does not sanction the conclusion that there was ever such a gift.

There is another view of this case which leads me to the same conclusion—that the land purchased belongs to the separate estate of Ann D. Flinn. What relation did H. K. W. Flinn sustain towards Ann D. Flinn? The trustee under the post nuptial deed turned over the negro slaves to the cestui que trust. According to the decision of Youmans v. Buckner, 3 Hill, 221, when the trustee under the deed allows the property to go into the possession of the cestui que trust who is a femme covert she is regarded as holding under him; she becomes the agent of the trustee. When Ann D. Flinn permitted her husband to assume the control and management of the trust estate, he became her agent. He sustained then towards his wife the relation of husband and constructive trustee.

"A purchase by a man in his own name, with funds in his hands in a fiduciary capacity, creates a resulting trust in favor of those whose money is thus employed."—Adams' Equity, 166, note.

So if a husband purchases property with his wife's separate estate, there is a resulting trust in favor of the wife. Ann D. Flinn did not assent to the use of her incomes by her husband in the purchase of property for his benefit, and, occupying the relation he did, the property so purchased belongs to the separate estate of his wife.

Suppose H. K. W. Flinn is to be considered as a trustee de son tort, by having, of his own will, intermeddled with the trust estate, he would be subject to the same rules and remedies which obtain as to constructive trustees.—Hill on Trustees, 173.

Suppose the relation of only husband and wife may be considered as subsisting between H. K. W. and Ann D. Flinn. If the husband applied the incomes in part to the purchase of property for his own benefit, and the presumption that it was a gift on the part of the wife may arise, yet the proof shows that the presumption in this particular case has been rebutted, for the wife constantly

*233

*asserted her claim to the land so purchased and never quietly acquiesced in such an appropriation of her incomes. Looking at the case in any aspect, I am of the opinion that the land described in the complaint is the separate property of Ann D. Flinn and was at the time of the execution of the mortgage deed to the plaintiffs.

In so far as the incomes were appropriated by H. K. W. Flinn to the payment of family expenses and the preservation of the trust estate, this was sanctioned by Ann D. Flinn, and H. K. W. Flinn would not be accountable for them. But the portion of the incomes invested by him in the land was without the consent of the wife, and the property so purchased is the separate property of Ann D. Flinn.

If the land is the separate property of Ann D. Flinn, did the plaintiffs have sufficient notice of her equitable claim at the time of the execution of the mortgage deed by H. K. W. Flinn? It appears that the plaintiffs had actual notice. This is the conclusion of the Referee. If so, they cannot occupy the position of a purchaser for valuable consideration without notice. The equitable claim of Ann D. Flinn is superior to theirs, and must prevail, unless they have some higher equity. Lands purchased by the husband with the separate moneys of his wife in his own name enures to her benefit as a resulting trust. And a purchaser from the husband in such case, with notice of the trust, takes the land subject to the trust.—Methodist Church v. Jacques, 1 John. Ch., 450.

The debt of the plaintiffs was that of H. K. W. Flinn. He contracted it and executed the mortgage to secure it. The wife's separate property should not be subjected to sale for the payment of it. The very object of the post nuptial deed was to protect the separate property from sale for the husband's liabilities. To subject this land to the payment of the plaintiff's claim would defeat the very object of the trust.

But the Referee finds that the debt of the plaintiffs was principally for plantation and family supplies. At the time it was contracted, the negro slaves, constituting the original separate estate, had been emancipated. The debt was not, therefore, contracted for the benefit of the original separate estate. It was the duty of the husband to support the family. The only separate estate at the time was the land which is now the subject of controversy. It was not necessary to contract the debt for the benefit of the trust

*234

*estate. The plaintiffs are not entitled to subject the land to sale for the payment of their debt.

It is the judgment of the Court that the lands described in the complaint, and purchased by H. K. W. Flinn with the incomes arising from the separate property of his wife, are the separate estate of Ann D. Flinn, and the plaintiffs are not entitled to a judgment of foreclosure and sale.

It is adjudged and ordered that the complaint be dismissed.

The plaintiffs appealed.

[For subsequent opinion, see Reeder & Davis v. Dargan, 15 S. C. 175.]

Edwards & Dargan, for appellants:

1. Appellants submit that there is no proof that the land in question was paid for by the incomes of the trust property. The proof relied on by the defense was the declarations of H. K. W. Flinn, given in testimony by Mrs. Ann D. Flinn, who, it is submitted, was an incompetent witness to make the proof.—Rev. Stat., 672, Chap. VIII, § 415; Guery v. Kinsler, 3 S. C., 423.

2. But, whatever may have been the declarations of H. K. W. Flinn, it is absolutely certain that the lands were not paid for with

the incomes of the trust property. According to Mrs. Flinn's own testimony, her husband borrowed money on his personal credit to pay for portions of it. It also appears that by the resale of the Hill land he realized a profit of about $2,000, and about the same time paid a considerable amount of cash on the purchase of a part of the land now in question. The presumption is that he paid it from the profit so realized. Then we hear of his receiving money from Mrs. Flinn's guardian, (not trust funds,) and that he bought stock and implements and some slaves of his own, which he employed on the place. It is impossible, therefore, to say that the lands were wholly paid for with incomes from the trust property, and the Referee cannot be understood as finding that as a fact. An accounting would be necessary to say what of the incomes were so employed, and the Court would require strictness in the proof that trust funds were invested in the lands.—Gordon v. Goodwin et al., 2 N. & McC., 70.

3. The doctrine that when a trustee mixes trust funds with his own the whole enures to the benefit of the cestui que trust does not apply here, because a husband is entitled to the receipt of the incomes of his wife's property as a compensation for his liability to

*235

*maintain her, and is not accountable for their application, together with his own funds, in the purchase of property. He is not a trustee, and the incomes are not trust funds.—Hill on Trustees, 410; Carter v. Anderson, 3 Sim., 370; 1 Rep. Hus. and Wife, 273; Perry on Trusts, 101, § 128.

4. The Referee finds that H. K. W. Flinn did support his family handsomely; made all contracts with factors for plantation and family supplies in his own name, and credit was extended to him; that the claim of plaintiffs was on a bond given for an account contracted mainly for plantation and family supplies; and that his management of the negroes and plantation, and his receipt, use and appropriation of their incomes and labor, was with the knowledge and consent of his wife resident with him; and his findings of fact ought rather to stand than the findings of the Circuit Judge reversing them.—Butler v. Ardis, 2 McC., Ch. 71, 72; Lord v. Lowry and Fogartie, Bail. Eq., 510, 514; Gee v. Hicks, Rich. Eq. Cases, 5, 19, 20; Alexander v. Maxwell, idem, 302, 314; Sullivan v. Thomas, 3 S. C., 531, 549, 550.

5. Whatever of incomes from the trust property may have been used by H. K. W. Flinn in paying for lands, it was done with the knowledge and consent of Mrs. A. D. Flinn, and she cannot now, even as between him and herself, claim the property purchased or an account of the incomes. Her assent amounted to a gift of the income to her husband.—Hill on Trustees, 425, and note; Methodist Episcopal Church v. Jacques, 3 John. Ch., 77; Charles v. Coker, 2 S. C., 123.

In this case, Mrs. Flinn's assent is properly inferred from her long acquiescence in the course of dealing by her husband, and she is estopped as to third persons from making the claim she now sets up.—Story Eq. Jurisp., § 1284, a.; Perry on Trusts, 608, 609, §§ 665, 666; Thrump v. Harman, 3 M. & R., 5, 2; Cosbally v. Granger, 4 Jr. Eq., 173; Gardner v. Gardner, 1 Gif., 126; McGlinsey's App., 14 S. & R., 64; Shirley v. Shirley, 9 Paige, 363.

6. In this case there was no constructive trust cast upon the husband, and, therefore, the distinction made by the Judge, and insisted on by counsel, between the case of a husband receiving the incomes of a wife's separate estate from the trustee and a husband in possession using and appropriating the incomes with her consent is unreal.—Same authorities as last above.

*236

*7. The post nuptial settlement, by its terms, contemplated no accumulations or accessory estate, and created no trust whatever as to the incomes. Hence the marital rights of the husband attached upon the incomes as they arose, and his application of them to his own use, or in the purchase of property for himself, carried no trust with them.—Hill on Trustees, 424; Perry on Trusts, 610, § 667; McKnight v. McKnight, 10 Rich. Eq., 157, 161; Staggers v. Matthewes, 13 Rich. Eq. 142.

8. Full notice to Reeder & Davis of Mrs. Flinn's claim could not affect their mortgage, as the land was paid for by H. K. W. Flinn, and the titles perfected in him, and a considerable portion of his debt incurred long before the alleged notice, and their mortgage taken before any steps by Mrs. A. D. Flinn to assert her claim. And, though notice of Mrs. Flinn's vague claim to all the property was brought home to one of the plaintiffs, it was not such notice as to defeat their mortgage even if she were entitled to an account from her husband.—Perry on Trusts, 608, 609, §§ 665, 666.

9. Mrs. Flinn's purchase of the Edward's mortgage (assigned to E. R. McIver) was made with funds belonging to the estate of H. K. W. Flinn. They were trust funds in her hands for the payment of debts, and using them for the purchase of said mortgage was payment of the debt; and thereby she also became executrix de son tort, and is liable to account for the amount used in the purchase.—Angel on Fire and Life Insurance, 456, § 396; Chapin v. Fellows, 4 Am. Rep., 49; Charter Oak Life Insurance Company v. Brent, idem, 328.

10. If the plaintiffs' mortgage is supported, we claim that they are entitled to an account for rents and profits from the defendant, Ann D. Flinn, and ask that that question be remitted to the Circuit Court.

McIver, contra:

As to the admissibility of the declarations of H. K. W. Flinn, we contend that the rule

is that the acts and declarations of a person, against his interest, done and made while in possession of the property which is the subject matter of the action are always admissible in a controversy between a third person and a party claiming under such person. The plaintiffs here claiming under H. K. W. Flinn, his declarations are admissible.

*237

—Simmons v. Por*teous, 1 Bail., 63; Floyd v. Minstey, 5 Rich., 374; McCord v. McCord, 3 S. C., 579; Adams' Eq., 168, note.

The question of fact raised by appellants as to whether the lands in question were paid for with the proceeds of the wife's separate property has been determined adversely to the appellants, both by the Referee and by the Circuit Judge, and will not be disturbed by this Court "unless clearly erroneous."—Sullivan v. Thomas, 3 Rich., N. S., 545.

The same remarks will apply to the question of notice raised by the appellants.

The Referee failed to observe the distinction between the acquiescence of the wife in the use by her husband of the incomes for the support of the family and her acquiescence in his applying such incomes to the purchase of property in his own name. In the former it is admitted she did acquiesce, but in the latter she did not; and, on the contrary, from the time she was informed of her rights, always set up a claim to the land.

Again, the Referee loses sight of the distinction between the case of a husband receiving the incomes of his wife's separate estate from her trustee, with her knowledge and implied assent, and the case of a husband appropriating to his own use the incomes of the separate property of which he is in possession, either as the agent of the wife or as the trustee de son tort, and, therefore, his conclusions of law are not sustained by the cases cited by him. Powell v. Hanky, (2 P. Wms., 82.) was a case in which the wife had constantly permitted the husband to receive the incomes of her separate estate, consisting of bonds and mortgages, without making any complaint, either to the debtors who paid the money or to her trustees, and this was a bill by the wife to require the representatives of the deceased husband to account for incomes received by him during his life.

Milnes v. Busk, 2 Ves., 488, was a case in which the wife, under a power of appointment, expressly directed her trustees by deed to pay over the rents and profits, during her life, to her husband "for his own proper use and benefit."

Smith v. Camelford, 2 Ves., 698, was a case in which the questions under consideration were only incidentally alluded to, but it is plain from what is said at page 715 that the husband had received the incomes from the wife's trustee with her assent, and the Lord Chancellor says: "If she permitted him to spend the income, he is not accountable."

*238

*Squire v. Dean, (2 Bro. C. C., 326,) simply decides that where a husband is permitted by the wife to receive the incomes of her separate estate, and such incomes are expended for the general purposes of the family, she will not be allowed to require the representatives of the husband to account for the same out of his estate.

The only ground upon which the husband could claim would be by virtue of a gift from the wife, either express or implied. There is no pretense of an express gift, and none can be implied from the testimony.

The Court of Equity looks with jealousy and suspicion at gifts from a wife to her husband.—Hill on Trustees, 639, *425, note 1.

Even in England, where the wife is regarded as a femme sole with respect to her separate property, and has power to charge or dispose of it as she pleases, except in so far as she is expressly restricted by the terms of the instrument creating the separate estate, it has been held that this doctrine ought not to be applied to transactions between husband and wife; and in Milnes v. Busk, 2 Ves., Jr., 488, Lord Rosslyn said that Pawlet v. Delaval, 2 Ves., 663, was the only case arising directly upon a gift from the wife to the husband, and there Lord Hardwicke placed the validity of the gift essentially upon the confirmation by the wife after her husband's death.

Here, where the reverse of the English rule has been established, (Ewing v. Smith, 3 DeS., 417; Reid v. Lamar, 1 Strob. Eq., 27; Nix v. Bradley, 6 Rich. Eq., 43; Dunn v. Dunn, 1 S. C., 354.) the remark of the Lord Chancellor should apply with increased force.

The husband was in possession of the wife's separate estate either as her agent or as trustee de son tort. In neither case could he make profit from his dealings with the trust estate.—Hill on Trustees, *406, note 1, *540, note 1, *159-60, *173.

The savings or accumulations from the wife's separate estate or purchases with them belong to the wife, and are subject to the same rules as the principal.—Hill on Trustees, *425, 641, note; Clancy on Women, 271; Methodist Church v. Jacques, 1 John. Ch., 450; Parker v. Brooke, 9 Ves., 583.

The plaintiffs can occupy no better position than the husband, through whom they claim, as they cannot occupy the position of purchasers for valuable consideration without notice.—Hill on Trustees, *509, 761.

*239

*Without conceding the proposition that a mortgagee can ever occupy the position of a purchaser, we contend that the plaintiffs cannot, because they paid no money—their mortgage was for an antecedent debt.—Williams v. Hollingsworth, 1 Strob. Eq., 113; Dillard & Kirby v. Crocker, Speers' Eq., 27; Shultz v. Carter, Speers' Eq., 542.

Again, as we have seen, supra, the plaintiffs had notice.

As to the claim of appellants that the debt

secured by the mortgage in question was in fact the debt of the trust estate, being contracted for plantation and family supplies, we say: The pleadings make no such claim in any proper form; the paper styled a reply was not proper, as there was no counter-claim set up in the answer, and a reply was not required by any order of the Court.—1 Tiff. & Smith, N. Y. Prac., 388; Garner v. Manhattan Build. Asso., 6 Duer, 539; Devlin v. Bevins, 22 How., 290.

If, however, the paper called a reply can be regarded as a part of the pleadings, then it does not state such a case as would entitle a creditor to subject trust property to a payment of his debt. It only states that the debt was for supplies used by the family and for carrying on the planting interests. It does not state that the money was advanced or the debt created in the advancement of the objects of the trust, or for the preservation of the trust estate.—Magwood v. Johnston, 1 Hill Ch., 232; Tupper v. Fuller, 7 Rich. Eq., 170.

July 13, 1875. The opinion of the Court was delivered by

MOSES, C. J. The issues of law involved in this case are to be determined without regard to the change made by the Constitution of 1868 in relation to the powers of married women over property which they held at the time of marriage or afterwards acquired. Neither, in the view which we take of the principal point presented by the appeal, is it necessary to consider whether the appellants had notice of the fact that the lands included in their mortgage were purchased by the husband with the proceeds of the labor of the slaves, conveyed by the deed of settlement to the separate use of the wife. It was of personal property only, and by its terms reserved "to the parties interested in the same, for the period during which they may be entitled to receive the income," the right, "at their discretion, either to possess

*240

and use the said slaves or hire out *the same." Under this power they continued in the charge of the husband and wife, probably never having been in the actual possession of the trustee. They were used and employed by the husband from the date of the deed in 1851 to their emancipation as they had been when their absolute title vested in him, and no difference followed in his unrestricted disposition of the proceeds of their labor.

With full knowledge by the wife of his application of the income from the trust property to the purchase of the lands, taking the title in his name, and treating them as his own independent property, she never demanded any account, though she resided on the very land for near twenty years, and during all that period forebore from any interposition through which she could have secured the enjoyment of any separate right to which she might have been entitled under the settlement. If she ever considered that she had an interest in the lands by reason of their purchase with the income derived from the labor of the slaves settled to her sole use, she abstained from following or charging them under the claim which she now asserts. It was on motion of the counsel of her husband that she even became a defendant to this cause. Is she debarred by her course in regard to the income from her separate estate from now asserting an equity which can override the title of the husband to the land covered by the mortgage?

The decree of the Circuit Judge admits that if the husband, with the knowledge of the wife, receives from her trustee the income of property conveyed to her sole use, the accumulations from that source belong to him absolutely. It contends, however, that a different rule prevails, where, with the consent of the wife, the property is in the immediate management and control of the husband.

We can perceive no principle to sustain such a construction, and a close examination of the cases fails to disclose a single authority in its support. The rule rests on the assumption of either an express gift of the income to the husband or one implied from her acquiescence.—Hill on Trustees, 425; Powell v. Hankey & Cox, 2 P. W., 82; Beresford v. Archbishop of Armagh, 13 Sim., 643; Thromp v. Harman, 3 M. and K., 513. In Charles v. Coker, (2 S. C., 136,) this Court said: "Even where the married woman is considered in regard to her separate estate as a femme sole only to the extent of the power conferred by the instrument, if this does not restrict her disposition and alienation, if she permits the

*241

husband to *receive the rents and profits of the estate, the presumption is that it is with her assent and by way of gift."

If neither the trustee nor the husband is liable to the wife, where, with her assent, the income of her settled property is paid by the trustee to the husband, the mind seeks in vain for a reason why a different rule should be enforced where the usufruct and income to which the wife is entitled are not only transferred to the husband, but permitted for a long series of years to be subjected to his sole control. In the latter instance her purpose is more distinctly disclosed and manifested. But the intention to confer a gift is still more apparent when regard is had to the terms of the settlement in question and the course of the wife in regard to the powers which she was at liberty to exercise under it. While it transfers the slaves to a trustee for the sole and separate use of the wife, during the joint lives of herself and husband, it expressly reserves to her, while she continues entitled to the income, the right to possess and use or hire them out. Under this reservation she retained the possession. The trustee was thenceforth discharged from all re-

sponsibility for the possession, and the use was subject to her control, with the full right to all the profits to be derived from it. The entire and uncontrolled use she committed to her husband, allowing him for a succession of years not only to receive the income but to appropriate it according to his own will and pleasure, with full knowledge of the fact that he had applied a portion of it to the purchase of the "Home place," on which they lived, taking a title to the several tracts which composed it in his own name. Effect must be given to her acts according to their manifest intent. On what principle can the claim she now makes be reconciled with her course in regard to the income of the property for so extended a period? If she was dissatisfied with the course of her husband in respect to the disposition of it, ready means were at her disposal to secure it for her own separate use. A transfer of the property to the trustee, with directions to pay the proceeds alone to her, would at once have accomplished the purpose and left the husband powerless as to any appropriation of it to his own purposes.

"The most favorable presumptions," says Chancellor Kent, in Methodist E. Church v. Jacques, (3 John. Ch., 79,) "are indulged when the husband is permitted by the wife to be concerned in the management of the income

*242

of her separate estate as it occasionally *accrues. Between strangers a more strict and severe rule would be required."

There is another principle which materially affects the claim of the wife now interposed. It is her want of diligence in not resorting to the means of securing the income of the property to her sole use. "Courts of equity administer their aid only in favor of those who are guilty of no improper acquiescence or delay. Hence, if there be a clear breach of trust by a trustee, yet if the cestui que trust or beneficiary has for a long time acquiesced in the misconduct of the trustee, with full knowledge of it, a Court of equity will not relieve him, but leave him to bear the fruits of his own negligence or infirmity of purpose."—2 Story's Eq., § 1284.

The same reason exists for applying the principle to a husband permitted by the wife to use and control property secured to her separate use. If there has been a breach of duty on his part, her delay in freeing herself from the consequences and seeking reparation is another evidence of her assent and acquiescence.

A question has been made as to the mortgage of H. K. W. Flinn to Edwards, and by him assigned to McIver for the benefit of Mrs. Flinn. It appears by the report of the Referee that such a mortgage exists and is a prior valid claim upon the land included in the mortgage of the plaintiffs. Exception was taken to this conclusion by the appellants, because "it appeared that Mrs. Flinn purchased said mortgage with trust funds applicable to the debts of Flinn, the husband, and amounted to payment." The report of the testimony discloses not a single fact in regard to the means through which the assignment was procured.

The Judge overruled the exception, save as to the rate of interest the mortgage debt is to bear after maturity. As we have been left without any evidence of the fact on which the exception is rested, we must sustain the conclusion of the Court in regard to it.

It is ordered that so much of the decree of the Circuit Court as dismisses the complaint, thereby holding that the plaintiffs are not entitled to a judgment of foreclosure of their mortgage, be reversed; that the case be remanded for such orders as may be necessary to give effect to the judgment of this Court as herein declared.

The point made by the plaintiffs as to their right to an account of rents and profits from the defendant, Ann D. Flinn, has not been passed upon by the Circuit Court. Its consideration was necessarily excluded by the effect of the decree on the mortgage.

*243

*It is remitted to the Circuit Court, with leave to the plaintiffs there to submit it, if they so desire.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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6 S. C. 243

CHICORA COMPANY v. CREWS.

(Columbia. Nov. Term, 1874.)

[*Corporations* ⟸1, 14.]

An Act of the Legislature, passed December 17th, 1863, incorporating a company for the purpose of exporting produce and importing arms, munitions of war and other commodities, with power to sue and be sued, and make by-laws not inconsistent with the Constitution and laws of this State and the Confederate States: *Held* to be null and void, as against public policy, and to vest the company with no power to make contracts and sue thereon in its corporate name.

[Ed. Note.—Cited in Liberian Exodus Joint-Stock S. S. Co. v. Rodgers, 21 S. C. 34.

For other cases, see Corporations, Cent. Dig. §§ 4, 16; Dec. Dig. ⟸1, 14.]

[This case is also cited in Liberian Exodus Joint-Stock Steamship Co. v. Rodgers, 21 S. C. 28, and distinguished therefrom.]

Before Graham, J., at Charleston, March, 1874.

This was an action by the Chicora Exporting and Importing Company of South Carolina against Joseph Crews.

The case was referred to M. P. O'Connor, Esq., as Referee, who, on the 17th October, 1873, filed his report as follows:

"On the 4th day of December, 1872, this

case was referred to me to inquire into all the matters of law and fact arising therein and report thereon. The following are the facts as made out by the pleadings and testimony:

"1. The plaintiffs were, on the 17th day of December, 1863, by Act of the Legislature, created a body politic and corporate, under the name and style of 'The Chicora Importing and Exporting Company of South Carolina.'

"2. Plaintiffs purchased of George W. Williams & Company, on the 27th day of July, 1863, 100 bales of cotton, weighing 40,661 pounds, at forty cents, paying for the same, in currency, $17,987.19.

"3. Plaintiffs, on or about December, 1863, it appears, purchased from defendant 150 bales more of cotton, at the rate of seventy-five cents per pound, paying for the same in the prevailing currency, known as Confederate money, $45,600.75.

"These two lots of cotton, aggregating 250 bales, were placed in the possession of the defendant, as agent of plaintiffs, at Laurens Court House, where it remained until the

*244

close of the war. All *charges and taxes upon this cotton were duly paid by plaintiffs to the 30th of January, 1865. One of plaintiffs' witnesses, Mr. A. J. Crews, has sworn that this cotton was good upland, and was worth, at the close of the war, in United States currency, about forty-five or fifty cents per pound; the same grade of cotton sold at this time in New York for these prices.

"In the Summer of 1865, Crews, the defendant, it appears, disposed of this cotton through Sibley & Company, of Augusta, and, though repeatedly asked, has refused to render unto plaintiffs any account of the proceeds, and has denied their right to call him to an account.

The gravamen of the defense set up grows out of the alleged fact that plaintiffs having been organized and chartered covertly to run the blockade, they have no status in Court, and have no right whatever of redress or recovery against defendant. Some minor defenses are set up, such as that the payment admitted to be made for the 150 bales being in Confederate money was not a valid payment, and the mere allegation, unsupported by a tittle of proof, that the proceeds of the sale of the 250 bales in the European markets were all absorbed in the expenses attending the shipment and sale of the cotton in Europe. As long as defendant refuses to make an account, he certainly cannot claim the benefit of any such defense.

"I do not, therefore, deem it necessary for me, for the purposes of this case, to consider but the one issue of law which is raised in the case, and upon the determination of which the case must stand or fall.

"Are the plaintiffs estopped, by virtue of their charter and the purposes of their organization, from demanding an account from the defendant for their property?

"1. Is the Act of the Legislature incorporating this company (because beneath the cover of the statute there lurks some enterprise illicit in its object and hostile in its nature to the United States) ipso facto void? I hold that, upon sound principles of construction, the law-making powers or the legislative bodies of the States could well have exercised all legislative powers and done all things deemed proper by such bodies, so far as the Federal government was concerned, not prohibited by the Constitution of the United States, and no Article in the Constitution can be pointed to which prohibits a State Legislature from incorporating a

*245

steamship *company. I need only to refer to Section 10 of Article I of the Constitution, containing prohibitions upon the powers of the States; among others, that 'no State shall enter into any treaty, alliance or confederation, make anything but gold and silver a legal tender, pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts; no State shall, without consent of Congress, lay any imposts or duties,' &c. It will be seen from these clauses that government powers are alluded to—powers to be exercised by organized governments, having independent spheres of action within the limits of the territory to which they belong, and acting in these spheres, not by virtue of their relation to or connection with the United States government, but by virtue of their own inherent vitality, or, more properly, in accordance with the American idea of a government, by virtue of powers derived from the people, by which they were created, and from which they derive their existence. It follows, that the fact of the normal relations of the State of South Carolina to the United States were temporarily suspended during the war, could not have the effect to render void an act of her Legislature not patently hostile to the United States and infringing the domain of its exclusive dominant powers. The Supreme Court of the United States, in the case of Lane County v. Oregon, 7 Wallace [71, 19 L. Ed. 101], says: 'The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The States, disunited, might continue to exist; without the States in union, there could be no such political body as the United States.' I hold, as beyond all question, that the charter of the Chicora Company was valid.

"Admitting that the company did use its steamers in exporting produce to neutral territory, and importing stores and supplies

within the Confederate States,—in other words did engage in running the blockade,—was the company, in consequence of such acts, outlawed and deprived of all legal status whatever? I believe that there is no penalty attached to running the blockade beyond seizure and confiscation of the vessel and property taken in the attempt. The attemptors must be caught in flagrante delicto. This I must regard as undisputed, until shown some special Act of Congress affixing other penalties.

*246

*"Suppose a citizen of the Confederate States had owned vessels and sent them out on a blockade-running expedition,—what effect would the enterprise have upon the legal status of the citizen? It certainly would not annul any contracts made by him with other citizens of the country wherein he was residing, no more than a purchase by an individual of cotton within the Confederate States for the purpose of shipping it through the blockade could impart to it a hostile character or subject it to forfeiture until the enterprise of running the blockade had begun, and, if taken in the act, forfeiture would ensue. The capture could have no retroactive effect upon the contract or purchase of the cotton, nor render the purchaser amenable to any tribunal for any violation of law. Unless the Act of incorporation of plaintiff was null and void, as an act done in hostility to the United States, there is no difference between a purchase of cotton by this steamship company destining it for some neutral port, through the blockade, and the same thing being done by a private citizen. To hold a contrary doctrine would be to concede the power of the government to arrest and punish all violations of the blockade after the cessation of hostilities, either by confiscation of goods or personal infliction of penalty, without any authority from Congress justifying the imposition. And I believe I am warranted in stating it as a matter of fact, that the arrest and confinement of one or two of the Presidents of these companies after hostilities had ceased was predicated upon a violation of the revenue laws and intended to coerce the payment of whatever customs the government had been defrauded of in their importations. And even these proceedings, instituted by arbitrary arrests and other irregular process, were subsequently abandoned by the authorities. I don't know of an instance where parties who had violated the blockade during the war have been visited with personal penalties. Not even were the ships engaged in such enterprises seized by the government; and if these were clothed with exemption, unless taken in the attempt to break the blockade, a fortiori other property, not directly connected with the blockade, must be exempt. There is no proof before me that this cotton, purchased and left by the company in the hands of their agent, the defendant, was destined to go through the blockade. The intention seems to have been the reverse; for it was left and stored in Laurens, and there kept until the close of the war, many miles out of the reach of any blockade-running vessel.

*247

*"If it was not competent for the government, after the war, to seize and confiscate these 250 bales of cotton as the property of this company, by what process of reasoning can this defendant be justified in appropriating it to his own use? Even if, by any stretch of interpretation, it should be held, that purchased as this cotton was by these parties imparted to it a hostile character in relation to the government, it certainly could bear no such impress in its relation to the defendant, who was the fiduciary agent of the plaintiffs. If I have not been misinformed, the proceeds of certain cotton which had been seized by the Treasury agents at the close of the war and subsequently claimed by parties citizens of the seceded States and stockholders in these steamship companies was restored and paid back to the claimants and owners of the cotton.

"For the defendant to claim the proceeds of these cottons now as his own is shocking to every principle of morality and opposed to all the sanctions of right and justice.

"The property was not derelict; he was its custodian; and even if picked up by him derelict, he would be responsible to the lawful owner for its value.

"The animosity and bitterness which had been engendered in the civil strife endured for some time after the war, and in this spirit many things were done which were without precedent in law or reason. This temper has been modified, and the more recent legislation of Congress and adjudications of the Federal Courts have been to construe in a more liberal and international spirit the relations between the government and the seceded States during the period of the war. Not only have acts and statutes of the Southern State governments during the war been held valid, but acts of Confederate authority. As the proceedings of a de facto government they have been held binding, and as giving legal effect to contracts made in pursuance thereof. The sole limit to the legal character of such acts and laws of the Confederate States is to be found in their hostility to the United States; and this hostile character must not be indirect and remote, but plain and distinct. Laws made to carry on war against the United States, contracts made with the Confederate or State governments in pursuance thereof, bonds issued or used to raise supplies for the Confederate or State forces,—all such legislation or other proceedings are invalid. But all other acts of Confederate authorities, the dominant powers of the territory, are entirely valid;

*248

and the State governments have *been held by the United States tribunals never to have lost their essential character as States, but to have maintained a de jure existence during the war, in addition to their de facto existence; and all such acts of State governments are without taint.—Texas v. White, 7 Wallace, 700 [19 L. Ed. 227]; Thorington v. Smith [8 Wall. 1, 19 L. Ed. 361].

"The very money stamped and issued by the Confederate government to carry on its operations has been recognized by the Courts as of value within the Confederacy, and the contracts based upon it have been valid and binding since the war.—See nisi prius decision of Chief Justice Chase in the case of the Petersburg Railway Company.

"Guided by the light of these decisions and the stern principles of justice, I have come to the conclusion:

"1. That the Act incorporating the Chicora Importing and Exporting Company of South Carolina was valid.

"2. That, though indirectly designed to run the blockade, did not work an outlawry of the corporation and divest it of all legal status.

"3. That the company had the right to purchase and own property, and sue and be sued.

"4. That the defendant, the agent of the plaintiff, cannot claim immunity from accounting to his principal for any of their property which came into his possession; and in furtherance of the positions just laid down, I report, as a conclusion of fact, to be drawn from the evidence, that Joseph Crews, the defendant, at the close of the war, having possession of 250 bales of cotton, the property of plaintiffs, shipped the same to Europe through the house of Sibley & Company, of Augusta. I am to assume that the cottons thus shipped were received in Europe and sold for account of shippers, for there has been no evidence to the contrary introduced. It has been proved that this quality and grade of cotton was worth for some time after the war, in United States currency, from forty-five to fifty cents per pound. Taking the smaller of the said figures as the measure of defendant's liability, and estimating the whole 250 bales at this rate, I find the value of the cotton so disposed, in United States currency, say 100,461 pounds, at forty-five cents per pound, $45,657.45; one-fourth of this amount, $11,414.36, is the share or portion to which the defendant would be entitled for his agency in the matter, according to the evidence of Mr. A. J. Crews, witness for the plaintiffs, which

*249

*leaves a balance of $34,243.09 due and owing by the defendant to the plaintiffs. This amount of $34,243.09 should bear interest from the first day of January, 1866; and so I report."

To this report the defendant excepted upon the same grounds taken on appeal and below set forth.

His Honor pronounced judgment as follows:

Graham, J. After hearing argument on the exceptions filed by the defendant to the report of the Referee, filed on 1st January, 1874, it is ordered, on motion of Buist & Buist, plaintiffs' attorneys, that the said exceptions be overruled and that the report of the Referee confirmed, and that the said plaintiffs have leave to issue execution against the said defendant for $34,243.09, with interest from 1st January, 1866, and also for the costs and disbursements of this action.

Judgment was duly entered up by the plaintiffs, and the defendant appealed on the following grounds:

1. That at the time of the alleged transactions the plaintiff was an alien enemy, engaged in active hostilities against the United States and the citizens thereof.

2. That the said plaintiff was formed and organized as a company for illegal trade and traffic, and for a violation of the laws of the United States, and, as such was, at the time of the alleged transactions with him, actually engaged in violating the blockade established and proclaimed by the government of the United States over and including the ports of the State of South Carolina.

3. That the said plaintiff was engaged in a business in violation of the revenue laws of the United States.

4. That the said plaintiff, by the very terms of its charter, the State of South Carolina being then in an armed hostility to the United States, was incorporated for the express purpose of exporting cottons from this State to other ports, and importing into this State from other ports arms and munitions of war, in violation of the laws of the United States.

5. That the said plaintiff was organized under a law made to carry on war against the United States, all which legislation and proceedings had thereunder were invalid.

*250

*6. That the alleged transactions took place prior to the incorporation of the plaintiffs, and before they had any power either to contract or be contracted with in their corporate name.

7. That the Court erred in the conclusion that there was anything due from the defendant to the plaintiffs, and the amount reported is a strained and hypothecal conclusion, and without warrant in the testimony.

Simonton & Seigling, for appellant:

1. The defendant, in his answer, denies that the plaintiffs are a duly and legally incorporated company. The plaintiffs affirm that they are, and produce as their title the

Act of Assembly of the State of South Carolina passed in 1863, during the late war, and when, as one of the Confederate States, in arms against and in hostility to the United States of America.

The Referee states the position thus: "Is the Act of the Legislature incorporating this company (because beneath the cover of the statute there lurks some enterprise illicit in its object and hostile in its nature to the United States) ipso facto void?" He holds that it is not. The defendant claims that it is. This is the issue which is tendered and accepted. And upon this issue the plaintiffs must stand or fall.

A corporation must be legally created. It is the mere creature of law, and can only possess those properties which the charter of its creation confers. The plaintiffs do not claim here as a mere partnership, or as two or more associated together by voluntary contract, or under articles of agreement, but as "a duly and legally constituted body, corporate by an Act of the General Assembly of South Carolina entitled 'An Act to incorporate the Chicora Importing and Exporting Company of South Carolina,' ratified on the 17th day of December, A. D. 1863."—A. A., vol. 13, page 214.

By that statute and the circumstances under which it was passed must both the legality of the corporation and that of the objects for which it was instituted be determined.

It is clear that the power must be competent to create for the purposes in view, and the powers conferred must not be repugnant to or in violation of the Constitution of the United States, the Acts of Congress or the authority of the general government. The Act of incorporation, if it exceeds the sov-

*251

ereignty of the Legislature *granting it, or if it authorizes an act to be done which is beyond the jurisdictional power of the State, cannot be otherwise than invalid. No statute of any State can be valid, or charter thus created legal, which is designed to aid in a war for the overthrow of the national authority.

To enable the plaintiff, therefore, to sustain this action, it must show that it has been legally and effectually made a corporate body, entitled to be recognized by Courts, whether State or Federal, in allegiance to the United States.

Let us examine this charter.

South Carolina had, prior to 1863, passed her Ordinance of secession from the Federal Union, withdrawn her Senators and Representatives from the Congress of the United States and formed a union adverse to the authority of the United States of America, under the name of the Confederate States of America. She was at the time in the occupation of the military and civil authorities of the Confederate States, and in hostility to the Federal government. The authority of the Constitution and laws of the United States was denied and excluded. Cotton, the principal product, was the chief sinew of war. It was the only purchasing medium in foreign countries for arms and supplies in exchange, to sustain and carry on the conflict. The United States, perceiving the importance of this fact, had blockaded the ports of the State. On the other hand, the necessity to sustain the war was to export the cotton and import supplies and arms. Therefore the State of South Carolina, in furtherance of the war, granted acts of incorporation to various companies, and, among others, to the plaintiffs. The charter in this case was granted by this State as one of the Confederate States.

The sixth Section is in these words:

"The said company may, by its corporate name, be plaintiff or defendant in any Court of law or equity in this State, and may have and use a common seal, and make such by-laws and regulations for their government as they shall see fit, with full power to enforce the due observance thereof upon their members: Provided, Said laws are not inconsistent with the Constitution and laws of this State and the Confederate States."

The defendant claims that its provisions are inconsistent with the Constitution and laws of the United States, however they may be in accord with those of the Confederate States.

*252

*The object of the charter is clear and distinct. It is indelibly stamped upon its face. It is organized as an "importing and exporting company." "Its powers are: First, to export produce from this State; second, to import into this State arms, munitions of war and other commodities."

What the produce thus to be exported was is evident from the testimony of Mr. Johnson, the President:

"The company was organized for the purpose of running the blockade—that is, for the purpose of shipping outward cotton and bringing in supplies in return."

The hostile character impressed upon the cotton thus to be exported has passed into judicial history. It is thoroughly considered in Alexander's case, (2 Wallace, page 404.) There Chief Justice Chase held that the capture of the cotton was justified by the peculiar character of the property and by legislation. That "peculiar character" he explains by affirming it as a well-known fact and matter of history that "cotton constituted the chief reliance of the Confederate States for means to purchase the munitions of war in Europe, and that, rather than let it come into the possession of the Federal government, the Confederate authorities everywhere devoted it to destruction." The justification of its confiscation by the United States, both by "legislation as well as by public policy," he sustains by reference to

the Acts of Congress on the subject, August 6, 1861, July 17, 1862, and March 12, 1863.—12 Statutes at Large, 319, 591 and 830.

So much for the character of the produce to be exported. The supplies to be brought into the State in return are defined by the Act of incorporation itself to be "arms, munitions of war and other commodities."

For what purpose these arms, munitions of war and other commodities were to be brought in and used, it would be worse than idle to argue. It is plain they were to aid and sustain in the then terrible war waging between this State and the Confederate States on the one side and the United States of America on the other.

It is affirmed, therefore, that this charter was granted in furtherance of the attempts to overthrow the government of the United States. This brings us to the consideration of the question, whether a charter thus created can be recognized or have any force in the Courts of the country whose authority it thus sought to assail and overcome?

*253

*What was the legal condition of each of the Confederate States in 1863? This is no longer a matter of argument. It has been judicially decided by the highest tribunal of the country. The subject is fully discussed in the case of White v. Hart, (13 Wallace, 647.) Said Mr. Justice Swayne, of the Supreme Court of the United States, in delivering the opinion of the Court:

"The national Constitution was, as its preamble recites, ordained and established by the people of the United States. It created not a confederacy of States, but a government of individuals. It assumed that the government and union which it created and the States which were incorporated into the union would be indestructible and perpetual; and, as far as human means could accomplish such a work, it intended to make them so. The government of the nation and the government of the States are each alike absolute and independent of each other in the respective spheres of action; but the former is as much a part of the government of the people of each State, and as much entitled to their allegiance and obedience, as their own local State governments—'the Constitution of the United States and the laws made in pursuance thereof' being, in all cases where they apply, the supreme law of the land. For all the purposes of the national government, the people of the United States are an integral and not a composite mass, and their unity and identity, in this view of the subject, are not affected by their segregation by State lines for the purposes of State government and local administration. Considered in this connection, the States are organisms for the performance of their appropriate functions in the vital system of the larger polity, of which, in this aspect of the subject, they form a part, and which would perish if they were all stricken from existence or ceased to perform their allotted work.

"The duration and magnitude of the war did not change its character. In some respects it was not unlike the insurrection of a County or other municipal subdivision of territory against the State to which it belongs. In such cases, the State has inherently the right to use all the means necessary to put down the resistance to its authority and to restore peace, order and obedience to law. If need be, it has the right also to call on the government of the Union for the requisite aid to that end. Whatever precautionary or penal measures the State may take when the insurrection is suppressed, the proposition would be a strange one to maintain that while it lasted the County was not a part of the State, and then was

*254

*absolved from the duties, liabilities and restrictions which would have been incumbent upon it if it had remained in its normal condition and relations.

"At no time were the rebellious States out of the pale of the Union. Their rights under the Constitution were suspended but not destroyed. Their constitutional duties and obligations were unaffected and remained the same.

"These analogies of the County and the citizen are not inapplicable, by way of illustration, to the condition of the rebel States during their rebellion. The legislation of Congress shows that these were the views entertained by that department of the government."

And again, in reference to the late war:

"Georgia, after her rebellion, and before her representation was restored, had no more power to grant a title of nobility, to pass a bill of attainder, an ex post facto law, or law impairing the obligation of contracts, or to do anything else prohibited to her by the Constitution of the United States, than she had before her rebellion began or after her restoration to her former position in the Union."

It may be admitted that in Thorington v. Smith, 8 Wallace, page 1, it has been held that the Confederate States were de facto governments, so far as the transactions in the ordinary course of civilization are concerned; but the same case affirms, in the most distinct manner, that this "supremacy did not justify acts of hostility to the United States" or in aid "of the domestic insurrection."

In Horn v. Lockhardt, 17 Wallace, 570, statutes of Alabama passed in 1861 and 1863, when that State was engaged in war against the United States, authorizing executors to invest in Confederate bonds were held null and void.

It was conceded in that case "that the acts of the several States, in their individual capacities, and of their different departments of government, executive, judicial and legis-

lative, during the war, so far as they did not impair or intend to impair the supremacy of the national authority or the just rights of citizens under the constitution, are, in general, to be treated as valid and binding. The existence of a state of insurrection and war did not loosen the bonds of society or do away with civil government or the regular administration of the laws. Order was to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, es-

*255

tates settled and the transfer *and descent of property regulated precisely as in time of peace. No one that we are aware of seriously questions the validity of judicial or legislative acts in the insurrectionary States touching those and kindred subjects where they were not hostile in their purpose or mode of enforcement to the authority of the national government and did not impair the rights of citizens under the Constitution."

It was at the same time clearly set forth that the Legislatures of seceding States were without power to pass any Acts which "impaired, or intended to impair, the supremacy of, or were hostile in their purpose or mode of enforcement to, the authority of the national government."

Said Mr. Justice Field, delivering the opinions: "The bonds of the Confederate States were issued for the avowed purpose of raising funds to prosecute the war then waged by them against the government of the United States. The investment was, therefore, a direct contribution to the sources of the Confederate government. It was an act giving aid and comfort to the enemies of the United States, and the invalidity of any transaction of that kind, from whatever source originating, ought not to be a debatable matter in the Courts of the United States. No legislation of Alabama, no act of its Convention, no judgment of its tribunals and no decree of the Confederate government could make such a transaction lawful. * * * Its action in this respect was an absolute nullity and can afford no protection to the executor in the Courts of the United States."

How much stronger is the case here presented. The charter now under consideration was for the exportation of cotton and the importation of arms and munitions of war, and with the evident view to the aid of the conflict then waged with the government of the United States. Could there be an act more "plainly and directly hostile to the United States?"

But, again: In this case the Circuit Court has simply confirmed the report of the Referee. We must, therefore, look to that report for the reasons assigned for the judgment. The question is there discussed as one of mere violation of the blockade. But the issue presented reaches far higher and deeper. It may be conceded that where the subjects of a neutral power, as individuals, engage in the violation of a blockade proclaimed by the United States, the only penalty which the laws of this country could enforce would be the confiscation of the vessel

*256

and cargo when captured. But what *would be thought if the Parliament of England had during the late war incorporated companies for the purpose of violating the blockade proclaimed by the United States, by exporting arms and munitions of war into the Confederate States and importing back cotton as the equivalent for their sale? Would not such an Act of Parliament have been a casus belli? Would it not have been a plain and direct act of hostility to the United States?

How much more patent is the principle when applied to one of the States of the government itself? If Connecticut were to-day to incorporate a company for the purpose of evading the laws of the United States by exporting its chief products, and of importing arms and munitions of war against the authority of the United States, would such an Act of incorporation be legal or the charter thus granted valid? And yet, it having been judicially determined that South Carolina was never out of the pale of the Union, is not this the precise question now presented for judgment?

If the Legislature, in 1863, was without the power to grant a charter for this purpose, as in violation of the laws of, or in conflict with its allegiance to, the general government, it follows that the plaintiffs are not a duly and regularly incorporated company, and the summons and complaint in this action must be dismissed.

It was urged upon the Circuit Court that, although the charter of the corporation may be illegal, the defendant has no right to complain or to set up the alleged illegality as a defense; that, having received the property of the plaintiff, the Courts will compel him to answer, regardless of the enterprise in which it had been acquired.

And cases are cited in support of this proposition. In Tenant v. Elliott, (1 B. & P., page 3,) there, by statute, (7 of George I, Ch. 2,) all contracts for the loan of moneys on ships in the service of foreigners bound to the East Indies were declared void. The plaintiff, a British subject, had effected an insurance of goods on board a foreign vessel so bound. The insurance was paid by the underwriters to the defendant, and it was held the defendant was bound to account. And so with the other class of cases cited.

But the distinction between these and the one presented is broad and clear. There the plaintiffs were all sui juris and had the capacity to sue and be sued. The objection here goes to the very existence of the corporation. If its charter is illegal and void, as in aid of the late war, and in contravention

of the Constitution and laws of the United States, then all the powers conferred by the

*257

*charter fall with it. Its capacity to sue by its corporate name depends upon the validity and legality of its charter. Without this, it can have no legal existence or status in any Court.

But, again, it is respectfully submitted that the true principle, where the disability to sue does not exist, is correctly laid down by Rooke, Justice, in Farmer v. Russel, 1 B. & P., 296, substituting the word "illegality" for "fraud:"

"The plaintiff is to recover on his own merits, not on the demerits of the defendant. If he has no merits, or if he discloses a case of fraud on his own part, I think he ought not to be heard, however great the demerits of the defendant may be.

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"He endeavors to carry on this traffic with complete security to himself as to payment. He knows he cannot recover payment as for goods sold and delivered, and, therefore, contracts with the defendants to carry the goods and to engage to receive the money on a commission of two pence in the pound. By these means he secures himself as to the payment, and the defendants become his agents to sell for ready money. They are instruments of fraud in the hands of the plaintiff, and, being such instruments, they behaved dishonestly to their principal. Shall, then, the Court assist such a principal to recover his money out of the hands of his agents, or shall it not rather say, if you will employ agents in a fraudulent transaction, you must rely on the fidelity of your agents, for the Court will not assist you?

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"The plaintiff ought not to be heard to make a claim in a Court of Justice. * * * Here is a contract to secure the plaintiff against loss in a fraudulent traffic, and the defendants, whether privy or not to the fraud, are the agents to secure him by dealing for ready money only. If the plaintiff will employ an agent in such a transaction, he must rely on the honesty of his agent, and I think the law ought not to assist him."

That was an action against a common carrier under a special agreement to deliver certain goods and to receive payment therefor and account to the plaintiff for the moneys so received.

They took charge of the bales containing the goods and received the money from the persons to whom the goods were consigned.

It turned out that some of the goods so sent were counterfeit halfpence, for the purpose of being distributed among the sailors

*258

at *Portsmouth. The defendants refused to pay the plaintiffs, charging the illegality of the shipment. There was no evidence that the defendants, who were called to account, were privy to the transaction. Chief Justice Eyre, in delivering the opinion of the Court in favor of the plaintiffs, puts it upon the ground: "If I could be satisfied that the defendant in this case ought to be considered as insuring the performance of an illegal contract, I should be of opinion that a demand necessarily connected with an illegal contract, and tending to facilitate the execution of it, would be violated by the contract; but my doubt is whether he can be so considered." Upon the point thus made, let us test the case. What was the contract? Says Mr. Johnson, the President of the company: "I was President of the Chicora Company from it formation to the close of the war. The company was organized for the purpose of running the blockade—that is, for the purpose of shipping outward cotton and of bringing in supplies in return. Mr. Crews was appointed agent to take charge of the cotton by myself as President of the company. The cotton was originally bought to be shipped through the blockade, but, having at the port of Charleston sufficient for shipment, this lot was allowed to remain." Mr. A. J. Crews, for the plaintiff, testifies: "That the company was organized and engaged in running the blockade during the war; that the cotton was purchased with the intention of shipping it through the blockade; that it was not shipped, and remained in Crews' hands (the defendant) until the close of the war, with the understanding that he (Crews) was to protect and save it and have a share of the proceeds."

Mr. Joseph Crews states that this cotton was in his charge as warehouseman, stored in the same building with the cotton the property of the Confederate States; that this cotton, being subject to be seized by the general government, and to prevent its thus being seized, he was under the agreement with the company to claim it as his own.

The facts can scarcely be questioned:

1. That the cotton was purchased and held for the purpose of being exported under the terms of the charter, sold, and the proceeds invested in arms and munitions of war and other commodities, in aid of the war against the United States of America. That it was not actually so used cannot affect the principle.

*259

*In Hanover v. Woodruff, (15 Wallace, 439,) it was held: "Bonds issued by authority of the Convention of Arkansas, which attempted to carry that State out of the Union, for the purpose of supporting the war levied by the insurrectionary bodies then controlling the State against the Federal government, do not constitute a valid consideration for a promissory note, although bonds of that character were used as a circulating medium in Arkansas and about Memphis in the common and ordinary business transactions of the people." There it was found by the

Court that the bonds received by the defendant were not used nor intended to be used by him in direct support of the war, but were received by him to be used in the ordinary course of his business, and that bonds of this character were at that time used as a circulating medium in Arkansas and about Memphis in the common and ordinary business transactions of the people.

Mr. Garland urged, as the bonds were not used or intended to be used in support of the war, the contract was not void, but stood on a valid consideration.

Said Mr. Justice Field:

"The first question presented is embraced within the second, for if the consideration of the note was illegal under the Constitution of the United States and the laws of Congress, there can be no inquiry whether it was void, for reasons of public policy.

"There can be no public policy in this country which contravenes the law of the land. And that the consideration was illegal and void under the Constitution and laws of the United States, does not admit of a doubt. If the Constitution be, as it declares on its face it is, the supreme law of the land, a contract or undertaking of any kind to destroy or impair its supremacy, or to aid or encourage any attempt to that end, must necessarily be unlawful, and can never be treated, in a Court sitting under that Constitution and exercising authority by virtue of its provisions, as a meritorious consideration for the promise of any one. * * * The issuing of the bonds in question was an act of open hostility to the United States; it was an act by which the Convention declares its adherence to their enemies and gave aid and comfort to them."

2. That the cotton, as stamping its purpose and character, was stored at Laurens Court House with the Confederate cotton.

3. That the contract with the defendant, if contract it may be called, was to cover up for the company, so as to protect it from

*260

*seizure by the United States authorities, to which it had been confiscated by the Acts of Congress.

The case of Cappell v. Hall, (7 Wallace, 542,) is decisive on this point. The text is: "A contract made by a Consul of a neutral power with a citizen of a belligerent State, that he will protect, with his neutral name, from capture by the belligerent, merchandise which such citizen has in the enemy's lines, is against public policy and void."

The ground of the decision is that the agreement to cover up and protect cotton liable to seizure by the United States was null and void, and in violation of public policy of the laws of the United States, and would not be enforced.

As Mr. Evarts well puts it in his argument, "every contract stipulating for the performance of an illegal act, or founded on an illegal consideration, is rendered void by the power, and to conserve the policy of the law, and this altogether independent of the will or wish of the parties concerned."

Lord Mansfield said "that it is not for the sake of a defendant that the objection is even allowed that a contract is immoral or illegal, but is founded on general principles of policy, which the defendant has the advantage of contrary to the real justice of the case."

The following cases are cited as illustrations of the principle:

In an action for a quantum meruit, an employé in a licensed billiard saloon, where liquor was illegally sold, will not be allowed to recover for any portion of his services, although but a small part thereof was bartending.—1871, Bexly v. Moor, 51 N. H., 402.

Where the parties to an application for insurance knew that it was Sunday, and, to avoid the illegality, post-dated the application and the premium notes some days. Held that the contract was void.—Heller v. Crawford, 37 Ind., 279.

It is a well-settled rule that contracts entered into in contravention of the terms and policy of a statute cannot be enforced.—Smith v. City of Albany, 7 N. Y., 14.

The New York Act (1833) prohibited persons from transacting business under fictitious names and made the violation thereof punishable by fine. Held that contracts made by persons doing business under a firm name in which the designation "and company" represents no actual partner or partners are void.—Sands v. Owens, 34 N. Y. Supr. Court, 277. (How. Practice.)

*261

*An agreement between S., a drafted man, and the master of T., an apprentice, to pay the master $500 to consent to the enlistment of T. as S.'s substitute, although T. consented. Held against the policy of the law and void.—Turner v. Smithers; see also Newstadt v. Hall, 30 Ill., 172; 3 Houston, (Del.,) 430; O'Hara v. Carpenter, 23 Mich., 410.

If any part of the entire consideration for a promise, or any part of the promise, be illegal, whether by statute or at common law, the whole contract is void, if the illegality form any part of the contract itself.—Koltintz v. Alexander, 34 Texas, 689.

A party cannot recover upon a contract prohibited by statute, although the statute contains no express declaration that such contracts shall be void. There the libellant was not licensed as a pilot by United States inspectors. He rendered service as an engineer upon the steamboat. He brought his action for services actually rendered. Held he could not recover.—The Pioneer; Deady, 72.

So where one lets a horse for hire on Sunday, he cannot maintain an action against the hirer for over-driving the horse.—Benville v. Gibbs, 1 Pa. Rep., 313.

Goods sold in aid of the rebellion, or with the knowledge that they were purchased for the Confederate government, cannot be recovered, nor can a promissory note given for such price be enforced.—Hanauer v. Doare, 12 Wall., 342; Thomas v. Richmond, 12 Wall., 349.

An agreement for blockade-running held invalid.—Hancock v. More, 23 La. Ann., 577.

Where the consideration of a contract was brandy made and sold in violation of the revenue laws of the United States. Held void.—Creekmore v. Chittwood, 7 Bush, (Ky.,) 317.

Contracts made during the war and tending to aid the Confederate States. Held invalid.—Oxford Iron Co. v. Quinerette, 44 Ala., 487.

A contract made during the war of 1861–65, whereby one party agreed to contribute money for purchasing tobacco and the other agreed to secure permits and to protect it in shipment to market for one-half the profits. Held not to render the party undertaking the shipment liable for losses incurred through the ill success of the adventure.

Recovery for goods sold as services rendered, or money borrowed or received, or for damages for breach of contract, denied

*262

on the *ground that the effect of the transaction appeared to be to aid the Confederate States in the war.—Bank of West Tennessee v. Citizens' Bank, 21 La. Ann., 18; Williams v. Gray, 21 La. Ann., 110; Haney v. Maning, 21 La. Ann., 166; Pratt v. Draughan, 21 La. Ann., 194; McWilliams v. Bryan, 21 La. Ann., 211; Juillard v. Rogay, 21 La. Ann., 259; Foster v. Bank of New Orleans, 21 La. Ann., 338; Overly v. Overly, 21 La. Ann., 492; Tanneret v. Marshall, 21 La. Ann., 619; Hendereich v. Leonard, 21 La. Ann., 628; Eastern v. Ducrert, 21 La. Ann., 656; Fourhet v. Beer, 21 La. Ann., 658; Cousin v. Abat, 21 La. Ann., 705.

The Courts will not lend their aid to settle disputes relative to contracts reprobated by law. They will take judicial notice of their illegality, and allow this to be suggested without any plea and at any stage of the proceedings. A contract must have a lawful purpose; and if it have an unlawful one, if it be contrary to good morals or public order, it can have no effect.—Bowman v. Gonegal, 19 La. Ann., 328.

Can it be doubted, then, that this action is brought in support of the illegal transaction?

The action is for the performance and enforcement of the illegal contract. A judgment for the plaintiffs affirms the validity of the charter, and not only facilitates but consummates the execution of the alleged contract. This is the practical and only result.

III. The defendant has thus interposed, as was his right, the defenses to which he is entitled under the laws of the land. He has answered, under oath, that the property now in question has practically perished, and that from it he has derived no pecuniary value.

There were but three witnesses examined on this subject. The testimony of Mr. Johnson, the President of the company, is without avail; for in his cross-examination, he affirms: "All my knowledge connected with the sale and transfer of this cotton by the defendant after the war, is derived from information from others. I do not know of my personal knowledge that the cotton was shipped through Sibley & Sons, of Augusta. My knowledge of the defendant's refusal to account and pay over the proceeds of the cotton is also derived from information from others; also to his (defendant's) promises to settle part."

It is true Mr. A. J. Crews says: "It was impossible that the shipment proved a total loss, and witness knows that Crews (defendant) got money from Sibley & Co. on account

*263

of this shipment." The *source of his knowledge is not stated. It may have been, like Mr. Johnson's, mere information or hearsay. On the other hand, we have the solemn assurance of the defendant: "The cotton has proved a total failure, owing to depreciation in price and high costs of transportation and the loss of the proceeds of my cotton. The whole of my cotton, this included, proved a total loss—that is, what I had at that time on hand."

"I was afraid to hold the company's cotton longer in my hands, for fear it would be seized, as my books and papers were destroyed in the riot at Laurens, in October, 1870, and I have never seen them since."

It is, therefore, respectfully submitted, that, in every aspect of the case, the defendant is entitled to have the judgment of the Circuit Court reversed and the summons and complaint dismissed.

Buist & Buist, contra:

It is averred by the defendant that the plaintiff cannot sue or maintain the action, for the reason that at the time of the alleged transaction with the defendant the said plaintiff was an alien enemy, engaged in active hostilities against the United States and the citizens thereof.

It is further averred that the plaintiff was formed and organized as a company for illegal trade and traffic and for a violation of the laws of the United States, and, as such, was, at the time of the alleged transaction with the defendant, actually engaged in violating the blockade established and proclaimed by the government of the United States over and including the various ports in the State of South Carolina, and thereby adhering to the enemies of the United States.

The Act incorporating the plaintiff was ratified on the 17th of December, 1863, and is in the following words, to wit:

An Act to Incorporate the Chicora Importing and Exporting Company of South Carolina.

Section 1. Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That A. S. Johnston, G. S. Cameron, T. D. Wagner, and their associates and successors, be, and they are hereby, made a body

*264

politic and corpo*rate in law, by the name of "The Chicora Importing and Exporting Company of South Carolina;" and the said company shall have power to export produce from this State to neutral ports, and import into this State from neutral ports arms, munitions of war and other commodities, and also to bring and carry mails and passengers in their vessels.

Sec. 2. The capital stock of the said company shall be two millions two hundred and fifty thousand dollars, with the privilege of increasing the same to three million dollars: Provided, Such increase shall be agreed to by a majority in number of the stockholders.

Sec. 3. The capital stock shall be raised by subscription, in shares of one thousand dollars each; but the said company shall not go into operation until the said stock, to the amount of at least two hundred thousand dollars, has been paid in cash, and an oath or affirmation thereof shall have been made and subscribed by the President of the company, the Treasurer and a majority of the Board of Directors, which shall be lodged and recorded in the office of the Secretary of the State, and shall be published in two newspapers in the city of Charleston.

Sec. 4. The affairs of the company shall be managed by a Board, consisting of a President and four Directors, who shall be elected in such manner and for such periods as the stockholders may prescribe.

Sec. 5. The said capital stock shall be deemed personal estate, and the company may hold such personal property as may be necessary for the purposes of their business, and may from time to time sell and transfer the same or any part thereof.

Sec. 6. The said company may, by its corporate name, be plaintiff or defendant in any Court of law or equity in this State, and may have and use a common seal, and make such by-laws and regulations for their government as they shall see fit, with full power to enforce due observance thereof upon their members: Provided, Said laws are not inconsistent with the Constitution and laws of this State and the Confederate States.

Sec. 7. No part of the capital stock shall at any time be withdrawn by a dividend among the stockholders until all the debts and liabilities of the corporation shall have been fully paid off and discharged.

*265

*The defendant does not question the validity of the Legislature of South Carolina of 1863, nor has he nor can he claim that the people of South Carolina, through their Legislature, had no right, during the Confederate regime, to make any laws whatever—such laws, for instance, as are necessary to carry on the machinery of civilized government.

He does, however, virtually claim that the said Legislature had no lawful right or authority to make an Act incorporating a steamship company while the United States blockading squadron was off the coast of South Carolina, and that the said Act was void.

This relieves us from debating the essential character of the Southern State governments during the late war.

But as the nature of the authority reposed in those governments, as settled by our national tribunals since the war, enter closely into the question of their right to incorporate a blockade-running company, we should ascertain their status in the light of those decisions.

Not only have Acts and statutes of the Southern State governments during the war been held valid, but Acts of Confederate authority—as the proceedings of a de facto government—have been held binding and as giving legal effect to contracts made in pursuance thereof. The sole limit to the legal character of such Acts and laws of the Confederate States is to be found in their "hostility" to the United States. And this hostile character must not be "indirect and remote, but plain and distinct." Laws made to carry on war against the United States, contracts made with the Confederate or State governments in pursuance thereof, bonds issued or used to raise supplies for the Confederate or State forces,—all such legislative or other proceedings are invalid. But all other Acts of Confederate authorities—the dominant powers of the territory—are entirely valid. A fortiori, the Acts of the State governments—who are held by the United States tribunals never to have lost their essential character as States, but to have maintained a quasi de jure existence during the war, in addition to their de facto existence,—their Acts were certainly without taint.—Texas v. White, 7 Wallace, 700; Thorington v. Smith, 8 Wallace, 1.

In Horn v. Lockhart et al., (17 Wallace, 571,) it is held, among other things, that "the Acts of the several States, in their individual capacities, and of their different departments of government, executive, judicial and legis-

*266

lative, during the war, so far as *they did not impair or tend to impair the supremacy of the national authority, or the just rights of citizens under the Constitution, are, in general, to be treated as valid and binding."

There is, of course, a limit to the validity of the Acts of the Southern State govern-

ments, for they might and did pass laws to carry on hostilities against the United States. But it is a noticeable fact that, in Thorington v. Smith, the Chief Justice, in delivering the opinion of the Court upon the validity of the Acts of the Confederate Government, employed language of a wider scope in defining the valid exercise of the powers of the Confederate government than he had before used in determining the rights of a State government under Confederate regime. It is clear, in the light of the opinion of Texas v. White, that the Supreme Court hold the Southern State governments to have enjoyed more extensive rights, in view of our national jurisprudence, than the Confederate government. Hence, in the face of Thorington v. Smith, and the tendency there displayed, we are forced to the conclusion that even a more liberal interpretation of the powers of those State governments than was held in Texas v. White and in Thorington v. Smith would be now maintained.

We have, therefore, a standard supplied by the United States Supreme Court for determining the legal force and effect to be given to Acts of the late Southern State governments. Taking the language of that Court, those Acts must be "plainly and directly hostile to the United States," or they are valid. Is the incorporation of a steamship company an act of hostility, or is it an exercise of the ordinary functions of a government? Does the presence of a blockade squadron make the Act of incorporation an act of hostility? Let us see if there is anything in the affirmative of this proposition.

It cannot be pretended that there is one word in the Constitution of the United States, or of the State of South Carolina, prohibiting the incorporation of an importing and exporting company, whether there be or be not a blockading squadron of the United States off the coast. Those instruments are entirely silent on this subject. Such an act is so clearly within the domestic functions of a State government as to require no argument in its support. Moreover, the Constitution of the United States, not contemplating resistance to the national government within its boundaries, in the form of an organized and constituted authority, has not

*267

provided any municipal *enactment in the nature of a law of blockade, and of course there is no Act of Congress on the subject.

No hostility can, therefore, be implied from the violation of any positive law of the land. The incorporation was valid on the face of our national jurisprudence. The blockade of the Southern ports was the ordinary blockade known to the laws of nations.

President Lincoln issued his proclamation of blockade by virtue of his executive power as Commander-in-Chief of the armies of the United States and his authority to suppress insurrection. This was his authority—his executive commission—to act in issuing his proclamation; but the act—the blockade itself—was the proceeding known to international law by that denomination, and its character must be defined by the international code, and by that alone. There are no other institutes in existence to define it.

Therefore, whether its breach was an act of hostility to the United States within the meaning and intent of the decisions of the Supreme Court, must be determined by ascertaining the character affixed to a breach of blockade by the code of law, under and by virtue of which it can alone exist.—2 Black's Reports, 665.

When a blockade is established, are individuals absolutely prohibited from doing any certain acts? Is the individual who commits a breach of blockade rendered amenable to any personal punishment? Certainly not; there is no malum prohibitum, even in the sense in which that term may be understood to apply to statutes affixing a penalty to the commission of any prohibited act, whether that penalty be a fine and imprisonment or a fine alone. As we have seen above, there is no constitutional or statutory prohibition against breach of blockade; and no one can be bold enough to say that running the blockade—an act that entails no personal penalty—is a malum in se.

What, then, is its legal character? It is an act, the attempted commission of which entails on the attemptor's specific goods engaged in the attempt the danger of capture and confiscation. When a nation establishes a blockade of its enemy's ports, it does not and cannot prohibit absolutely the entering of and departure from the ports blockaded. It cannot exercise any such assumed jurisdiction over the inhabitants of foreign countries, or of the country blockaded, while the territory blockaded remains in the enemy's possession.

*268

*It says to the world: We have established a blockade under the laws of nations. Acting under those laws, we will search and overhaul vessels suspected of being engaged in the attempt to evade our maritime cordon. If your property is caught in that attempt—the property of Englishmen, Frenchmen and Confederates—it will be taken to the next prize court and confiscated.

But who ever heard of any legally inflicted penalty on an individual's person or property (other than on the corpus delicti) for breach of blockade? Could an Englishman or a Confederate caught in the act of running the blockade be legally punished for that act? Under what law could he be indicted or a fine imposed on him? There is no municipal law to meet such a case. Its control does not pertain to municipal jurisprudence.

Far from any absolute prohibition, the

world is told that it may run the blockade if it can; if it is caught in the attempt, its property is confiscated, and there ends the matter. If it succeeds, no penalty of any kind whatever follows the success.

One penalty is inflicted by international law, and no nation belonging to the family of nations has heretofore found it expedient to enact any further law on the subject, or to affix any new penalty to the act.

To ascertain if there is any element of hostility in the breach of a blockade, let us see if it is considered hostile on the part of neutrals. And in the discussion of the right of the plaintiffs to recover in their corporate capacity, it ought to be a conclusive argument in favor of that right, to show that neutrals engaging in a similar adventure might recover in our Courts in that same capacity.

Suppose, for example, that the English Parliament had seen fit to incorporate a company for the avowed purpose of running the blockade of the Southern ports. Could our government have properly remonstrated with the English Cabinet on the ground that it was an act of hostility? Or, to put the case more properly, would such an act have constituted a casus belli? Certainly not.

It would have shown no such hostile intent. The government of England might say that "running the blockade" is a purely commercial enterprise, with the risk of capture, in addition to the danger of wind and waves, and if English merchants engage in such an enterprise, and think their individual interests would be better protected by an Act of incorporation, there is no ground for refusing it except the one of policy.

*269

*Merchants may invest their capital in that way if they please, and insurance companies may indemnify them against the risk of capture as against the risk of fire or any other risk. Was not the English island of New Providence the harbor of refuge of these blockade runners during the late war—openly their base of operations? And did the English government ever attempt, or our government ever ask it to attempt, to arrest their operations on the ground that they were hostile to the United States, or on any other grounds?

Here was a country shut out from the world; goods of all kinds had necessarily become scarce and advanced in price; there was every commercial inducement to import the means of life and comfort. There is every presumption that the Act was dictated by commercial reasons, and not by any hostile intent.

To carry on this business, a party of merchants thought proper to become incorporated.

To what authority did they apply for this incorporation? Not to the Confederate government. They did not seek the aid of the power at war with the United States.

They went to their State Legislature and asked to be incorporated as an importing and exporting company—as a body of merchants engaged in a mercantile transaction.

They knew they would not incur, by breaches of blockade, the penalty of hostility to the United States; they knew there was one penalty affixed to their acts by the laws of nations, and by that they were willing to abide. They knew that no penalties of treason were incurred if they were caught in the act of steaming out of the harbor of Charleston.

The law of nations has itself defined when a breach of blockade loses its inherent character and becomes an act of hostility—namely, when the vessel caught in the attempt gives back shot for shot—then she is committing an act of hostility and not before. So closely is the commercial character of this venture defined, that the vessel is not liable to capture after her return voyage—then her delictum ceases. So that vessels most notoriously engaged in blockade running during the late war might, after making a return voyage from the blockaded ports, charter with impunity in any other trade.—Wheat. Int. Law, 586.

We should not be told that the necessities of the Southern people were intended to be produced by the blockade, and hence that its

*270

*violation to relieve those necessities was a hostile act. Because the blockade was one of the means used to put down the rebellion, we are not to be told that its evasion was an act of hostility. Such answers simply beg the question. The United States used the means known as blockading in the course of a war. They did not and could not use it as they used the sword and rifle. The relations of the parties in hostility bore no analogy to the relations of parties engaged in maintaining and evading a blockade, as we have shown above by citing the case of a neutral engaged in such a venture—those relations are determined by the rules of international law.

The government has frankly accepted this position. When the war ended the officers of several blockade corporations were arrested and held to bail. The claim of the government on them individually, or their property, or the property of their corporations, were examined by the Attorney-General of the United States. Finally, their bonds were cancelled and returned, and all proceedings against them discontinued.

The government had established a blockade; the law of blockade obliges the blockader to catch the blockade runner in flagrante delicto; if he fails in this, he has no rights over the fruits of the enterprise. The stockholders did nothing in that character hostile to the United States; the corporators might

have been foreigners and have cared little for the result of the war.

Here were resident Southerners or Confederates, living under a de facto government, whose acts the Supreme Court of the United States has decided to have been valid when not directly "hostile" to the United States; and all the foregoing argument has gone to show that the Act of incorporation of a steamship company for purely commercial purposes was, notwithstanding the presence of a blockading squadron, simply what it purports to be—a mere commercial incorporation without any hostile character.

To sum up the foregoing arguments:

1. The Supreme Court of the United States has held that the general government of the Confederacy was endowed with very high prerogatives of a de facto government; that although all its acts, and everything done by and under those acts, was, strictly speaking, in contravention of United States authority, yet, on account of the magnitude of the rebellion, and in view of the duty of our tribunals to follow the authority of the standard writers on international law, it must be held that the acts of the Confederate gov-

*271

*ernment were valid and binding on residents of the Confederacy, except when clearly hostile to the United States.—Thorington v. Smith, 8 Wall., 1.

2. A blockade—our late blockade—must be legally contemplated under the rules of international law; there is no other code to define and interpret it.—Prize Cases, 2 Black.

3. The institutes of the law of nations determine an attempt to run a blockade to be a mere commercial undertaking, in which all the world, neutrals included, are distinctly allowed to engage, without assuming, or being presumed to assume, any hostile attitude; nay, without appearing in the least degree in any character of hostility.—Wheat. Inter. Law, 586.

4. Hence this corporation, even if created by authority of the Confederate Congress, could recover against a fraudulent trustee in our Courts, being a body politic, organized without hostile intent against the United States.

5. The United States Supreme Court has also decided that the individual States of the Confederacy were endowed, in view of our national jurisprudence, with greater inherent political authority than the government of the Confederacy.—Texas v. White, 7 Wall.

6. Hence, a fortiori, this company, incorporated by a State, is entitled to sue in our tribunals without regard to its corporate character, unless such character be as clearly hostile to the United States as would be sufficient to invalidate any incorporation originating in the bosom of the general Confederate government; and, under the decision in Texas v. White, such character coming with the sanction of State authority, should be even more clearly, and in the strictest sense of the term, "hostile" to the United States, which the law of nations determines this corporation not to be.

However illegal may have been the acts of the plaintiff, the defendant, its agent, has no right to complain or to set up that alleged illegality as a defense.

Having received property to the use of the plaintiff, the duty of the defendant was to pay it over, and Courts of equity will compel him to do so, regardless of the enterprise in which the money had been acquired. The duty of the agent arises from a consideration entirely distinct from the original contract. In Courts of equity no higher ground of public policy can be assumed than the performance of a trust.—Tenant v. Elliott, 1 Bos. & Pul., 3; Farmer v. Russell, 1 Bos. & Pul., 290; Armstrong v. Toler, 11 Wheat., 592; Hamilton v. Canfield, 2 Hall, 526.

*272

*The contract upon which we claim is the fiduciary relation that results between principal and agent, trustee and cestui que trust.

The broad principle governing such cases is laid down with great simplicity and clearness in Paley on Agency, (Dunlap's edition, m. p. 62):

"If money had been actually paid to an agent for the use of his principal, the legality of the transaction of which it is the fruit does not affect the right of the principal to recover it out of the agent's hands; for, though the law would not have assisted the principal by enforcing the recovery of it from the party by whom it was paid, because it is the policy of the law not to aid the completion of an illegal contract, yet when that contract is at an end the agent whose liability arises solely from the fact of having received money for another's use can have no pretense to retain it.

"This doctrine was recognized by the Court of Common Pleas in the case of Tenant v. Elliott, 1 B. & P., 3, where a broker, having effected an insurance upon a ship engaged in a trade to the East Indies, contrary to 7 George I, 1 C., 21 S., 2, and having received the loss from the underwriters, refused to pay it over to his employer, alleging the illegality of the transaction as a defense to the action for money had and received to his own use. The plaintiff, however, had a verdict, and the Court, upon a motion for a new trial, thought the verdict right.

"And in the subsequent case of Farmer v. Russell, 1 B. & P., 296, where the defendants had received money for the plaintiff as the price of counterfeit coin which they had been employed to carry and procure payment for from the parties who purchased it, it was held that the illegality of the transaction furnished no defense to them in an action for money had and received. And in both these cases the Court considered the original transaction as forming no part of that implied

contract arising from the receipt of the money which formed the ground of the action."

These cases, cited by Mr. Paley, are not only illustrative of the doctrine, but carry the equity far beyond the imputed illegality of the Chicora Importing and Exporting Company.

In Tenant v. Elliott, Buller, J., says: "Is the man who has paid over money to another's use to dispute the legality of the original consideration? Having once waived the legality, the money shall never come back into his hands again. Can the defendant, then, in conscience keep the money so paid? For what

*273

purpose should he *retain it? To whom is he to pay it over? Who is entitled to it but the plaintiff?"

And Eyre, C. J., says: "The defendant is not like a stakeholder. The question is whether he who has received money to another's use on an illegal contract can be allowed to retain it, and that not even at the desire of those who paid it to him? I think he cannot."

In Brooks v. Martin, (2 Wallace, 70,) it is ruled that "after a partnership contract, confessedly against public policy, has been carried out, and money contributed by one of the partners has passed into other forms, the results of the contemplated operation completed—a partner in whose hands the profits are cannot refuse to account for and divide them on the ground of the illegal character of the original contract."

In the case of Anderson v. Moncrieff, (3 Dess. Eq., 124,) the counsel for the defense undertook to give an application to a class of cases by insisting that that suit was brought upon a contract whereby one McLeod, whose executor the defendant was, had undertaken by receiving negroes to sell them and be accountable for the proceeds; and this contract being contrary to law was void and could not be enforced in a Court of justice.

The Court, in delivering the opinion, says: "I cannot think that these decisions have any application to this case. This is a mere agency. It was so understood by the parties. But suppose it to be a contract, what is it? That defendant would receive a cargo of negroes, and sell them, and receive the money for the complainant. All this he has done; it is completed. But the defendant says: 'I will not pay you the money which I have received on your account, because the transaction is illegal, as the law prohibited the importation of negroes.' The complainant files this bill to compel the payment. The suit is not brought to recover a cent out of the defendant's pocket of his own money; it is to make him pay money which he has received as the agent and for the use of the complainant. It would be monstrous that the defendant should be permitted to keep the money; and the decided cases, following the principle of abstract justice, show that where an illegal transaction has taken place, the agent who has received the money on the part of the principal shall not shelter himself from the payment of its principal under the pretense of the illegality of the original transaction. I will not say that there may not be cases where the transaction may involve so much moral guilt that Courts of

*274

justice would *not suffer themselves to be polluted with them directly, or indirectly. But I think this is not one of those cases, or that it differs from the decided cases in point."

He then quotes some of the elder cases to which reference has been made, and ends saying: "I think these cases were rightly decided, and are applicable to the case now under consideration, thinking, as I do, that the defendant was a mere agent, and that this is not an attempt to enforce an illegal contract under the sanction of the Court, but a suit which is brought for the recovery of money received by defendant for the complainant, though founded on a transaction originally illegal."

This is not an action for the enforcement or completion of a contract, but an action on a transaction ended, and for an account of money which an agent or trustee has in his hands, and which he received from third parties to our use.

The question under discussion was put by Lord Cottenham in the case of Sharp v. Taylor, 2 Phillip's Ch. R., 812. This cause arose under the English Registry Law, a violation of a positive statute, as was alleged.

Lord Cottenham says: "The answer to the objection appears to me to be this, that is on the illegality, that the plaintiff does not ask to enforce any agreement adverse to the provision of the Act of Parliament. He is not seeking compensation for payment for an illegal voyage. That matter was disposed of when Taylor received the money, and the plaintiff is now only seeking for payment of his share of the realized profit."

He further says: "As between these two, can this supposed evasion of the law be set up as a defense by one against the otherwise clear title of the other? In this particular suit, can the tenant in common dispute the title common to both? Can one of two partners possess himself of the property of the firm, and be permitted to retain it, if he can show that in realizing it some provision in some Act of Parliament has been violated or neglected? Can one of two partners in any trade defeat the other by showing that there was some irregularity in passing the goods through the custom house? The answer to this, as in the former case, will be that the transaction alleged to be illegal is completed and closed, and will not be in any manner

affected by what the Court is asked to do as between the parties. Do the authorities negative this view of the case?"

*275

*He then examines the authorities, and concludes they support and do not negative the case.

In the case of Watts v. Brooks, (3 Ves., 612,) the Chancellor ordered a general account, even where it involved smuggling and stock jobbing transactions.

The Court of King's Bench had in this cause refused to go on because the illegality of the transaction appeared. But this case was brought in equity. "There is nothing," says the Chancellor, "immoral in the transaction; but it is against a prohibitory statute."

The result of the examination of the authorities is, that although Courts will not execute contracts which are against the policy or letter of the law, where the thing is completed, and one of the parties has in his charge property which in conscience belongs to another, equity will not permit him to retain that which is not his, for the relation existing between such parties is not grafted in, but at most superinduced upon, the original transaction, and does not necessarily partake of its nature.

April 23, 1875. The opinion of the Court was delivered by

WRIGHT, A. J. The respondents were chartered as a corporation by the Legislature of the State on the 17th of December, 1863, for the purpose of exporting produce and importing arms, munitions of war and other commodities.

Division first of the charter of incorporation is as follows: "That A. S. Johnson, G. S. Cameron, T. D. Wagner, and their associates and successors be, and, they are hereby, made a body politic and corporate in law, by the name of 'The Chicora Importing and Exporting Company of South Carolina;' and the said company shall have power to export produce from this State to neutral ports, and import into this State from neutral ports arms, munitions of war and other commodities, and also to bring and carry mails and passengers in their vessels."

Division sixth of the said charter is as follows: "The said company may, by its corporate name, be plaintiff or defendant in any Court of law or equity in this State, and may have and use a common seal, and make such by-laws and regulations for their government as they shall see fit, with full power to enforce due observance thereof upon their members: Provided, Said laws are not inconsistent with the Constitution and laws of this State and the Confederate States."

*276

*Mr. A. S. Johnson, President of the said company, in his testimony, says: "I was President of the Chicora Company from its formation to the close of the war. The company was organized for the purpose of running the blockade—that is, for the purpose of shipping outward and bringing in supplies in return."

The contracts which have been held as valid, made during the war in the Confederate States, were such as were made between individuals having legal capacity to contract. Before a contract can be held as valid, the parties to such contract must possess the legal ability to contract. The whole and only question in this case is, was the Chicora Importing and Exporting Company competent as a corporate body to contract?

The Legislature of the State had undoubted authority to make all laws necessary to carry on the machinery of the civil government during the time that the State was in rebellion, but no Legislature can delegate authority it does not possess, or authority to do that tending to destroy our national compact.

If an Act of a Legislature conflicts with the Constitution or laws of the United States, such Act is, ipso facto, void. This corporation was not forbidden by the Legislature to violate the Constitution and laws of the United States, but it was forbidden to have any by-laws inconsistent with the laws of this State and of the Confederate States; therefore, the company was left with full power to carry out the ends for which it was chartered.

To run the blockade and carry out the purposes for which the said company was chartered was an act of hostility to the United States authority, an act against public policy, an act contributing to and aiding the rebellion. In the case of Horn v. Lockhart, 17 Wall., 580 [21 L. Ed. 657], Mr. Justice Field, in delivering the opinion of the Court, says: "The bonds of the Confederate States were issued for the avowed purpose of raising funds to prosecute the war then waged by them against the government of the United States. The investment was, therefore, a direct contribution to the resources of the Confederate government; it was an act of giving aid and comfort to the enemies of the United States; and the invalidity of any transaction of that kind, from whatever source originating, ought not to be a debatable matter in the Courts of the United States. No legislation of Alabama, no act of its Convention, no judgment of its tribunals and no decree of the Confederate government could make such a transaction lawful."

*277

*When the Legislature chartered the Chicora Company to run the blockade and export produce and import arms and munitions of war, it was an act that was hostile to the government of the United States and its authority, and, therefore, void.

Any contract the company might make by virtue of their charter was void as being

against public policy. To recognize such legislative authority would be to recognize the right of the Legislature to give aid and comfort to an enemy to overthrow the government of the United States. It is true, as is recognized in the case of Lane County v. Oregon, where it is said: "The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The States, disunited, might continue to exist; without the States in union, there could be no such political body as the United States." But while the above is, and must be, a recognized fact, a State is only supreme in its power so far as it does not contravene or infringe upon the power or authority of the United States government.

The powers attempted to be given to the Chicora Company by the charter were contrary to public policy, to the proclamation of the President of the United States, and to every act and thing that was in accord with the United States government.

The motion is granted, and the judgment of the Court below set aside.

MOSES, C. J., concurred.

WILLARD, A. J. I cannot concur in the views of the majority of the Court. I know of no test of the validity of the laws of the State but the Constitution of the State and of the United States. Where the laws of the United States operate to destroy such an act of State authority, it results from some express provision of the Constitution of the United States.

The only question in this case is whether the plaintiffs were validly created a corporation and body politic by the laws of this State. Even if the particular powers attempted to be conferred upon them were inconsistent with the Constitution and laws

*278

of the *United States, it does not follow that the general capacity to act as a corporate body, to hold property, to sue and to be sued, was thereby destroyed.

In my opinion, the plaintiffs have the capacity to hold property, and to sue for and recover the same.

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6 S. C. 278

MANUFACTURING COMPANY v. PRICE.

(Columbia. April Term, 1875.)

[*Appeal and Error* ⇐1195.]

The questions decided by the Supreme Court on an appeal are conclusively adjudicated so far as the same case is concerned.

[Ed. Note.—Cited in Jones v. Charleston & W. C. Ry. Co., 65 S. C. 418, 420, 43 S. E. 884.

For other cases, see Appeal and Error, Cent. Dig. § 4661; Dec. Dig. ⇐1195.]

Before Moses, J., at Spartanburg, October Term, 1873.

This was a new trial of the case reported in 4 S. C., 338.

The case was now heard and decided by the Circuit Judge without a jury, and upon the same state of facts proved on the first trial.

His Honor reversed the facts and the law of the case as laid down by the Supreme Court on the first appeal, and gave judgment for the defendant.

The plaintiff appealed on grounds presenting the same questions, with one unimportant exception, that had already been decided.

Bobo & Carlisle, for appellant.
Evans & Bomar, contra.

September 9, 1875. The opinion of the Court was delivered by

WILLARD, A. J. All the important questions in this case have been already conclusively adjudicated. The decree of foreclosure clearly includes the disputed one hundred acres by referring the description to the mortgage in which they are described. The subsequent expression, viz., "now owned and possessed by the said Benjamin Price," must be construed as intended to identify the tract to which the mortgage related as a whole, but not to limit or qualify the description as set forth in the mortgage.

The appellants misconceive the former judgment of this Court in this case.—4 S. C., 338. We did not hold that the plaintiffs

*279

were neces*sary parties to the foreclosure suit, but that, not being parties, they were not subject to technical estoppel as it regards matters alleged in the decree in that cause. The bill to foreclose the mortgage was filed in April, 1856, and the decree of foreclosure made June 7th, 1856, while it was not until 1858 that the plaintiff obtained the conveyance from the Commissioner in which their claim to title rests.

The judgment of the Circuit Court is entirely conformable to the former decision of this Court, and properly disposed of the question presented by this case.

The appeal should be dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

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6 S. C. 279

THOMPSON v. THOMPSON.

(Columbia. April Term, 1875.)

[*Costs* ⇐271.]

Where, before the adoption of the Code, costs were taxed under a bill in equity, and no appeal was taken: *Held*, That the Court would not consider the question whether, since the

adoption of the Code, costs under the former laws could be taxed.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 1029; Dec. Dig. ⇐271.]

[*Costs* ⇐191; *Reference* ⇐76.]

Where there is no agreement in writing for a different rate of compensation to a Referee, his costs must be taxed at $3 a day, as prescribed by Section 339 of the Code.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 697; Dec. Dig. ⇐191; Reference, Cent. Dig. § 112; Dec. Dig. ⇐76.]

[*Executors and Administrators* ⇐456.]

Where, under a bill to wind up a decedent's estate, the creditors agree that certain fees of an attorney employed to defend a claim against the estate shall be payed out of the assets: *Held*, That they should be taxed to be paid out of the creditors' shares.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1941–1967; Dec. Dig. ⇐456.]

[*Appeal and Error* ⇐553.]

Where the statement of facts upon which an execution is founded appears only in the exception itself, the Court cannot consider it. The facts must be made to appear in the mode pointed out by the Code.

[Ed. Note.—Cited in McPherson v. McPherson, 21 S. C. 267.

For other cases, see Appeal and Error, Cent. Dig. § 2461; Dec. Dig. ⇐553.]

[This case is also cited in Stegall v. Bolt, 11 S. C. 525, as to the question of costs.]

Before Moses, J., at Newberry, February, 1875.

This case was heard upon a brief, which is as follows:

"The bill in this case was filed by the plaintiff, as executrix of her late husband, Thos. W. Thompson, for the purpose of calling on the creditors and marshaling assets for the sale of the real estate of the said testator to and in paying his debts, and for dower in said real estate. The dower was laid off, the real estate sold, and the assets marshaled by the report of Silas Johnstone, as Special Referee, to which exceptions were filed. While said case was pending on the report and exceptions, and before they were heard, Silas Johnstone filed his petition in re this

*280

case, praying that the costs and fees *allowed him in said report, as late Commissioner in Equity, and as Referee, should be paid to him, which was ordered to be done by His Honor M. Moses, at Chambers, on the 9th day of December, 1873. At June Term, 1874, the case came up regularly for hearing on the report and exceptions, except those disposed of by the aforesaid order at Chambers, and His Honor confirmed the said report. From these two orders the creditors have appealed.

"A house and lot was assigned to the plaintiff for life, as her dower in the real estate of her said husband, and at her death was sold by order of the Court, and D. Mower bought and paid for it. The two defendants, Thos. A. and John M. Thompson, filed proceedings against Cynthia Mower and G. S. Mower, the heirs at law of D. Mower, claiming homestead in said house and lot. They notified Mr. Fair, the attorney of the plaintiffs, of this suit, and required him to defend the same, and he agreed to do so, and requested Jones & Jones to aid in said defense, and consented that their fee and costs should be paid out of the estate of T. W. Thompson. The attorneys for the creditors, in writing, admitted the above statement, and consented that said costs and fee should be paid out of the estate. The Referee refused to allow them.

"The exceptions and Exhibit A filed with the report will sufficiently explain the points at issue.

Exhibit "A."

Taxation of Costs, Counsel Fees, etc.

In Equity.

Mr. Fair, bill 20, brief 5, special matter 5, 71 references 355, commissions 8	$ 393 00	
Mr. Boozer, answer 20, brief 5, special matter 5	30 00	
Mr. Baxter, 25 references	125 00	
Mr. Jones, 18 references	90 00	
Mr. Summer, 2 references	10 00	
Mr. Caldwell, 1 reference	5 00	
Messrs. Garlington & Suber, 7 references	350 00	
Johnstone, Commissioner's writ and proof 50, 4 summons and proof 2.50, special witness 1	4 00	
Amount carried forward	$1,007 00	

*281

*Amount brought forward	$1,007 00	
Special defendant 1, report 3, searches 1, 13 references 13, deeds 12, stamps 5.50	35 50	
Bonds 4 Commissioner's sales, 51.75, writ dower 50, rule 3, writ 12, P. orders 2	71 25	
Stamp 10, copy 15.45, recording 4.50, 128 claims 256	285 95	
Serving 15 notices auctioneer 4, Commissioner's dower 13	32 00	
Printer 43.50 surveyor 20.45, Clerk Court 4, axemen 2	69 75	
Paysinger, Sheriff	8 00	
Houseal, Sheriff	2 25—	$1,196 90

In Common Pleas.

Plaintiff's costs, Messrs. Fair, Pope & Pope	25 00	
Referee, Thomas M. Lake 3, printer 9	12 00—	37 00

In Ordinary.

John T. Peterson, Ordinary fees, (paid by Commissioner)	60 00—	60 00

In Probate Court.

Ex parte T. B. Chalmers, petitioner's administrator	35 00	
J. C. Leahy, Justice of the Peace fees, &c	20 50—	55 50
Fee to counsel for estate, (Mr. Fair)	500 00	
Fee to counsel Referee Johnstone	300 00—	800 00
		$2,149 40

Appendix.

"Just as I had closed the foregoing report, in which I had excluded a claim for bill of costs from the Probate Court in the case of John M. Thompson v. Cynthia Mower et al.,

petition for homestead, amounting to $272.90 a paper was presented to me, signed by attorneys representing the creditors, consenting 'to the payment of this claim from the assets of the estate of T. W. Thompson,' together with a statement of the facts connect-

*282

ed with the matter. *These papers accompany this report. The attorneys representing Mr. Fair, who was of counsel in the case, ask leave to withdraw from the claim the charge of $100 for counsel fee in his behalf, so that the bill amounts in gross to $172.90. These latter attorneys, representing Mr. Fair, and also, through him, the estate of the testator, object to the allowance of the claim, and upon a review of the facts and authorities furnished to sustain the claim, I do not see wherein the estate of the testator is liable for the costs of the petition. The creditors may consent to do what they please with their own, and if they choose to pay this bill of costs, they can do so by contributing one and seven-tenths per cent. from their respective demands.

"July 25th, 1873. Silas Johnstone."

"The following exceptions are taken to the report of Silas Johnstone, Special Referee in this case, dated 23d day of July, 1873, on the part of the following creditors: G. M. Bowers, Henry Dominick, W. J. Duffie, G. W. Glenn, J. H. Hunt, L. J. Jones, Wm. Mars, J. B. O'Neall, estate; B. J. Ramage, J. S. Renwick, F. E. Sloan, J. J. Sloan, Jenet Sloan, James Sloan, Thos. G. Sloan and Cynthia Mower.

"1. Because the Referee erred in taxing the costs under the old fee bill, instead of under Code or new fee bill.

"2. Because the Referee erred in allowing himself under the old fee bill costs to the amount of $415.70 and a fee of $300 besides, making in all $715.70.

"3. Because the Referee erred, even supposing he is entitled to tax his costs under the old fee bill and also under the Code, in allowing himself under the old fee bill $256 for 128 claims, when he only reports on 74 claims; and also his regular fee, $13 for thirteen days on reference, when the fee bill only allows $1 per day for each day on reference, no matter how many claims may be established on one day.

"4. Because the Referee erred in allowing himself a fee of $300, instead of $3 for every day spent in the business of the reference as allowed by the Code, and no more, except by an agreement of the parties in writing.

"5. Because the Referee erred in not allowing the costs and fees incurred by Cynthia Mower, as administratrix of D. Mower, deceased, in defending the title of the said deceased to a house and lot purchased by him at a sale made in this case by an order of this Court, notwithstanding the attorney

*283

of the estate of T. W. Thompson, de*ceased, Col. S. Fair, was vouched to defend said title, and requested Messrs. Jones & Jones to assist him in the defense, and agreed that the expenses should be paid out of the estate, and notwithstanding the attorneys for the creditors consented, in writing, that the said costs and fees should be paid out of the estate of T. W. Thompson.

"6. Because the Referee erred in allowing the costs in the following case as preferred claims against the estate of the said T. W. Thompson, deceased, without some evidence that the same could not be collected out of the defendants, namely, S. A. Thompson, executrix, against the following persons: John A. Harp, $20; F. S. Paysinger, $5.60; W. F. Robertson, $18.92; A. C. Glasgow, $5.60; J. S. Caldwell and others, $22.25; F. L. Boozer, $5.40; H. A. Bailey, $5.50; Abram Wicker, $5.70; Henry Hendrix, $14.50."

Order of Moses, J., at Chambers, December 9th, 1873:

"On hearing the petition of Silas Johnstone, Esq., and on motion of Mr. S. Pope, petitioners' attorney, it is orderd that Thomas M. Lake, late Clerk of this Court, in whose hands the funds belonging to the estate of Thomas W. Thompson, deceased, are, do pay unto Silas Johnstone, as Referee herein, the sum of three hundred dollars, and also to Silas Johnstone the sum of ninety-eight dollars and two cents, the balance of costs due to him herein as late Commissioner in Equity for Newberry—in all three hundred and ninety eight dollars and two cents."

Notice of appeal:

"Silas Johnstone, Esq., or his attorney, will take notice that an appeal to the Supreme Court of South Carolina will be taken by G. M. Bowers, Henry Dow, W. J. Duffie, G. W. Glenn, J. H. Hunt, L. J. Jones, W. Mars, J. B. O'Neall, B. J. Ramage, J. S. Renwick, F. E. Sloan, J. J. Sloan, Jenet Sloan, James Sloan, Thomas G. Sloan and C. Mower from the decree of His Honor Montgomery Moses, Judge of the Seventh Judicial Circuit, made in the above stated action, and filed on the ninth day of December, 1873."

Decree of Moses, J., February 27, 1875:

"These proceedings were instituted by bill in the Court of Equity for Newberry District, and they are now heard in this Court on the report of the Referee and exception thereto.

*284

*"The order of this Court appointing the Referee, passed before the adoption of the Code of Procedure, referred to him all matters herein previously referred to the Commissioner in Equity. The Referee did not report on the exceptions (it appears he was not served with a copy of them) and there was no settlement of the case by him. No exceptions were taken to the manner and form of the report, which was submitted according

to the rules of practice of the Court of Chancery, and this Court is satisfied with it.

"It is, therefore, on hearing the report of the Referee, the exceptions thereto and argument of counsel, ordered, adjudged and decreed that the exceptions be overruled, that the report be confirmed, and that the report be made the judgment of this Court."

Notice of appeal:

"Take notice that J. M. Bowers, Henry Dominick, W. J. Duffie, G. W. Glenn, J. H. Hunt, L. J. Jones, W. Mars, J. B. O'Neall, B. J. Ramage, J. S. Renwick, F. E. Sloan, Jenet Sloan, James Sloan, Thos. G. Sloan and C. Mower appeal to the Supreme Court of this State from so much of the decretal order of His Honor M. Moses in this case, dated the twenty-seventh day of February, A. D. 1875, as overrules their exceptions to the report of the Referee, dated the twenty-fifth day of July, A. D. 1873."

Jones, for appellants:

This was a bill in equity, filed in 1866, to call in creditors and marshal assets, and the principal questions presented for the consideration of the Supreme Court have relation to costs and fees.

I. The right to costs, as to their rate and amount, and as to the items to be allowed, are to be controlled by the statutes in force at the time of the final decision or taxation. —Stewart v. Lancoreaux, 5 Abb., 14; Crary v. Norwood, 5 Abb., 219; Moore v. Westen, 14 How., 279; 6 Duer, 684; Hurst v. Middlebrook, 14 How., 300; Fisher v. Hunter, 15 How., 156; McCann v. Bradley, 15 How., 79; Holmes v. St. John, 4 How., 66; 2 Code Rep., 46; 19 Abb., 119; Jackett v. Judd, 18 How., 385; Jones v. Underwood, 18 How., 532; Bennett v. Westfall, 15 How., 430; Supervisors of Onondaga v. Briggs, 3 Duer, 173; Clark v. Lensser, 1 Bail., 187.

By Section 329 of the Code all statutes establishing and regulating costs and fees are repealed and cannot now be enforced between plaintiff and defendant.

*285

*But as between attorneys and their clients, they are to be taxed according to the fee bill existing when the several services were rendered.—Brooklyn Bank v. Willoughby, 1 Sand., 669.

II. Admitting, for argument's sake, that costs can be taxed under the old fee bill, the item of $256 for 128 claims established, which the Referee allowed himself as late Commissioner, should not be allowed, because under the old fee bill he is only allowed $1 for "each day engaged in holding references," no matter how many claims are established.—6 Stat., 335.

III. The fee of $300 allowed to S. Johnstone as Referee, by his own report, should be disallowed, because he is only entitled to $3 for every day spent on reference as Referee, except by agreement in writing signed by the parties.—§ 339, Code.

IV. Even admitting that costs can be taxed under the old fee bill for Mr. Fair, attorney for plaintiff, he is not entitled to $355 for 71 references when the Referee reports he only held 13 references.

The case of McDonald v. Williams, Rice's Equity, 296, only applies to solicitors for creditors.

V. The fees and costs of Jones & Jones ($172.90) in defending the title to the house and lot sold by order of this Court to D. Mower should be paid out of the estate of Dr. T. W. Thompson.

1. Because as soon as the heirs of the purchaser, D. Mower, were sued for homestead in said house and lot, they vouched the plaintiff to defend the case, and she agreed to do so, and employed Jones & Jones to aid in defending it.

2. Because the creditors, the only persons interested in the estate, consented in writing that said costs and fee should be paid out of the estate.

3. Because the purchase money of said house and lot was paid into Court, and the Court is, therefore, bound in good faith to defend the purchaser's title.

Blakely v. Calder, 1 Smith, 617.

Rowe on Judicial Sales, 25–161.

In Waldo v. Long, 7 John. Rep., 174, it is decided that the costs incurred in an action brought against the grantee by a mortgagee on a prior mortgage of the same land by the grantor can be recovered against the grantor. See also Middleton v. Thompson, 1 Speer, 70.

In Boston Manufacturing Company v. Fiske, 2 Mason, 120, Judge Story laid down the rule "that the jury are at liberty to al-

*286

low the *plaintiff, as part of his actual damages, any expenditures for counsel fees, or other charges, which were necessarily incurred in vindicating the right denied under his patent, and are not taxable in the bill of costs.

See also 1 Reeves' History of Eng. Law, 426, ed. 1869; 9 Wheat., 163; 3 Peters, 307; 9 Cranch, 126.

VI. The costs allowed as nulla bona costs in the cases named in exception eight should not have been allowed, for the reason that there was no evidence that the defendants could not pay the same.

Pope, Pope & Fair, contra:

1. The order of reference under which the report was submitted was granted in the case of Sarah A. Thompson, executrix, v. Thomas A. Thompson et al.

2. The claim of Eliza Coleman was against the estate of Sarah A. Thompson, deceased, and not in any manner a debt against the estate of the testator, Thomas W. Thompson, marshaled under these proceedings. The payment of this claim by Williams, the administrator of Sarah A. Thompson, had been vouched before and allowed by the Probate

Court, and no objection was raised to its allowance until after the report was filed.

3. The costs were taxed in the report in accordance with the fee bills of the several Courts in which they had accrued. Section 329 of the Code of Procedure repeals all statutes establishing or regulating the costs and fees of attorneys, solicitors and counsel only,—not of officers of Courts,—and is not retrospective in its terms, as was the Act of 1827.

4. The Commissioner in Equity and the Referee, though the same individual, are two persons so far as relates to the services rendered. No costs were taxed to the Referee, but a fee was allowed him in lieu thereof. "When parties agree orally that a Referee may charge over $3 a day, they cannot afterward object to his charge in excess of $3."—Thurman v. Fiske, 30 How., 397. And in Philben v. Patrick, 22 How., 1, "an oral agreement made by the parties to the action, in the presence of the Referee, as to his allowance for fees, and entered by him on his minutes, is an agreement in writing within the meaning of Section 313" of the New York Code, which is Section 339 of the Code of Procedure of South Carolina.

*287

*5. The Act of 1827 (6 Stat., 335,) allowed to Commissioners "for each day engaged in holding references, $1;" and "for swearing all the witnesses on reference before him or on trial in Court, $1." McDonald v. Williams, Rice Eq., 296, decides that, under the Act cited, "the demand of each creditor is to be considered a separate and independent suit, and fees were allowed on each demand for every day's necessary attendance." The Act of 1859 (12 Stat., 786,) entitled "An Act to enlarge the powers of the Commissioners in Equity in this State in certain respects, though it reduces the fees of Solicitors with respect to the number of demands presented on the same day, in no wise restricts Masters and Commissioners to the same rule, so the charge of two dollars on each demand established on oath, one for reference and one for swearing witnesses in each suit, allowed to the Commissioner is correct.

6. The rejection of the claim for costs and fees incurred by the purchaser in resisting homestead exemption in the lands sold as the estate of the testator is correct. The land was sold under these proceedings by the Sheriff, and the application for the homestead was made in the Probate Court, during the pendency of this action. Passing by all questions of warranty, express or implied, of title acquired at Sheriff's sale, and all question of jurisdiction of an inferior Court over matters undergoing full and thorough investigation in a higher tribunal, the resistance was successful, (the application being abandoned,) and the warranty was made good, whether there was any liability therefor on the part of the testator's estate or not. It is expressly declared in the case of Jeter v. Glenn, 9 Rich., 374, that counsel fees paid by the purchaser cannot be recovered against the vendor in actions of this kind.

The opinion of the Court was delivered by

WILLARD, A. J. The questions submitted relate to costs in a suit commenced prior to the Code of Procedure, by bill in equity by an executrix to call in creditors, marshal assets, &c, and transferred to the Court of Common Pleas upon the abolition of the Courts of Equity. The questions will be considered as they are raised by the appellant's propositions of law and fact.

It is not necessary, to consider the first proposition submitted, namely, that since the adoption of the Code costs cannot be taxed

*288

*on account of proceedings previously had under the former laws then prevailing as to costs; for it was conceded by all the counsel, upon the argument, that the costs in the Court of Equity were taxed in that Court while the former laws on that subject were in force, and that no appeal was taken from such taxation, and that such taxation embraced all the items objected to by the appellants which relate to and grow out of the proceedings prior to the transfer of the cause to the Court of Common Pleas.

The item of $256 allowed to the late Commissioner, mentioned in the second proposition, and the item of $355 to the attorney for the plaintiff, mentioned in the fourth proposition, belong to the class just mentioned. Having been taxed in the Court of Equity and no appeal having been taken, the right of the parties in whose behalf they were so taxed became absolute and are unaffected by any subsequent change in the laws relating to costs.

The third proposition relates to an item allowed in the Court of Common Pleas in the following terms: "Fee to Referee Johnstone, $300."

Section 337 of the Code authorizes the fees of officers to be included among the disbursements to be allowed in addition to costs. Section 339 declares that "the fees of Referees shall be three dollars to each for every day spent in the business of the reference: but the parties may agree in writing upon any other rate of compensation." It does not appear that any such agreement of the parties was produced. Unless such an agreement appears in writing, the fees of the Referee should be computed at the rate prescribed by Section 339. The allowance of a gross sum, as the present allowance appears to have been, was not in conformity with Section 339 and should be set aside.

The facts to which the fifth proposition submitted by the appellants relate appear to be as follows: A house and lot, part of the testator's estate, having been sold under proceedings in this cause, a claim of homestead

adverse to the purchaser was set up by third parties. At the request of the attorneys for creditors who had appeared, the plaintiff's attorney defended this proceeding.

The attorneys for the creditors have agreed in writing that the costs of this defense, amounting, according to the report of the Referee, to $172.90, should be paid out of the fund. To this the parties interested in the testator's estate object. No other proof is offered for charging this as a debt of the

*289

estate than the consent of *the attorneys for the creditors. The Referee disallowed the item and the Court sustained his conclusion. The charge is not either one of costs or of disbursements, for the services alleged were not rendered in this cause. The creditors having consented to this form of compensation to the plaintiff's attorney, doubtless to relieve the fund from a possible claim by the purchaser for indemnity, there is no reason why their shares of the fund should not be charged in accordance with their consent. As they have no power to affect the rights of other parties who did not unite in such consent, the item in question can only be charged against the creditors. As the creditors are appellants, and as, if they desire so to do, they can modify the order so as to bind their shares in accordance with their consent, it is not necessary that the order should be disturbed.

The sixth proposition of the appellants is not explained by any statement appearing on the Referee's report or in any part of the proceedings, except in the statement made in the sixth exception to the Referee's report of July 25th, 1873. The language of an exception is not the source from which can be properly derived the facts and circumstances by which the Referee's report can be tested.

If the parties prejudiced by a report wish to object to it, they must procure a statement of all that is necessary for the information of the Court, to be made out in the manner pointed out by the Code. The language of an exception is not a substitute for such a statement.

The orders appealed from should be modified in the manner hereinbefore pointed out and the cause remanded to the Circuit Court.

MOSES, C. J., and WRIGHT, A. J., concurred.

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6 S. C. *290

*BRADLEY v. RODELSPERGER.

(Columbia. April Term, 1875.)

[*Appeal and Error* ⇐268.]

Though it is error for a Referee to decide matters of fact from his own personal recollection of them, yet if no objection is taken to them on that score, but only to the effect of the evidence, and the Judge below concurs with the Referee, then it must appear that the overbearing weight of the evidence is against their conclusion or this Court will not disturb it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1602; Dec. Dig. ⇐268.]

[*Appeal and Error* ⇐239; *Costs* ⇐9, 197.]

A Referee has nothing to do with questions of costs; they must be taxed by the Clerk; and it is only when they have been so taxed, and a motion to correct the taxation has been made in the Court below and decided, will this Court hear an appeal on a question of costs.

[Ed. Note.—Cited in Dilling, Baker & Co. v. Foster, 21 S. C. 340, 341; Cooke v. Poole, 26 S. C. 326, 327, 2 S. E. 609; Crocker v. Collins, 44 S. C. 502, 22 S. E. 719; Hall v. Hall, 45 S. C. 7, 22 S. E. 881; Lockwood v. Lockwood, 73 S. C. 20, 52 S. E. 735; Burgess v. Crumpton, 93 S. C. 563, 77 S. E. 356.

For other cases, see Appeal and Error, Dec. Dig. ⇐239; Costs, Cent. Dig. §§ 12, 754, 804, 806; Dec. Dig. ⇐9, 197.]

Before Moses, J., at Newberry, June Term, 1874.

The points decided by the Court on this appeal from the judgment below will be sufficiently understood from the opinion of the Court.

Jones & Jones, Y. J. Pope, S. Pope, for appellant.

Suber & Caldwell, J. M. Baxter, contra.

April, 1875. The opinion of the Court was delivered by

WILLARD, A. J. An objection is made to the report of the Referee on the ground that an obligation contracted in 1864 was valued by the Referee, for the purposes of the suit, according to the value of Confederate currency at the date of the contract. It appears that, instead of testimony being adduced before the Referee to establish the facts upon which the question of the intention of the parties as it regards the kind of currency that should discharge such obligation, the Referee resorted to his personal recollection of the facts, and mainly from that source derived the evidence on which he concludes that the parties contracted with reference to Confederate currency. If this departure from sound and established practice had been the subject of a proper objection, the report could not be permitted to stand as it regards the question under consideration; but no such objection is made. Assuming, then, that the facts stated by the Referee from his personal recollection were accepted by the parties as evidence, and it appears that there was evidence tending to show that the parties contemplated the use of Confederate money, the Referee and the Circuit Judge arrived at the same conclusion as to such matter of fact,

*291

and *there is no overbearing weight of evidence in opposition to their conclusion. This Court cannot, therefore, disturb their conclusion.

That part of the Referee's report that assumes to pass upon questions of costs cannot

be reviewed in detail. The Referee had nothing to do with the question of costs. The proceedings to ascertain the amount of costs and disbursements should have been taken in accordance with Section 337 of the Code of Procedure. If the allowances made by the Clerk for costs or disbursements are objected to by either party, the proper practice is to bring the matter before the Court on motion to correct such allowances. Not until such a motion is heard and decided is a question of that nature ripe for this Court to pass upon it.

The report should be set aside so far only as it assumes to tax or allow costs and disbursements, and the cause remanded to the Circuit Court for proper proceedings for the allowance of costs and disbursements.

MOSES, C. J., and WRIGHT, A. J., concurred.

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6 S. C. 291

CLARKE v. SWEARINGEN.

(Columbia. April Term, 1875.)

[*Appeal and Error* ⇐1050.]

It is not error to receive evidence on behalf of a defendant which could not prejudice the plaintiff's case as proved, whether such evidence was relevant and material or not.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4154; Dec. Dig. ⇐1050.]

[*Trial* ⇐252.]

It is not error to fail to charge a request by plaintiff which is altogether unimportant to his case as proved.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596–612; Dec. Dig. ⇐252.]

[*Appeal and Error* ⇐882.]

A charge that pursues the plaintiff's request cannot be objected to by him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3602; Dec. Dig. ⇐882.]

Before Cooke, J., at Abbeville, April Term, 1874.

Action by James A. Clarke, plaintiff, against John I. Swearingen, defendant.

The complaint alleged that defendant was a common carrier for hire on the Savannah River; that on the 15th day of January, 1873, it was agreed between plaintiff and defendant that defendant would receive at Watkins' Landing, on said river, on the 23d day or the 27th day of the same month and year, eighteen bales of the plaintiff's cotton, and for the usual price of freight would transport

*292

*said cotton to the city of Augusta, and there deliver the same to Franklin, Reid & Co., the plaintiff's factors, and that the plaintiff should deliver the said cotton to the defendant at the said landing at the time mentioned: that, according to said agreement, the plaintiff did, on the 23d day of January, 1873, deliver eighteen bales of the plaintiff's cotton at the landing aforesaid; that the defendant did not, on either of the days mentioned, or at any time thereafter, transport said cotton to the city of Augusta, but, well knowing that the plaintiff had delivered the same at Watkins' Landing, as aforesaid, he permitted the same to remain there until the 22d day of February, 1873, when thirteen of said bales were swept off by a freshet in said river, and that six of the said thirteen bales were altogether lost, and the other seven were recovered in a damaged condition. Judgment was demanded for the value of the six bales lost by the plaintiff, and for the damages sustained by the injuries to the others.

The answer denied the contract as alleged by the plaintiff, or that the defendant agreed to receive the cotton at the time and place named by him; denied that any time for receiving the cotton had been agreed on; that defendant was ever notified that the cotton was at Watkins' Landing; that it was there at his risk or that he was liable for it.

At the trial the plaintiff testified as follows:

"On the 15th of January, 1873, at the late residence of Mrs. Jane L. Allen, in Elbert County, Georgia, he contracted with John E. Swearingen, the defendant, to carry by boat to the city of Augusta eighteen bales of plaintiff's cotton on either the 25th or the 27th day of January, 1873, at the price of fifty cents the hundred pounds, and to deliver the same to Franklin, Reid & Co., cotton factors. The cotton was to be delivered at 'Watkins' Landing,' on the Savannah River, by the former day, and, agreeably to the contract, the eighteen bales of cotton were delivered at Watkins' Landing. The defendant did not carry to Augusta any bales of the cotton, which remained at Watkins' Landing until the 23d of February, 1873, when thirteen bales of the cotton were removed from their place of deposit by high water; of these bales seven were recovered, five of which were badly damaged, and the remaining six bales were never recovered or heard of. The average weight of the bales was four hundred and one pounds. The price of cotton was eighteen and a half cents, and the whole

*293

loss was $559.89. *The expenses of search and the salvage was $71.50, making the total loss $631.30. The cotton remaining at Watkins' Landing, plaintiff wrote to defendant the 1st of February, 1873, that he had delivered the cotton at Watkins' Landing, according to their agreement, and urged him to carry it to Augusta without delay. To this note defendant replied, and promised to carry the cotton during the following week. Defendant's note to the plaintiff has been lost or mislaid and cannot be produced."

A. A. Blackwell and Samuel Carter were also examined on behalf of plaintiff, and gave evidence tending to show that there

was an agreement between plaintiff and defendant, as testified to by the plaintiff. They and other witnesses testified that the cotton was deposited at a safe place on the bank of the river, and that it was swept off on the 23d of February, 1873, by an extraordinary freshet, and that defendant made no effort to save the cotton.

The defendant and others were examined for the defense. Some of them gave evidence tending to show that it was the general custom on the Savannah River for persons who took cotton there to be carried to guard it themselves until it was taken by the carrier on his boat. This evidence was objected to by plaintiff, and on the objection being overruled he excepted to the ruling.

The plaintiff asked the Court to instruct the jury as follows:

1. Mr. Burt respectfully asks His Honor Judge Cooke to instruct the jury that if the contract between the parties was that the defendant should receive and carry the plaintiff's cotton on a particular day, or at a time between two periods of time, at a specified place, and the cotton was delivered according to the contract, and the defendant failed to carry the cotton according to the contract, and the cotton was afterwards lost, even by the act of God, the plaintiff must recover.

2. That the delivery of the cotton at the time and place agreed on by the parties was a delivery to the defendant.

This, said His Honor, I did charge the jury, leaving them to find from the testimony whether or not the custom prevailed, as proved. The first was also fairly submitted to the jury, leaving them to find whether or not a special contract had been made between the parties, varying the custom, except that portion as to the act of God, which I unintentionally overlooked.

*294

*The jury found for the defendant, and thereupon the plaintiff moved for a new trial upon the following grounds:

1. Because the verdict is against the overwhelming weight of the evidence.

2. Because the contract to receive and transport the plaintiff's cotton in the month of January, 1873, was proved by three witnesses, to wit, the plaintiff, Blackwell and Carter.

3. Because there was no act of God to prevent the defendant from executing his contract to carry the cotton of plaintiff until Sunday, the 23d of February, 1873.

4. Because the proof shows that plaintiff made every exertion to save his cotton after he was apprised of the freshet.

5. Because the defendant made no effort to save the plaintiff's cotton, and gave him no notice that he could not transport it at the time agreed on between them.

The motion was overruled, and the plaintiff appealed.

Burt, for appellant.

McGowan & Parker, contra.

September 9, 1875. The opinion of the Court was delivered by

WILLARD, A. J. The main question at the trial was, whether a delivery of the goods set forth in the complaint had been made to the defendant under an express contract with the defendant that he should carry them from Watkins' Landing to Augusta and there deliver them to the plaintiff's consignees.

The facts appeared upon the trial that the plaintiff hauled the goods in question, consisting of cotton in bales, to the banks of the Savannah River, at an intermediate landing place for defendant's boat in its trips up and down the river. The goods were piled in a place regarded as safe from the waters of the river and were left without shelter or person to guard them.

There was delay on the part of the defendant in calling for the goods, and in the meantime an extraordinary freshet occurred, occasioning partial destruction and injury to the goods.

The first exception relates to proof introduced by the defendant, notwithstanding objection on the part of the plaintiff, to the following effect: "That general custom was for persons to guard their cotton until delivered on boat."

*295

*There is nothing in the contract as set forth in the complaint or in the testimony of the parties themselves to warrant the conclusion that anything short of actual delivery or tender to the plaintiff or to some person in charge of his business as a carrier was sufficient to subject the defendant to the risks and liabilities of a carrier as it respects the safety of the goods in question.

If defendant had agreed, upon consideration, to be present to receive the goods at a designated time and place, and had failed so to do, an action would arise for damages sustained in consequence thereof.

The evidence under immediate consideration has no bearing upon the aspect of the case last referred to, but bears exclusively on the question whether the depositing of the goods at the landing was in itself a delivery to the defendant so as to charge him at once with the responsibilities of a carrier.

The plaintiff's case was destitute of evidence tending to show that the goods were at the risk of the defendant at the time and place of the damage. It was unnecessary for the defendant to offer proof tending to show that such a deposit of the goods was not a delivery according to the habit of business at that particular landing, for that conclusion was already the proper inference from the terms of the contract as laid and proved. The evidence in question neither tended to

contradict or vary the terms of the contract nor to explain it as to any matter of a doubtful nature. It is not necessary, therefore, to consider whether it was properly relevant and material, for, even if not, under no aspect could it prejudice the plaintiff's case as it stood under the terms of the contract. This exception must be disallowed.

The remaining exceptions relate to the rulings upon certain requests to charge.

The case states that the first instruction prayed "was fairly submitted to the jury, leaving them to find whether or not a special contract had been made between the parties, varying the custom except that portion as to the act of God, which I unintentionally overlooked."

That portion of the request unintentionally overlooked related to the nature of the defendant's liability, assuming that a delivery had been made sufficient to charge defendant with the liability of a carrier with respect to the goods. Inasmuch as the force of the plaintiff's exception must be tested by the

*296

assumption of an express *contract to convey, and as the obligations and proofs of the plaintiff failed to show a contract making a deposit of the goods at the place in question equivalent to an actual delivery, the failure to submit a proposition the only bearing of which was to test the defendant's liability when there had been a delivery and acceptance of the goods was altogether unimportant.

The remaining portion of the first request to charge must, under the statement of the case, be regarded as having been charged according to the plaintiff's desire, and, therefore, this exception fails.

The second request to charge was as follows: "That the delivery of the cotton at the time and place agreed on by the parties was a delivery to the defendant." Had the Court simply refused to charge, as thus requested, the ruling would have been supported by the true construction of the contract. But the Court took a view of the question more favorable for the plaintiff than the case warranted. He says: "This I did charge the jury, leaving them to find from the testimony whether or not the custom prevailed as proved." This charge, although not consistent with the terms of the contract, was favorable to the plaintiff rather than to the defendant, and, if objected to by either party, that objection should come from the defendant. At all events, as the charge pursued the plaintiff's request, he is not in a position to object to it.

This exception must be disallowed. It does not appear that any request to charge or ruling was made bearing on the question whether the defendant had sufficiently excused his failure to be at the landing in question at the time required by the contract, assuming that the contract was established in accordance with the allegations and proofs on plaintiff's part. That aspect of the case is not, therefore, before us in the present case.

The motion should be dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

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6 S. C. *297

*DANIEL v. SWEARENGEN.

(Columbia. April Term, 1875.)

[*Master and Servant* ⇦1.]

The relation of master and servant exists in this State as at common law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1; Dec. Dig. ⇦1.]

[*Master and Servant* ⇦3.]

To constitute the relation of master and servant, it is not necessary that the contract of service should be in writing.

[Ed. Note.—Cited in Huff v. Watkins, 18 S. C. 512, 513; State v. Sanders, 52 S. C. 582, 583, 30 S. E. 616; State v. Lanier, 79 S. C. 105, 60 S. E. 225.

For other cases, see Master and Servant, Cent. Dig. §§ 2, 3; Dec. Dig. ⇦3.]

[*Master and Servant* ⇦336.]

One who contracts to serve as a farm laborer comes within the relation of master and servant.

[Ed. Note.—Cited in Huff v. Watkins, 15 S. C. 84, 86, 87, 40 Am. Rep. 680; Huff v. Watkins, 18 S. C. 510, 511, 514; State v. Sanders, 52 S. C. 580, 30 S. E. 616.

For other cases, see Master and Servant, Cent. Dig. § 1281; Dec. Dig. ⇦336.]

[*Master and Servant* ⇦65.]

The statutes of this State do not prescribe the only modes of redress to which a master may resort where the contract between him and his servant is violated.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 73; Dec. Dig. ⇦65.]

[*Master and Servant* ⇦336.]

A master has his remedy, as at common law, against one who entices or persuades his servant to leave his employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1281; Dec. Dig. ⇦336.]

Before Cooke, J., at Abbeville, April Term, 1874.

Action by Thomas A. Daniel against Ansel Swearengen and James Swearengen for enticing plaintiff's servants to leave his employment.

The complaint alleged that on the 1st of January, 1872, the plaintiff made contracts with three persons of color to serve him for one year from that date, two as laborers on his farm and one as a domestic and house servant; that on the 5th of February of the same year, the defendants, well knowing said persons to be the servants of the plaintiff, wrongfully enticed and persuaded them to leave the employment of the plaintiff and enter into the service of the defendants, and

that a day or two afterwards plaintiffs sent a written notice to one of the defendants informing him of the said engagement.

The answer denied, on information and belief, the contract with plaintiff alleged in the complaint. It also denied all knowledge on defendants' part of such contract, if one existed; admitted that on or about the 26th of January, 1872, they employed the persons named in the complaint, and that they were then in their employment as laborers on their farm, and it also admitted the giving of notice as alleged.

At the trial the material allegations of the complaint were proved—the contract of service with the plaintiff being a verbal one.

At the close of plaintiff's case, defendants moved for a nonsuit on the following grounds:

1. That the domestic relation of master and servant does not exist in South Carolina.

*298

*2. That none of the legal incidents of that relation in England or elsewhere apply to laborers under contract with employers in South Carolina.

3. The contract between them, to be valid, must be in writing, and must be attested.

4. That the statutes of this State prescribe the only redress in cases of violation of the contract by either of the parties to it.

5. That the employer cannot maintain an action for enticing or otherwise persuading or causing a laborer, and especially an agricultural laborer, to leave his services, and thereby violate his contract.

The motion was denied.

The jury found for the plaintiff $600.

The defendants appealed on the grounds taken in their motion for a nonsuit.

Burt, for appellants:

The appeal rests mainly on the proposition that the domestic relation of master and servant does not exist in South Carolina.

The relation of master and servant, unlike that of parent and child, husband and wife, is not a natural relation, but is social and conventional.

Blackstone (vol. 1, p. 242,) says "it is founded on convenience." Chancellor Kent (lecture 32, part 4, p. 258,) says: "The relation of master and servant rests altogether upon contract. The one is bound to render the service, the other to pay the stipulated compensation."

"There seems to be, according to the law of England, a difference between menial and other servants, but I know of no legal distinction between them."—Kent.

Whether the relation be founded in convenience or on contract wherever it exists it is regulated by law. Reciprocal rights and duties are prescribed by law. In England this relation is regulated by numberless statutes that are not of force in this State.

The recent amendments to the Constitution not only forbid slavery, but involuntary servitude, except as punishment, and invest with citizenship all persons born or naturalized in the United States, and provide that the right

*299

to vote as citizens shall not be *denied or abridged on account of race, color or previous condition.—Revised Statutes, 17, 18; Amendments 13, 14, 15.

Revised Statutes, page 400, Section 9, provides "that all contracts made between owners of land and laborers shall be witnessed by one or more disinterested persons, and, at the request of either party, be duly executed before a Trial Justice, whose duty it shall be to read and explain the same to the parties. Such contract shall clearly set forth the conditions on which the laborer or laborers engage to work, embracing the length of time, the amount of money to be paid and when; and if it be on shares of crop, what portion of the crop or crops."

Section 12, page 491, provides the penalty of violation of such contracts by "failing, willfully and without just cause, to give the labor required by the terms of the contract, or in other respects refuse to comply with the conditions of such contracts," &c. If the offender be the land-owner, the penalty is not less than $50 or more than $500; if it be the laborer, the penalty is fine or imprisonment, according to the gravity of the offense.

The Statute of 1712 (Public Laws, 99,) enacts "that all and every part of the common law of England, where the same has not been altered or inconsistent with the particular Constitutions and customs and laws of this province, shall be of force in this province."

In King v. Huntingdon, (1 Mills' S. C. Rep., 165,) the Court say: "The Act of 1712 contains rather a privilege than command to adopt the common law, except in its great and leading principles, and in effect we have only adopted it when we thought it reasonable and just."

Burgess v. Carpenter, (2 S. C., 9.) Burgess, alleging that Carpenter was his servant, sued for damages done by loss of services, and was nonsuited.

The majority of the Court say: "The relation of master and servant, as it existed in England, was wholly different from employer and employé as it exists in this country."

Mr. Justice Willard concurred in the judgment, but did not think the case "required any expression necessary as to whether the rule (of the English law) is applicable to a case of hiring for wages, nor as to the class of persons properly falling within the designation of servants hired for wages." His assent is put on the ground that the employer in this case "had not an entire interest in the services of the laborer."

*300

*The Act of 1865, page 31, did establish and regulate the domestic relations of per-

sons of color. Of that Act, Section 54 gave the master an action against another for enticing away, harboring, or detaining, or beating, or injuring his servant.

This Act was repealed February 12, 1872. —See Revised Statutes, 842. And owners of land and laborers are synonymous with master and servant. If the relation of master and servant exists in this State, the Revised Statutes contain the only regulation on the subject, and contemplate that the contract between them shall be in writing. Formalities of the contract are prescribed—that it shall be witnessed, the Trial Justice read and explain the contract to the parties; such contracts shall clearly set forth the length of time, the amount of money to be paid, and when to be paid,—which cannot attend a mere verbal agreement or contract.

The remedy for violation of such contract cannot be said to be cumulative if there be no other legal remedy.

The word "master" implies authority, control, command, the right to exact service. Servant implies obedience, subjection to the will of another. Interest in the services of another implies power to exact, to coerce their performance, property in another. A mere contract to perform a service confers no control of the will, no subjection to authority. Its violation is compensated by damages.

To recover damages for enticing away, harboring or injury, there must exist the right of constraint in the one and the duty of submission in the other.

This right does not attach even to the relation of parent and child.

These citations embrace all the law—constitutional, legislative and judicial—of this State applicable to the question under consideration.

If the relation of master and servant does not exist, the nonsuit should have been granted.

If laborers are not servants, and domestics are servants, then a new trial should be granted.

Thomson, contra:

1. That the relation of master and servant at common law, with its legal incidents, has long been recognized, and now exists, in South Carolina.—2 Statutes at Large, 413; General Statutes, 767; 10 Statutes at Large, 496, 497; General Statutes, 199, 27.

*301

*2. By the common law a servant may be hired either by deed or parol.—Smith's Master and Servant Law Lib., 35; 4 Bacon Ch., 577, Title Master and Servant.

3. That an action lies for enticing away, harboring or, after notice, employing the servant of another.—Smith's Master and Servant Law, 79; Blake v. Lanyon, 6 Term. R., 221; Lawley v. Gye, 20 Eng. Law and Equity Rep., 168; Hart v. Aldridge, Cowper, 56.

4. That the interruption of an actual subsisting service by a third person gives the employer a right of action.—Keane v. Boycott, 2 H. Blackstone, 511; Sykes v. Dixon, 36 Eng. Com. Law Rep. 244; Martinez v. Gerber, 42, 55.

5. Every Act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title.—General Statutes, 27, 20.

(a.) The headings of titles, chapters and articles of the General Statutes are parts of the law itself.—People v. Molineaux, 53 Barb., 9; 1 Hand, 113.

(b.) That the Act to protect laborers applies only to persons working for shares of crops. —A. A. 1868–69, 227; Gen. Stat., 490.

6. That the Statute of Laborers is affirmative, and does not change the relation of master and servant at common law.—Dwarris on Statutes, 474, 475.

Sept. 9, 1875. The opinion of the Court was delivered by

MOSES, C. J. This was an action on the case for enticing, persuading and procuring three persons of color, claimed to be the servants of the plaintiff, to leave his employ and engage in that of the defendant. Two of them had been engaged by the plaintiff as farm laborers, and the third, a female, as a domestic and house servant. The verdict of the jury establishes the facts alleged in the complaint, and the exceptions to the judgment are identical with those on which the motion was made in the Court below for a nonsuit. They may be comprised in the three following propositions:

1. That the relation of master and servant does not exist in South Carolina; that the employer cannot maintain an action for enticing, or otherwise persuading, or causing a laborer, and especially an agricultural laborer, to leave his service.

2. That a contract between employer and laborer to be valid must be in writing and attested.

*302

*3. That in the event of a violation of the contract by either of the parties to it, the statutes of the State provide the only redress.

The relation of master and servant, as it prevailed in this State before emancipation, was not restricted to that which existed between the owner and the slave. While the rights of the master, as against the slave and all others, acquired by and consequent upon his ownership, were defined and protected by law, another relation was recognized, arising from the employment of one free man by another, known and distinguished as that of master and servant. The statute book is filled with various enactments governing and regulating it, and those which were passed, up to the publication of Brevard's Digest, may be found collected in a separate chapter of his second volume. It cannot be questioned that an action of the character of the one

before us, where the party employed was a free person, was maintainable while slavery actually existed in the State. Is there anything in the change, resulting from its abolition, which can vary either the rights and obligation which attach to such a contract as between the parties themselves, or those qualities and incidents which must affect third persons having knowledge of it? If the relation existed at common law, and has been heretofore acknowledged in this State, is there not a greater necessity for preserving it? Where the service which was exacted through the existence of slavery can no longer be demanded, and the wants and necessities of the community for labor, both domestic and agricultural, can only be supplied by mutual will and agreement, while the liabilities and obligations between the employer and employé rest on and must be regulated by their contracts, the consequences of the loss of service stipulated to be rendered under it should fall upon those who by their intrusion and interference have induced it. If the employer was left alone to resort to his contract for the injury thus sustained, in most instances his reparation would fall far below the actual damage he has suffered.

It is not necessary to refer to authority to show that an action was maintainable at common law for enticing a servant from the service of his master. To sustain it there must be an actual binding contract of service, and where this exists such an interference by a third person as results in its violation will render him liable to the master, not only for his actual loss, but for such further compensation in the way of damages as may be demanded by the character of the circumstances attending the injury through which

*303

the *loss was inflicted. It is claimed, however, that if such a relation does exist in this State, it cannot be extended to laborers and must be restricted to domestic servants. We cannot see on what principle such a distinction can rest. From the nature of the service in which the large majority of laborers are engaged in this State, the profit which is to be made from it depends on their employment for the year. The loss of agricultural labor, for even a few days, might often prove of irreparable injury to the crop, and an equal if not greater necessity would seem to exist for extending the rights of the employer which pertain to the relation in which he stands to the domestic servant not only to the farm laborer but the mechanic. The place of the domestic can be more readily supplied, and the loss occasioned by the sudden departure of the farm hand or the mechanic would usually be larger than would follow the absence of the mere employé in house or kitchen work. No such distinction prevails in England. In Hart v. Aldridge, (1 Cowp., 54,) it was held that trespass on the case lies for enticing away the servants of the plaintiff who worked for him in the capacity of journeymen shoemakers. Lord Mansfield said: "What is the gist of the action?" That the "defendant had enticed a man away who stood in the relation of servant to the plaintiff, and by whom he was to be benefitted." Ashton, J., said: "Even supposing the servant did live in his own house, if he were employed to furnish a certain number of shoes for a particular person by a fixed time, and a third person enticed him away, I think an action would lie." In Gunter v. Aston et al., (4 J. B. Moore, 12,) the action was sustained in favor of a manufacturer of piano-fortes for enticing his workman from his service. In Lumley v. Guy, (20 Eng. Rep., 168,) it was held that the action was maintainable at common law against one who had procured a dramatic artiste to break her contract with the plaintiff and depart the service which she was bound to render under it. That the rule of law giving a remedy for enticing away servants is not confined to menial servants, or such as fall within the Statute of Laborers, but extends to all cases where the person is employed to give his exclusive personal service for a given time under the direction of an employer who is injured by the wrongful act.

In our judgment, Section 9 of Chapter CIII of the General Statutes does not require that a contract for service, to be valid and effectual, must be in writing. Either party may

*304

require it "to be *duly executed before a Trial Justice;" in which event it must be in writing, for it is to be then "read and explained to the parties." But even if a writing was necessary, it was only for the purpose of allowing either of the parties to avail himself of the remedy allowed to such contracts by the twelfth Section of the same Chapter. Its provisions extend alone to those contracting, and were intended for their protection. The employer was not deprived of any rights he might have against a third person for improperly interfering with those in his service in any way by which it becomes less available or productive to him. But, in any view, the provisions referred to do not take away or impair the power to contract by parol, as it existed at common law, or limit the remedies, for any violation of the contract, to those afforded by the said Sections. There are no negative words which destroy the remedy which existed at common law or restrict it to that provided by the statute. It is only cumulative, and leaves unaffected any remedy to which resort might have been had before its enactment. Although what was said in the opinion of the Court in Burgess v. Carpenter, (2 S. C., 7 [16 Am. Rep. 643],) may be somewhat in conflict with the views which dispose of the case before us, still the decision there may well be sustained upon the material ground assumed by the Justice who delivered it, and referred

to in the separate opinion of Mr. Justice Willard. It was, that Henry Burgess did not occupy the relation of servant to the plaintiff, W. R. Burgess; that he was a co-worker with him in the crop, each contributing the means necessary to its production, liable for the losses and entitled to share the profits, if any accrued. This constituted them partners.

The motion is dismissed.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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6 S. C. *305

*VAN WYCK v. NORRIS.

(Columbia. April Term, 1875.)

[*Creditors' Suit* ⇨32.]

It is not inconsistent with the rights of creditors generally, who are subject to the usual restraining order under a creditor's bill, to allow a particular creditor to establish his claim by judgment; such judgment not to entitle him to preference over other creditors.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. § 130; Dec. Dig. ⇨32.]

Before Cooke, J., at Chambers, August, 1874.

These were three actions commenced in the County of Anderson, each entitled The State of South Carolina, ex relatione Lydia A. M. Van Wyck and others, plaintiffs, against Isabella H. Norris and others, defendants, for settlement of the estate of Andrew O. Norris, deceased, alleged to be insolvent. The case is sufficiently stated in the opinion of the Court.

Burt & Thomson, for appellants.

Earle & Wells, contra.

April, 1875. The opinion of the Court was delivered by

WILLARD, A. J. Appeals are taken from orders made in three several cases, each entitled as above, dissolving, to a limited extent, injunctions that had been previously granted. The actions in which the injunctions had been allowed were in the nature of creditors' bills against the administrator and distributees of A. O. Norris, deceased, various other parties interested or affected directly or collaterally being made parties thereto, in order to obtain payment of demands against the deceased on account of moneys received by him as Commissioner in Equity and not accounted for. The complaints sought to reach the assets of the deceased and of his sureties, and to apply them ratably to the payment of his debts, both individual and official, and prayed that the creditors of the deceased might be restrained from prosecuting their demands at law.

The injunctions were allowed according to the prayer of the complaints. Subsequently, on notice, an order was made in each of the cases by the Circuit Judge as follows:

"It is ordered that the injunction be dissolved in so far as it affects the action pending between John Featherston et al. against Francis McDavid, J. C. C. Featherston and Ezekiel Norris."

*306

*"It is further ordered that the money made upon any judgment which may be obtained in said action shall only be paid out upon the further order of the Court."

The special grounds for permitting the action referred to in the order to proceed notwithstanding the injunction do not appear. But this is unimportant, as the appeal is not based on the sufficiency of these grounds, but assumes the general position that such a modification of the injunction is necessarily inconsistent with the rights of the plaintiffs to restrain all proceedings sought to enforce an individual demand exclusively, in the face of an action intended to enure for the benefit of all creditors upon an equal footing. The order dissolving the injunction pro tanto does not permit the creditor suing at law to gain any advantage that conflicts with the equitable purposes of the complaint. He may recover a judgment and search for assets, but can acquire no lien, and is entitled to no process to enforce his judgment by which he can apply to his exclusive use any part of the estate of the deceased as against other creditors.

His judgment, when recovered, is simply proof under which he may be admitted to the character of a creditor in the distribution of the assets of the estate of deceased under a decree in behalf of creditors generally. Nor can he assert against creditors any lien or priority as obtained under that judgment that did not exist at the commencement of the action.

It is not unusual nor inconsistent with the rights of creditors, under a complaint framed as the present one is, to permit particular creditors to establish their demands by judgments at law so long as such judgments are subjected to the proceedings in behalf of creditors at large.

The appeal should be dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

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6 S. C. *307

*Ex Parte DUNN, in re HAND v. RAILROAD COMPANY.

(Columbia. April Term, 1875.)

[*Courts* ⇨397.]

No order or action of any kind can be taken in a State Court in a cause which has been removed by writ of error to the Supreme Court of the United States. The writ of error suspends the jurisdiction of the State Courts un-

til by some act of the Supreme Court of the United States itself it is restored to them.

[Ed. Note.—Cited in Frazee v. Cardozo, 6 S. C. 316.

For other cases, see Courts, Cent. Dig. § 1084; Dec. Dig. ⟸397.]

Before Reed, J., at Charleston, June Term, 1875.

This was an appeal from an order made June 19th, 1875, in the Circuit Court, in the case Ex parte Thomas C. Dunn, Comptroller General of South Carolina, in re Daniel Hand against The Savannah and Charleston Railroad Company and others. A full statement of the facts of the case is contained in the opinion of this Court.

[For subsequent opinions, see 8 S. C. 207; 10 S. C. 406; 12 S. C. 314; 17 S. C. 219.]

Corbin & Stone, for appellant.

Buist & Buist, contra.

The opinion of the Court was delivered by

MOSES, C. J. The appeal was heard on the 23d July, 1875. The facts and the ruling of the Circuit Judge in regard to them are comprised in the following statement:

On the 5th day of June, 1875, the Supreme Court pronounced a judgment in this cause, reversing the judgment of the Court of Common Pleas for Charleston County, and holding that the Comptroller General of South Carolina is authorized to take possession of the Savannah and Charleston Railroad, with all its appurtenances, and remanded the petition to the "Circuit Court for such orders as may be necessary to give effect to the judgment of this Court."

This judgment of the Supreme Court was duly certified to the Circuit Court of Common Pleas for Charleston County, and filed with the Clerk of said Court June 7th, 1875. On the 8th day of June, 1875, the counsel for the Comptroller General notified the counsel of Daniel Hand and of the Savannah and Charleston Railroad Company et al. that they would move, on the 14th of June, 1875, at 10 o'clock A. M., or as soon thereafter as counsel could be heard, before the Court of

*308

Common Pleas for Charleston County *for an order to carry out the decree of the Supreme Court, and to put the Comptroller General in possession of the Savannah and Charleston Railroad, its rolling stock, outfit and property of every kind whatever. A copy of the proposed order is found in the record, from folio 18 to folio 24.

This motion came on to be heard finally June 19, 1875, before Hon. J. P. Reed, in the Court of Common Pleas, who thereupon made the following order:

"It appears to the Court that a writ of error has been sued out and an appeal to the Supreme Court of the United States perfected. The Court considers itself estopped thereby, and the motion submitted on the part of the Comptroller General is refused. The motion to cause the copies of the papers from the Supreme Court of the State relative to the writ of error exhibited by respondents to be filed as records of this Court is also refused. J. P. Reed.

"June 19, 1875."

"Thereupon the counsel for the Comptroller General appeals, and the appeal is allowed.

"J. P. Reed."

The single question thus presented involves the effect of the writ of error in arresting any further action on the judgment of this Court, made in the said cause, until it is reversed by the Supreme Court of the United States, or the case itself remitted by that tribunal for further proceedings. If the writ stays all action by this Court, it necessarily operates to suspend the jurisdiction of the Court below, which, but for its interposition, might be resorted to for the purpose of enforcing the judgment of this Court where the terms of its mandate so permit.

Where the writ had been allowed in supposed conformity with the Acts of Congress and the construction which has been given to them by the Supreme Court of the United States, the case is transferred from this jurisdiction to a higher one, which is to decide for itself how or to what extent it is to operate, and whether the cause is carried before it according to the requisitions prescribed for the allowance of such a writ to a State Court.

The right of that Court to decide not only whether a writ of error is to have the effect

*309

of a supersedeas but all the questions *which may arise under it cannot be doubted. It has been exercised in innumerable cases, of which it is sufficient to refer only to a few. —Catlett v. Brodie, 9 Wheat., 553 [6 L. Ed. 158]; Adams v. Law, 16 How., 144 [14 L. Ed. 880]; Hudgins v. Kemp, 18 How., 531 [15 L. Ed. 511]; Silsby v. Foote, 20 How., 290 [15 L. Ed. 822]; United States v. Gomez, 3 Wall., 752 [18 L. Ed. 212]; Green v. Buskirk, 3 Wall., 448 [18 L. Ed. 245]; Rubber Company v. Goodyear, 6 Wall., 156 [18 L. Ed. 762]; Slaughter House Cases, 10 Wall., 273 [19 L. Ed. 915]; Bigler v. Walter, 12 Wall., 149 [20 L. Ed. 260].

In the case first named, it not only held the writ of error not a supersedeas, because of the want of a sufficient bond, but gave time for the filing of a new one. In French v. Shoemaker, (12 Wall., 99 [20 L. Ed. 270],) Mr. Justice Clifford delivering the opinion of the Court, referring to the bond required, where the writ is to operate as a supersedeas, said: "What is necessary is that it be sufficient; and when it is desired to make the appeal a supersedeas, that it be filed within ten (now sixty) days from the rendering of the decree; and the question of sufficiency must be determined in the first instance by the Judge who signs the citation; but, after the allowance of the appeal, that question, as well as every

other in the cause, becomes cognizable here. It is, therefore, matter of discretion with the Court to increase or diminish the amount of the bond, and to require additional sureties, or otherwise, as justice may require."

We do not propose to intimate any opinion as to the power of the Justice who has allowed the writ to require a new bond before the writ shall be permitted to operate as a supersedeas, although a bond to answer "all damages and costs" may have been approved. False representations may be made as to the competency of the obligors, which might mislead him as to the sufficiency of the surety he has accepted, or he may be deceived as to the value of the property involved in the litigation. In accordance with the course pursued in Black et al. v. Zacharie & Co., and sanctioned by the Supreme Court, (3 How., 494 [11 L. Ed. 690],) the Justice or Judge who has allowed the writ may, under certain circumstances, control its operation as a supersedeas.

Independent of our want of authority to pass upon the effect of the writ in suspending any further proceeding in the case, there is an objection to the motion of the appellant which strikes us as insurmountable. The Act of Congress (Rev. Stat. United States, 188, § 1007 [U. S. Comp. St. 1913, § 1666],) provides that "if the defendant desires to stay process on the judgment he may, having served his writ of error as aforesaid, give the security required by law within sixty

*310

days after *the rendition of such judgment, or afterwards with the permission of a Justice, or a Judge of the Appellate Court; and in such cases where a writ of error may be a supersedeas, executions shall not issue until the expiration of the said term of 'sixty days.'" Within the said term it seems clear that all action under the judgment is suspended. This motion is made within the sixty days. Even assuming that the plaintiff in error has not yet perfected his writ, so that it may have effect as a supersedeas, there is nothing to prevent his so doing before the expiration of the time allowed by law, for, by the Act, "executions, where a writ of error may be a supersedeas, shall not issue until the expiration of the said term of sixty days."

The motion is dismissed.

WRIGHT, A. J., concurred; WILLARD, A. J., absent.

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6 S. C. 310

PERRY v. SULLIVAN MANUFACTURING COMPANY.

(Columbia. April Term, 1875.)

[*Equity* ⇐409.]

The conclusions of a Referee upon issues of fact, in a chancery case, have the force and effect of the verdict of a jury, and can only be set aside upon principles which would warrant the setting aside of a verdict and granting a new trial.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 921; Dec. Dig. ⇐409.]

[*Appeal and Error* ⇐1017; *Reference* ⇐99.]

Though the evidence is conflicting, yet, if there is enough to sustain the conclusion of the Referee, it must stand.

[Ed. Note.—Cited in Thorpe v. Thorpe, 12 S. C. 168.

For other cases, see Appeal and Error, Cent. Dig. § 3997; Dec. Dig. ⇐1017; Reference, Cent. Dig. § 154; Dec. Dig. ⇐99.]

Before Cooke, J., at Greenville, July, 1874.

This was an action by William Perry, plaintiff, against the Sullivan Manufacturing Company, defendant, for injunction and account.

The case was referred to a Referee "to take the testimony and make a full report to this Court, upon the law and facts thereof, and upon all the issues involved."

The Referee made a report upon the different items of the account, and, amongst other items, he reported in favor of the plaintiff a claim set up by him for $1,500 for services rendered by him to the defendant. He reported a balance due by the plaintiff to the defendant, at the foot of the account, of $560.48, and that, as the suit was necessary for the protection of the plaintiff, the defendant do pay the costs.

*311

*The defendant excepted to the report, and, upon the hearing thereof, and the testimony reported by the Referee, His Honor overruled so much of the report as allowed the plaintiff's claim of $1,500 and directed the costs to be paid by defendant, and confirmed the same in other particulars.

The plaintiff appealed.

Earle, for appellant.

Sullivan & Stokes, contra.

October 1, 1875. The opinion of the Court was delivered by

WRIGHT, A. J. The issues both of law and of fact arising in the said case were referred to the Referee, who, with a full statement of the evidence, made his report. Exceptions were filed by the respondent, of which it is only necessary to notice two, which were sustained by the Court. The ruling in regard to them the appellant now seeks to reverse.

The Referee found, as an issue of fact, that the plaintiff below (the appellant here) had rendered certain services to the defendant to the value of $1,500, and, as an issue of law, that he was entitled to set off the said sum against the amount which he had found to be due by the said plaintiff to the said defendant. The Referee also recommended that the costs be paid by the said defendant. The allowance of these exceptions is charged as error. No question was made as to the right of the appellant to set off the said sum

against the demand established against him; the whole issue was one of fact, whether the said services were rendered, and, if so, was the sum allowed as compensation above their true value. The Circuit Judge overruled the allowance of the said sum "as contrary to the evidence in the case." As we have not been favored with his views in respect to the evidence, which was heard and reported by the Referee, we do not know whether to refer his action to his impression that no services were rendered by the appellant which could be made the subject of a charge, or, if they could constitute a charge, whether the sum allowed was not in excess of their value. The view that we take of this case will apply to either or both of the said aspects.

We have on more than one occasion expressed the views by which this Court will be governed on appeals in chancery cases in-

*312

*volving only questions of fact, both where they are made on the conclusions of the Judge below, from the testimony heard ore tenus by him, or reached through the report of a Referee in which he either concurs or from which he may differ. In Dewitt et al. v. Atkinson et al., (decided at the last term [6 S. C. 140].) where the whole testimony was taken by the Referee, we felt bound to sustain his judgment, although overruled by the Circuit Court, because, as was there said, the presiding Judge had no better means of estimating the comparative force of the evidence as rendered by the respective witnesses. His opportunity of discriminating either as to their relative intelligence or the effect of their manner while testifying was not greater than that allowed to us. His impressions, as our own, are only derived from the report of the Referee, who, from a knowledge of the witnesses, has a better opportunity of comparing their intelligence and determining the effect of their evidence.

When a case is referred to a Referee to ascertain facts, he is substituted in the place of a jury, and his report should be recognized as equivalent to the verdict of such a body. "When the Referee is to report the facts, the report shall have the effect of a special verdict."—Code, § 296.

The same considerations which would govern the Judge on a motion to set aside a verdict and grant a new trial should prevail on a motion to reverse the report of a Referee on the facts. No distinctions should be made in the principles which are to be applied, whether the question arises in the one form or in the other. The Referee hears the whole testimony, as does the jury, and both have the benefit of its full examination and elucidation through the argument of counsel. If the question had arisen on the verdict of a jury, in the place of a report by a Referee, we do not see how the Judge, in the case before us, could have set it aside by an order for a new trial. Although the testimony may be conflicting, yet if there is enough to sustain the conclusion of the Referee on the facts, it should prevail. This is the rule which is applied to the verdict of a jury, and the same principle should govern the determination of an issue of fact by a Referee. They are both mediums provided by law for the ascertainment of facts—the rules of evidence alike governing both.

As we have said in other cases, we do not feel bound, in declaring our convictions from

*313

the consideration of testimony, to enter *into any discussion of the views which may be taken of what was said by each witness and a comparison of the evidence of one with that of another. We look to the whole, and, by a consideration of its full scope, form our judgment. It is enough to say that in the conflicting testimony we do not see such a clear preponderance in favor of the respondent as should alone justify the action of the Court below.

The order disallowing the $1,500 reported in favor of the appellant is reversed. This will leave a balance in his favor, which result must necessarily affect the question of costs. Looking to all the circumstances, we think each party should pay his own, and it is so ordered.

Let the case be remanded to the Circuit Court for such orders as may be necessary to conform its judgment to the views of this Court herein declared.

MOSES, C. J., and WILLARD, A. J., concurred.

6 S. C. 313

GOWER v. THOMSON.

(Columbia, April Term, 1875.)

[*Appeal and Error* ⇨106, 186.]

An order of a Circuit Judge denying a motion in a civil action on a money demand to change the place of trial, made under Section 149 of the Code of Procedure, is not appealable.

[Ed. Note.—Cited in Parker & Co. v. Grimes & Co., 9 S. C. 285; Utsey v. Charleston, etc., R. R. Co., 38 S. C. 409, 17 S. E. 141; Willoughby v. Northeastern R. R. Co., 46 S. C. 321, 24 S. E. 308; McCown v. Northeastern R. R., 55 S. C. 389, 33 S. E. 506.

For other cases, see Appeal and Error, Cent. Dig. § 726; Dec. Dig. ⇨106, 186; Venue, Cent. Dig. § 149.]

Before Cooke, J., at Greenville, August, 1874.

This was an action by Sallie A. Gower against Thomas Thomson. The case for this Court did not state what was the cause of the action further than this—the complaint was stated to be a complaint on money demand.

The defendant resided in Abbeville County, and the action was commenced on the 6th of

June, 1874, in Greenville County, where the plaintiff resided.

The defendant moved for an order to change the place of trial from Greenville to Abbeville County. The motion was made after notice, and upon affidavits submitted by the defendant, the plaintiff submitting none.

*314

*The motion was denied and the defendant appealed.

Noble, for appellant.

Earle & Wells, contra.

October 1, 1875. The opinion of the Court was delivered by

WRIGHT, A. J. The motion below, the refusal of which is assigned as error, was to change the place of trial under the power conferred on the Circuit Court by Section 149 of the Code of Procedure, which sets forth the cases "in which such change may be made." It includes the following among them: "When the convenience of witnesses and the ends of justice would be promoted by the change." We are not informed by the brief of the character of the action, but must conclude that it was one which, at the time it was brought about, allowed the plaintiff to select the County, provided "any of the parties at its commencement resided therein." —Code, § 148. Affidavits were submitted to sustain the grounds on which the defendant relied, and their allegations were not in any way assailed or contradicted by the plaintiff. While we are free to confess that our conclusion would have been different if the original right to determine the question had been vested in us, we do not see any power which authorizes us to interfere with the order made by the Circuit Court.

In Cureton v. Hutchinson, (3 S. C., 607,) the cases in which this Court can exercise jurisdiction to review errors at law are clearly and distinctly stated. The right is conferred under the Constitution by Section 11 of the Code, as amended by the Act of November 25, 1874.—15 Stat., 195. It would be impossible to give any construction to the words of the said Section which could properly embrace within their meaning the case now presented. We are not to be understood as holding that the power "to change the place of trial" under the said Section 149 of the Code, or "to change the venue" by virtue of Section 5 of Chapter 105 of the General Statutes, page 497, is so entirely in the control of the Circuit Court as to preclude the interposition of this Court from the review of every order which may be claimed under their respective provisions. The place of trial, when designated and fixed by law, may so attach as an incident (particularly in criminal cases) to the jurisdiction of the Court as necessarily to involve the merits of the

*315

action; and other *instances may be adduced where the place of trial, though not fixed by statute, may become a jurisdictional question.

The motion is dismissed.

MOSES, C. J., and WILLARD, A. J., concurred.

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6 S. C. 315

FRAZEE v. CARDOZO.

(Columbia. June Term, 1875.)

[*Appeal and Error* ⊂⊃445; *Mandamus* ⊂⊃186.]

A party cannot be attached for contempt in refusing to obey a writ of mandamus issued by the Supreme Court of the State, where the cause in which it issued has been removed by writ of error to the Supreme Court of the United States, until that Court, by some action of its own, has returned the case to the State Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2205; Dec. Dig. ⊂⊃445; Mandamus, Cent. Dig. § 424; Dec. Dig. ⊂⊃186.]

This was a rule to show cause, issued by the Supreme Court in the case of The State of South Carolina, ex relatione Phineas F. Frazee, against F. L. Cardozo, State Treasurer.

October 6, 1873. The opinion of the Court was delivered by

MOSES, C. J. A rule was issued requiring the respondent, F. L. Cardozo, State Treasurer, to show cause why he should not be attached for a contempt in failing to obey a writ of mandamus issued by this Court in the case stated, requiring him to perform a certain act or certain acts as in the said mandate set forth.

The cause shown is the allowance of a writ of error from the Supreme Court of the United States operating as a supersedeas on the judgment of this Court. Against this averment, it is alleged that the writ issued is not a supersedeas, and if it originally had effect as such, the plaintiff in error has failed to prosecute it as by law he was bound, and that his delay has operated as an abandonment or discontinuance of it. Whatever may be our views in regard to the effect of the writ, or the failure of the respondent to further his appeal in conformity with the requirements of the Supreme Court in like cases, the withdrawal of the suit from this Court for its proposed transfer to the higher tribunal leaves us without power over any question arising under it until authorized to act by the order of the Court through the writ by which it was hence withdrawn. We have so lately presented our views on the ef-

*316

fect of such a writ *in arresting all further proceeding by the Court to which it is directed, until authorized by the Court from which it issued, that we may consider ourselves

spared the necessity of here repeating them. —Ex Parte Dunn, Comptroller General, in re Hand v. Savannah and Charleston Railroad Company, MS. [6 S. C. 307].

While the writ is pending, (and whether pending is alone to be determined by the Court which issued it,) we cannot hold the respondent in contempt for not conforming to a judgment which has been superseded by the allowance of it.

The rule is discharged.

WRIGHT, A. J., and WILLARD, A. J., concurred.

6 S. C. 316

EDWARDS v. SANDERS.

(Columbia. April Term, 1875.)

[*Executors and Administrators* ⇐261.]

The term "mortgages" in Section 26 of the Act of 1789, prescribing the order in which debts of a decedent are to be paid, embraces mortgages of chattels as well as mortgages of real estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 952; Dec. Dig. ⇐261.]

[*Executors and Administrators* ⇐261.]

Under Section 26 of the Act of 1789, prescribing the order in which debts of a decedent are to be paid, mortgages, whether of chattels or real estate, rank in the third class, and are entitled to payment out of the general estate in preference to specialty and simple contract debts.

[Ed. Note.—Cited in McLure v. Melton, 24 S. C. 565, 567, 569, 570, 58 Am. Rep. 272.

For other cases, see Executors and Administrators, Cent. Dig. § 952; Dec. Dig. ⇐261.]

[*Mortgages* ⇐556, 583.]

A purchase of the mortgaged premises, by the mortgagee or his assignee, under a decree for foreclosure, does not extinguish the mortgage debt for any unsatisfied balance that may remain; and where the purchase is made after the death of the mortgagor, the unsatisfied balance retains its rank as a mortgage debt, with right to priority of payment out of the general estate over specialty and simple contract debts.

[Ed. Note.—Cited in Devereux v. Taft, 20 S. C. 559; Piester v. Piester, 22 S. C. 139, 145, 53 Am. Rep. 711; McLure v. Melton, 24 S. C. 566, 58 Am. Rep. 272.

For other cases, see Mortgages, Cent. Dig. §§ 1592, 1681; Dec. Dig. ⇐556, 583.]

[This case is also cited in Wilson v. Kelly, 19 S. C. 167, as to the question of priority in payment of decedent's debts, and in McLure v. Melton, 24 S. C. 559, 58 Am. Rep. 272, and held erroneous.]

Before Townsend, J., at Darlington, December, 1873.

This was a bill in equity, filed in January, 1869, by B. W. Edwards, administrator de bonis non of Julius A. Dargan, deceased, (who died intestate in March, 1861,) against H. E. P. Sanders and others, creditors of the intestate. The object of the bill was to call in creditors to establish their demands, enjoin them from suing at law and to wind up the estate.

A Referee was appointed to call in creditors, take testimony and report upon the claims presented.

The Referee submitted his report, bearing date November 19, 1873, in which he set forth and classified the claims that had been

*317

*presented and proved, those of the first class, entitled to priority of payment over specialty and simple contract debts, being stated under the caption "Judgments and Mortgages." In this class were included, amongst others, three claims as follows: †3. A claim for $4,821.57, due upon a bond and mortgage of real estate given by the intestate to T. C. Evans, Commissioner in Equity; †4. A claim for $2,133.71, due upon a bond and mortgage of slaves given by the intestate to T. C. Evans, Commissioner in Equity; and, †5. A claim for $929.41, due upon a bond and mortgage of a slave, also given by the intestate to T. C. Evans, Commissioner in Equity. The bonds and mortgages all bore date February 1, 1858. The rest of the facts bearing upon the questions raised by the appeal are stated in the opinion of the Circuit Court.

L. C. McCall and T. A. Woods, creditors of the intestate, excepted to the report as follows:

1. Because the Referee has erred in classing as mortgage debts the claims of Thomas C. Evans, as Commissioner in Equity, amounting on the 1st day of June, 1873, the one to $2,133.71, and the other to $929.41, the same being bonds secured by mortgages of slaves, which had matured while the said slaves were property; and the property mortgaged having been exhausted, the debts secured thereby no longer exist as mortgage debts, but must stand as specialty debts merely.

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3. Because the claim proved as a mortgaged debt by Thos. C. Evans as Commissioner in Equity, stated as No. †3 on the class designated "Judgments and Mortgages" on the schedule of claims attached to said report, is improperly classed as a mortgage debt, the same having been extinguished by operation of law by reason of the purchase of mortgaged land by the assignee and holder of the said mortgage under proceedings to foreclose the same.

The Circuit decree is as follows:

Townsend, J. A bill is now before this Court for the settlement of the estate of Julius A. Dargan, deceased. An order, in the progress of the cause, has been heretofore granted, requiring creditors to come in and establish their claims against his estate. W. E. Charles, Clerk of the Court, has submitted

*318

his report, con*taining the names of such creditors as have, in obedience to the order, proved their claims, and a classification of

the same in regard to their rank. Exceptions have been filed to the report, suggesting error as to the classification of four of the claims. The first, designated as No. †3 in his report under the class of mortgage and judgment, was a bond executed by the intestate, J. A. Dargan, to T. C. Evans, the then Commissioner in Equity, given for the purchase money of a tract of land sold by the Commissioner belonging to the estate of T. J. K. Dargan, and on the same day, to wit, first of February, 1858, executed a mortgage of the said land to the Commissioner to secure the payment of the purchase money. After the death of the obligor and mortgagor, this tract of land was sold as a part of his estate, and purchased by one J. J. McCown, who gave a mortgage to secure the payment of his purchase and made payments on same to the amount of $1,500. Afterwards the mortgage given by J. A. Dargan was, under proceedings in which the Commissioner in Equity and J. J. McCown were parties, foreclosed, and the land sold. B. W. Edwards was the purchaser at this sale and is now the owner of the land. He has also become the owner of the bond and mortgage against J. A. Dargan. This claim of B. W. Edwards has been classified by the Clerk as a mortgage debt, after allowing on it a credit of the amount of the bid of the purchaser. The second and third, designated as Nos. †4 and †5, in the same class, are bonds executed by J. A. Dargan to T. C. Evans, the then Commissioner in Equity, on the 1st day of February, 1858, for the purchase money of slaves purchased by him at a Commissioner's sale, and payable in one, two and three years from date, the payment of which bonds were secured by the execution of mortgages of the said slaves by J. A. Dargan on the same day.

The fourth, designated as No. †6 in the same class, are bonds executed by S. H. Wilds to T. C. Evans, the then Commissioner in Equity, for certain slaves purchased by him at a Commissioner's sale, with one James Bell and J. A. Dargan, the intestate, as his sureties, which bonds were dated on the 14th day of January, 1857, and payable in one, two, three and four years; and further to secure the said bond, the said S. H. Wilds executed mortgages of the said slaves. E. B. Brunson, the former Referee appointed to take proof of claims, made no report to the Court. Before him the claims above enumerated and described were established as specialty debts and not as mortgages. W. E.

*319

Charles, in his report, *alludes to this action before the former Referee and allows the same claims to be established before him as mortgage debts. The exceptions allege that there was error in this classification, and that the claims should have been allowed and classified as specialty debts and not as mortgage debts.

The exceptions will be considered seriatim. The first exception is: "Because the Referee has erred in classing as mortgage debts the claims of Thomas C. Evans, (numbered 4 and 5 in the schedule,) amounting to $2,133.71 and $929.41, the same being bonds secured by mortgages of slaves, which had matured while the said slaves were property; and the property mortgaged having been exhausted, the debts secured thereby no longer exist as mortgage debts but must stand as specialty debts merely."

The 26th clause of the statute of 1789, (5 Stat., 111,) furnishes a rule or guide for the appropriation to the payment of debts of the assets of an intestate or testator. Certain claims are therein specified, and when the nature of the obligation or debt is ascertained it must be arbitrarily placed within its appropriate class. In the administration of the assets of an intestate or testator's estate, this Court is governed by the requirements of the statute, for in administering legal assets the Court distributes them according to the strict rule of law. In the administration of assets that are purely equitable, it is governed by a rule peculiar to its self founded upon the principle that equality is equity.—Tennant v. Stoney, 1 Rich. Eq., 235 [44 Am. Dec. 213]. This Court, in the distribution of funds, recognizes liens, and enforces, in the same manner that a law Court would, if it had jurisdiction, all antecedent liens on property.—Story Eq., 519; Tennant v. Stoney, 1 Rich. Eq., 235 [44 Am. Dec. 213].

In the administration of the assets of an insolvent testator or intestate, mortgages, as mortgages, are not entitled to priority over rents, specialties and simple contract debts, except so far as they are liens on any particular part of the estate. After the lien is exhausted, the grade of the demand must be determined by the nature of the instrument which the mortgage was given to secure.—Kinard v. Young, 2 Rich. Eq., 247.

To determine the question as to whether these debts of Evans are mortgage debts or mere specialty debts, the inquiry is pertinent whether the liens of the mortgages given to secure the debts have been exhausted. It is contended that they have not by seizure of the mortgaged property and its appropriation

*320

or sale by the mort*gagee, but because the slaves so mortgaged have been emancipated and the liens are thus extinguished. What is the legal effect of a mortgage of personal property as to the title?

"The legal title to personal property conveyed by mortgage vests in the mortgagee, but the breach of the condition does not confer so absolute a right as to give a perfect and independent claim to the chattel as one holds property subject to his own control and dominion. Even if he has possession of the chattel, his title is diverted on the payment of the debt and transferred to the mortgagor. His possession, if he had it, is a quali-

tied one, and, though he may be clothed with a mere legal title, he is a trustee for the mortgagor, who still continues to hold the equity of redemption, and who has the real and beneficial interest."—Calhoun v. Calhoun, 2 S. C., 307.

The Act of 1712 vests the mortgagee with the complete title and ownership, if he takes possession after breach of condition and retains possession for ten years. In Black v. Hair, 2 Hill Eq., 624 [30 Am. Dec. 389] it is held: "That a creditor holding a mortgage security is a trustee, to sell not only for the benefit of the mortgagor but for his own use."

The interest in or title to the slaves in this case was a qualified one, and the mortgagee was not the owner. His mortgage was a mere pledge or security for his debts, taken with a view to recover his money and not to obtain the possession of the property itself. The mortgage debt was due on the 1st day of February, 1861. On that day there was a breach of the condition of the mortgage. The mortgagee was authorized, at that time, to seize the slaves and convert them into money, to be applied to the satisfaction of his debt, or to seize them and retain the possession of the property and appropriate it, in specie, to his own use. This would have operated as a satisfaction of his secured demand. In either event, after the seizure and sale or appropriation of the property, the mortgagee would have been accountable for the surplus over and above the amount of his debt. The mortgagee did not satisfy his mortgage debt by a seizure of the property, but, after condition broken, left the slaves in the possession of the mortgagor until their emancipation. When were they emancipated? In the case of Pickett v. Wilkins, 13 Rich. Eq., 366, it was held: "That slaves in this State did not become either de jure or de facto free until 1865, when they were emancipated by the United States authori-

*321

ties." The slaves *continued, then, in the possession of the mortgagor more than four years after their emancipation. But this possession by the mortgagor, after condition broken, neither conferred on him an absolute beneficiary interest nor in the mortgagee an unqualified legal title. Ten years, under the statute, are necessary to confer such a title upon the latter after possession is acquired by him. In this case he never obtained possession.

But in 1865 the slaves were emancipated. This was a destruction of the property so mortgaged. A mortgage is not a general but a special lien. It is a charge upon specific property therein mentioned and described. When the specific property so mortgaged or charged is seized and sold in payment of the debt, this is an extinguishment of the lien. So when the specific property is destroyed, the lien is lost, as when the slave so mortgaged dies or the property so charged is destroyed. The lien of a mortgage in such a case would be exhausted. In this case the property in the slaves so mortgaged was destroyed by the United States authorities, and, being so destroyed, where is the distinction between this case and one in which the property dies or perishes in some other way? If the lien of the mortgage is lost by the destruction of the property in the one case, why would it not be in the other?

But it may be said the mortgagor had the benefit of the slaves, and was in the possession of them at the time of emancipation, and contributed by his own act to the loss of the slaves. The act of the government is not to be regarded as the act of any citizen. This doctrine has not been recognized in this country.—Calhoun v. Calhoun, 2 S. C., 305. "The emancipation of slaves by governmental authority was a possible contingency, which must be assumed, from the peculiar character of the property, to have been understood by the parties treating for their sale and purchase. To whatever immediate cause emancipation is to be referred, it is not to be denied that it was effected by a power to which the citizen was bound to yield obedience and which he could not resist."—Calhoun v. Calhoun, 2 S. C., 304. Neither the mortgagor nor the mortgagee can be said to have contributed to emancipation, and neither party should be held responsible for the governmental act which they were not able to resist and to which they were bound to yield obedience. But the mortgagee will be responsible for his laches in not taking possession of the slaves after condition broken, while they were property, or for not enforcing the mort-

*322

gage by a foreclosure *and sale. He was a public functionary, whose duty it was to enforce it immediately after condition broken. The mortgagor was in possession, and it was neither his duty nor to his interest to have it enforced. The mortgage cannot now be enforced by reason of the emancipation of the slaves, and the mortgagee, therefore, loses his lien. The mortgagor's estate should not be held responsible for the laches of the mortgagee, or for the destruction of the property, and to allow these as mortgage debts would practically impose this hardship upon it.

There are other creditors of the estate; and to allow this claim to rank as a mortgage debt, under all the circumstances, would be, to say the least of it, inequitable so far as they are concerned.

In my judgment, the lien of the mortgages in question has been extinguished by the emancipation of the slaves, but the creditor is entitled to prove his claim as a specialty debt. The bond which the mortgage was given to secure has not been paid, and the claim will, therefore, rank as a bond debt against the intestate's estate.—Kinard v. Young, 2

Rich. Eq., 247; Tennant v. Stoney, 1 Rich. Eq., 263 [44 Am. Dec. 213].

The first exception is therefore, sustained.

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The third exception is "because the claim proved as a mortgage debt by Thomas C. Evans, as Commissioner in Equity, stated as No. †3 in the schedule, is improperly classed as a mortgage debt, the same having been extinguished by operation of law, by reason of the purchase of the mortgaged land by the assignee and holder of the said mortgage, under proceedings to foreclose the same."

J. A. Dargan, the intestate, purchased a tract of land, and executed a bond and mortgage to T. C. Evans, Commissioner in Equity, to secure the payment of the purchase money. Under the bill filed for the settlement of the intestate Dargan's estate, an order of sale was granted. J. J. McCown was the purchaser at the sale, and executed a mortgage of the land to secure the payment of the purchase money. What did McCown purchase at the Commissioner's or Clerk's sale? Nothing but the right, title and interest, whatever that was, of J. A. Dargan. What was this?

"The equity doctrine is that the mortgage is a mere security for the debt and only a chattel interest, and that until a decree for foreclosure the mortgagor continues the real

*323

owner of the fee."—*4 Kent's Com., 159. In equity the mortgagee is considered as having a transfer of the property itself as a security for the debt, and, according to the intention of the parties, a qualified estate and security. —Williams v. Beard, 1 S. C., 323.

"In the Court of Equity the equity of redemption is considered to be the real and beneficial estate, tantamount to the fee at law."—Williams v. Beard, 1 S. C., 324.

J. J. McCown, then, purchased the equity of redemption of J. A. Dargan, which is said to be tantamount to the fee at law.

After the purchase by McCown, and the payment of a part of the purchase money, the mortgage given by J. A. Dargan to the Commissioner in Equity was foreclosed by proceedings in which the Commissioner and McCown were the only parties. B. W. Edwards purchased the land at the sale and is now the owner. At the time of the purchase, he was not the assignee of the bond and mortgage of J. A. Dargan, but has since become the owner.

What was the effect of the sale of the land under the order of foreclosure?

In this case the mortgagor, Dargan, was out of possession, but McCown claimed through him and stood in his place. The Act of 1791 changes the relation which exists between the mortgagee and mortgagor, as to the legal estate, when the latter is out of possession. When, by reason of the mortgagor being out of possession, the legal estate is vested in the mortgagee, he can occupy no other or higher position than the mortgagee at common law. All the rights and equities which attach to the one the other is entitled to, and no more; and, unless there is some covenant restraining him, he may enforce his legal rights by a possessory action or claim the reception of the rents and profits.—Williams v. Beard.

The Act of 1791 applies exclusively to the proceedings in the Courts of law.—Cruger v. Daniel, Riley, Eq. 151.

When a mortgagee comes into a Court of Equity for a foreclosure, he does not proceed under his legal title for a recovery of the land, but to enforce the security for his debt; and the relief which he thus seeks he can obtain only by an order for the sale of the property, that the equity of redemption may be barred, and all the rights which attach to both parties will vest in the purchaser under such sale. It is the equity of redemption, which is tantamount to the fee at law, that equity acts upon in a bill for foreclosure.—Williams v. Beard, 1 S. C., 324.

*324

*Under the sale made to B. W. Edwards, the purchaser, all the rights which attached to the mortgagor and mortgagee vested in him. Were all the parties necessary or required before the Court in the proceedings to foreclose the mortgage? In the case of Cruger v. Daniel, Riley's Eq., 151, it is held: "A decree for foreclosure does not mean that the title to the land shall be immediately vested in the mortgagee and make the mortgagor a stranger to the land. It is for a sale. The common course is that the payment of the money due should be decreed. Then a sale is directed, and if the land should sell for less than the debt, the mortgagee may have an execution for the residue. If it sell for more, the mortgagor is entitled to the surplus. The mortgagee, if out of possession, has a right to come for a sale of the land, that he may have his debt. So the mortgagor, if out of possession, has a right to enforce a sale, that he may have the surplus, if any. When the mortgagee is out of possession, he has a clear right to come for a sale to satisfy his debt; but he must make the proper parties; then who would be entitled to the surplus or who have the fee of the land?

Was the estate of Dargan entitled to the surplus, if any, in this sale? or was the fee in this mortgaged land in his heirs at law at the time of the sale to Edwards? The Court of Equity ordered the equity of redemption of J. A. Dargan, then vested in his heirs, to be sold. McCown purchased it, and it was conveyed to him by the officer of the Court. The effect of this conveyance was to vest in him the real and beneficial estate, the equity of redemption of Dargan, which is tantamount to the fee at law. So that, by operation of the order of the Court, he was the purchaser of the fee in the sense

in which the term is used in the case last cited. Who was entitled to the surplus, if any, over and above the mortgaged debt? If McCown acquired the right, title and interest, the equity of redemption of Dargan, he was certainly entitled to the surplus. If he was, then, entitled to the surplus, if any, and the equity of redemption, which is tantamount to the fee, was in him, was he not the proper and only party to be made in the proceedings for foreclosure? It seems so to me.—Wright v. Eaves, 10 Rich. Eq., 586.

In what character did Evans come into the Court, except as mortgagee, asking that McCown, who was claiming through Dargan, should be barred of all equity of re-

*325

demption by a sale, and *that the proceeds should be applied to the debt as a security for which the mortgage was taken and held?

The purchaser, Edwards, then, at the sale and by his deed, is vested with the equity of redemption of Dargan originally and McCown afterwards.

But Edwards is also the assignee or owner of the bond and mortgage given by J. A. Dargan to T. C. Evans. By virtue of this purchase and transfer, he has acquired all of the rights and title of Evans as mortgagee in the land sold. He stands as the mortgagee by assignment and the purchaser of the equity of redemption. By operation of law the mortgage debt is extinguished.—2 Story Eq. Juris., § 1035, b. "A purchase of the equity of redemption by the mortgagee extinguishes the mortgage debt; and the effect is the same whether the purchase is by a direct conveyance from the mortgagor or at a sale of the land under a junior judgment."—Schnell v. Schroder, Bail. Eq., 334. The effect of a sale under foreclosure proceedings in a Court of Equity is to bar the equity of redemption and vest all the rights which attach to mortgagor and mortgagee in the purchaser. The special lien is then extinguished, and the mortgagee must recover the balance, if any is due, out of the mortgagor.

The mortgage debt of the assignee, Edwards, has been extinguished, and nothing remains but the balance due on his security. They must rank as a specialty debt.

The third exception is sustained.

It is, therefore, adjudged, ordered and decreed that the debts against the estate of J. A. Dargan, established before the Referee as mortgage debts, and particularly described in the exceptions, rank only as specialty debts, and that they be placed in that class in the schedule, and be so regarded in the distribution to be made of the fund in Court.

The plaintiff appealed.

Spain, for appellant:

Shall the debts marked †3, †4 and †5 in the report of the Referee stand as mortgage debts, as reported, or shall they be classed as specialty debts, as adjudged?

If not, may not the liens overreach and exclude specialty debts till those liens are satisfied out of the assets of the intestate?

*326

*The debts, at the time of the death of the intestate J. A. Dargan, having rank as mortgage debts, must so rank in the distribution of the assets of his estate without regard to subsequent events, whether of partial payment from collaterals or otherwise, or of loss, destruction, sale or exhaustion of the mortgaged property.

Section 26, A. A. 1789, (5 Stat., 111,) created a statutory lien on the assets of the intestate at from the moment of his death, which lien can be satisfied only by the application of those assets, first, to the extinguishment of all the debts in class No. 1, when those debts are so extinguished by the application of any remaining part of those assets; second, to the extinguishment of all the debts in class No. 2, and so forth, through the succeeding classes, to and inclusive of that of No. 6. Each class, in its order, being thus extinguished, any remaining balance of those assets are, by law, appropriated to the distributees and heirs of the intestate. This appropriation and this order of application are fixed at the time of death as to the creditors in their classes, as well as to the distributees. As in the case of creditors, so in the case of volunteers, vested rights are not divested by supervening events.—A. A. 1789, § 26, supra; Gen. Stat., § 3, 457; 15 Stat., 609; Stock v. Parker, 2 McC. Ch., 384; Tunno v. Happoldt, 2 McC., 188; Kinard v. Young, 2 Rich. Eq., 247; Morton v. Caldwell, 3 Strob. Eq., 164; Ex parte Ware, 5 Rich. Eq., 473; Tucker v. Condy, 7 Rich. Eq., 281; Brown v. James, 3 Strob. Eq., 29; May v. May, Rich. Eq. Cases, 379; Kuhn v. Law, 14 Rich., 26.

The appellants are entitled, in virtue of the lien of their mortgages existing at the time of the intestate's death, to claim priority over the bond creditors, even though the mortgaged property, since the death of the intestate, has been sold, exhausted or destroyed.

The appellants are entitled, by virtue of their liens on particular parts of the estate existing at the date of the intestate's death, to overreach and exclude specialty creditors until satisfaction is had of their liens, and this without regard to any supervening event.—Authorities, supra.

By the terms of the mortgage deeds, nothing but payment in full is to avoid them.—1 Hill on Mortgages, 476; Davis v. Maynard, 9 Mass., 247; Lent v. Morrill, 25 Cal., 492; Gillett v. Powell, Sp. Eq., 155.

*327

*Warley, contra:

The appellant insists that a chattel mortgage of negro slaves, given to secure the payment of a bond executed for their purchase money, is a mortgage within the meaning of

the Act of 1789, and, as such, is entitled to precedence over "bonds and debts by specialty" in the settlement of estates.

According to this Act, the third class of debts in order of payment are "judgment mortgages and executions, the oldest first." All these were liens upon real estate, as we insist. At the time of the passage of the Act, the term "mortgage," unqualified by other words, had, as it has now, a fixed meaning. What was it?—Littleton, §§ 332, 205, a; 2 Thomas' Coke, 33; 7 Bac. Abr. Tit. Mortgage A., 29; Coote on Mor., 1; 1 Bouv. Inst., 347; 2 Wash. on Real Property, 36. In our statutes, the term "mortgage" always applies to conveyances of land by way of security. Mortgages of personalty are called "chattel mortgages," "bills of sale by way of mortgage," "mortgages or pledge of personal property," etc.

What did the Act of 1789 really do? In McIntosh v. Wright, Rich. Eq. C., 388, the Court says: "In giving construction to this Act, we must have reference to the law as it stood before. Before the Act, administrators and executors were bound to pay off judgments, the oldest first, in preference to bonds or simple contract debts. A judgment obtained against the executor himself gained a preference over specialty and simple contract debts, and was ranked as a judgment. In this respect the statute has made an alteration; in other respects it seems to have enacted the common law."

Why are mortgages thus preferred and entitled to satisfaction out of the personal estate?

"As the heir at law is regularly entitled to the benefit of redemption, he is also entitled to the assistance of the personal estate of the mortgagor for that purpose, according to the doctrine established in Courts of equity that the personal estate in the hands of the executor shall be employed in ease of the heir, by whatever means the heir becomes indebted as heir. * * * And on this foundation it hath been frequently held that if a man mortgage lands and covenant to pay the money, and die, the personal estate of the mortgagor shall, in favor of the heir, be ap-

*328

plied in *exoneration of the mortgage."—7 Bac. Ab. Tit. Mortgage E., 63. The author cites 1 Vern., 36; 3 P. Wms., 360; 2 Atk., 436; 1 Ves., 251; 6 Bro. P. C., 520; 2 Bro. Ch. R., 273.

"A mortgage is a debt by specialty. It follows from the known rules, both of law and equity, that, as between the real and personal representatives of the debtor, the personal estate is primarily liable to the payment of the debt and must indemnify the real estate against it. All instances to the contrary are mere exceptions to this general rule."—Coote on Mor., 198, and cases cited from 2 Salk., 149; 1 P. Wms., 292; 2 Atk., 436; 2 Ch. Ca., 84; 1 Vern., 36; 2 Vern., 112.

This is sufficient as to the principle and the reason for it, as found under the common and civil law. The same principle finds expression in the Act of 1789, and our Courts have gone very far in enforcing it.—Frances v. Lehre, 1 Rich. Eq., 271; Lawton v. Hunt, 4 Rich. Eq., 252; Hennegan v. Harllee, 10 Rich. Eq.

A mortgage is a subsisting lien upon some portion of the real estate. The mortgagee, therefore, upon the foregoing principles, has not only this superior claim upon the personal assets, but a lien upon the land which cannot be defeated by other creditors. The difference between his rights and those of mere specialty creditors is well illustrated in the following extract: "So there is a distinction between the case where the estate is devised and there are specialty creditors and the case where it is devised and there is a mortgage on it. In the latter case, the legatees stand in the place of the mortgagee, if he exhausts the personal assets; in the former case, they do not stand in the place of the specialty creditors. The reason assigned is that a specialty debt is no lien on land in the hands of the obligor or his heir or devisee. But a mortgage is a lien and an estate in the land."—1 Story's E. J., § 565. It is this estate in the land which gives the mortgagee his high claim to payment out of the assets.

Can the same be said of the mortgagee of a chattel mortgage?

In North v. Drayton (Har. Eq., 34,) the Court held that the bond of the intestate "must be satisfied out of the mortgaged negroes." Satisfied out of the chattel upon which the lien existed. So we say in this case. But inasmuch as the chattel is destroyed, the creditor has no specific lien and must take his place among the creditors according to the character of the demand for the security of which the chattels were pledged.—Tunno v. Happoldt, 2 McC., 188; affirmed in equity in Kinard v. Young, 2 Rich. Eq., 258.

*329

*It will not do to say that anything in the form of a mortgage must necessarily occupy the position assigned to mortgages in the Act of 1789. In Commissioners of Accounts v. Greenwood, 1 DeS. Eq., 451, decided in 1795, our Courts held that: "The State has no prerogative to be paid out of the effects of the debtor in preference to any of the citizens who have judgments, mortgages or other liens;" and, further, that the "Act is merely directorial to executors and administrators and does not alter the law in relation to the rights of the State and other creditors of the deceased." This is precisely what we contend for here. If "bills of sale of slaves by way of mortgage" did not, anterior to the passage of the Act of 1789, rank with mortgages and judgments, they cannot do so now by virtue of that Act, for it did "not alter the law;" but, in the language of the Court

in McIntosh v. Wright, "it seems to have enacted the common law."

In reference to the paper, No. †3, which once was a mortgage, our position is: That if the debt secured by the mortgage has not been paid, the lien of the mortgage has certainly been destroyed. The mortgaged premises are now the property of the owner by assignment of the mortgage.

"If a mortgagee who has received equitable satisfaction of his mortgage afterwards attempts to set it up as a subsisting lien upon the premises, satisfaction of the mortgage may be decreed so that it may be cancelled on the record of the mortgage."—Kellogg v. Wood, 4 Paige, 578.

"The act of taking possession of mortgaged premises by a mortgagee, under a decree of foreclosure, is, by operation of law, an extinguishment of the mortgage debt."—Derby Banks v. Landon, 3 Conn., 62.

"A decree of foreclosure, without any subsequent act in pais, is an appropriation of the pledge and an extinguishment of the mortgage debt."—Swift v. Edson, 5 Conn., 531; 7 Bac. Abr. Tit. Mortgage E., 88.

We submit that in case of insolvent estates, as this, "the Courts will not apply the personal to relieve the real estate."—2 Was. on Real Property, *566; Gibson v. Crehore, 3 Pick., 475; but that after lien creditors have exhausted their specific liens, their positions in the rank of creditors will be according to the character of their security.—Kinard v. Young, 2 Rich. Eq., 247.

*330

* "In the sense of Courts of equity, the marshaling of assets is such an arrangement of the different funds under administration as shall enable all the parties having equities thereon to receive their due proportions, notwithstanding any intervening interests, liens or other claims of particular persons to prior satisfaction out of a portion of these funds."—1 Story Eq., § 558.

"The rule of Courts of equity in marshaling assets in the course of administration is, that every claimant upon the assets of a deceased person shall be satisfied, as far as such assets can, by any arrangement consistent with the nature of their respective claims, be applied to satisfaction thereof."—1 Story, Eq., § 561.

McIver, same side:

The questions in this case are whether debts of the intestate which had been secured by bond and mortgage, where the mortgages had lost their lien on the property mortgaged, either by the destruction of the property mortgaged or by a sale under foreclosure, can be established as mortgage debts against the estate of the intestate or must they be placed in the rank of specialty debts.

Our first proposition is that in the administration of the assets of an insolvent estate debts secured by mortgages are not entitled to priority, except in so far as they are liens on any particular part of the estate, and that after the lien is exhausted or lost the grade of the demand must be determined by the nature of the instrument which the mortgage was given to secure.—Kinard v. Young, 2 Rich. Eq., 247; Tennant v. Stoney, 1 Rich. Eq., 261; Tunno v. Happoldt, 2 McC., 188; Manigault v. Deas, Bail. Eq., 287, *292; Act of 1789, § 26, 5 Stat., 111.

As to the effect which a purchase by a mortgagee of the property mortgaged, the rule is thus stated in 2 Story Eq. Jur., § 1035, b: "An extinguishment of the debt will also ordinarily take place when the mortgagee becomes also absolute owner of the equity of redemption, for then the equitable estate becomes merged in the legal." This rule is thus stated on the authority of the following cases: James v. Marcy, 2 Cowen, 246; Jackson v. De Witt, 6 Cowen, 310; Pelletrave v. Jackson, 11 Wend., 110; Wade v. Howard, 6 Pick., 492; St. Pauls v. Viscount Dudley & Ward, 15 Ves., 173; Forbes v. Moffat, 18 Ves., 390; Gardner v. Astor, 3 Johns. Ch., 53.

*331

*While this rule is stated by Story as subject to a qualification, yet it seems to have been adopted in this State without any qualification.—Ex parte City Sheriff, 1 McC., 399; Schnell v. Schroder, Bail. Eq., 338; McLure & Brawley v. Wheeler, 6 Rich. Eq., 343; Allen v. Richardson, 9 Rich. Eq., 53; see also James v. Johnson, 6 John. Ch., 423.

The rule established by the case of Morton & Courtney v. Caldwell, 3 Strob. Eq., 161, and recognized in Wilson v. McConnell, 9 Rich. Eq., 500, is simply this: the creditor of an insolvent has the right to have a certain proportion of the assets applied to the payment of his debt, which proportion is to be ascertained by inquiring how much was due and what was the amount of the assets at the time of the death. It is not merely a right to have a certain portion of his debt paid. But this right of the creditor to a certain portion of the assets becomes divested so soon as his debt is paid or is otherwise extinguished. So here we say that the holder of the mortgage had at the death of the intestate a right to have the assets applied to it as a mortgage, but so soon as the mortgage was extinguished such right was divested.

Oct. 14, 1875. The opinion of the Court was delivered by

MOSES, C. J. We shall first dispose of the questions which are raised in regard to the mortgages of personal property. It is urged that they are not within the meaning and intent of Section 26 of the Act of 1789, (5 Stat., 116,) which prescribes the order in which "the debts due by any testator or intestate shall be paid by executors or administrators," because the term mortgage, in our statutes, always applies to conveyances of

land by way of security, and never to an instrument conveying chattels for a like purpose. If the proposition is not sustained by the fact, on which alone it rests for support, it is not necessary to do more than to show that at the passage of the Act it was applied as well to mortgages of personal as of real estate. As long ago as 1698, mortgages of negroes and other chattels were recognized, and a rule prescribed as to their priority, where more than one of the same property was given.—2 Stat., 137.

Again, in 1745, (3 Stat., 664; 1759, 4 ib., 89, and 1785, 7 ib., 234,) provisions are made for their security as existing valid liens, operating to as full an extent, on the property

*332

which they cover, as *those of real estate. Indeed, on the very day of the ratification of the Act which prescribed the order in which payment of the debts of a decedent was to be made, the Legislature, in an Act providing for the transmission of an abstract of all judgments to the Clerk of the Court at Charleston, declared "that no judgment not so entered in the books of the said Clerk shall affect any property, real or personal, as to purchasers or mortgagees."—Stat., 256. It would thus seem that the term was applied without distinction as to the character of the security. Indeed, the expression "chattel mortgage" has never been used in this State, and is not to be found in any of its statutes. Even in the General Statutes, although the heading under Chapter 120 is of "chattel mortgages and liens," the very first provision refers to the recording of "a mortgage or other instrument in the nature of a mortgage of personal property." Even in England it is also applied to the pledge which is made of personal property for the security of a debt by loan or otherwise. Mr. Coote, in his work on mortgages, devotes a chapter to "mortgages of chattels personal," and the right of such a mortgagee to foreclose is recognized in Kemp v. Westbrook, Betts' Suppt. to Vesey, 141; in Dyson v. Moris, 1 Hare, 422; Slade v. Riggs, 3 Hare, 35. Regarding them as mortgages within the designation of the Act of 1789, we fail to discover any rule or principle by which they are to be excluded from the rank to which, by its express terms, they are entitled.

It is not without some diffidence that we enter on the consideration of this point in the case, as the judgment of the Court below in relation to it was in conformity to the decision in Young v. Kinard, 2 Rich. Eq., 258. The deference which we have been accustomed to accord to the decided cases in our own Courts, we must admit, has here lost some of its force, not only by reason of the full and convincing argument of Chancellor Johnston in the Circuit decree, but by the language of the Appeal Court in reversing it. That Court thus expressed itself: "It feels much difficulty in giving construction to the Act of 1789, recited in the decree, and is not prepared to say that, if the question were entirely open to them, the construction adopted by the Chancellor is not a fair deduction from its phraseology. But it is deemed expedient to defer to the case of Tunno v. Happoldt, cited in the decree, as an exposition of the Court of law, leaving to that Court, or to a future occasion, the consideration of the suggestion made in this

*333

case." Notwithstand*ing this, it is with deference we venture to say that the question raised and decided in Tunno v. Happoldt, (2 McC., 188,) was not identical with that made in the case in which it was accepted and followed as a guide for its ruling. The point which the Court there seems to have considered was whether the mortgage deed could change the character of the note which it was given to secure, and elevate it from the class of simple contracts, to which it belonged, to the higher grade of a specialty. Concede, as we must, that it could not, still that did not decide the point made by the appeal. The note could have no preference over other simple contracts, and the rank which should be accorded to the mortgage, in the order of priority in the payment of the debts by the administrator, remained undetermined. The Act of 1789 does not interfere with liens as they existed at the death of the debtor. Whatever rights they confer are still secured to the holder, and the property, if it exists, remains subject to their satisfaction. The order of payment which it declares has no application to liens which could be enforced against the property on which they attached. As to those, the concluding words of the Section clearly show that they are to prevail as they existed at the death of the debtor. The order of priority was only to be observed in the application of such general assets in the hands of the executor or administrator as were not bound by any specific lien.—Rutledge v. Rutledge, 1 McC. Eq., 471; Keckley v. Keckley, 2 Hill Eq., 257; Haynsworth v. Frierson, 11 Rich., 476. It is then not the lien which the Act deals with but the character of the debt, and it is that which is to determine its rank in the order of payment. It prescribes the order in which "the debts due by any testator or intestate shall be paid by executors or administrators." It embraces "mortgages" in the classification; they are to take precedence of "bonds or other obligations." In the Circuit opinion in Young v. Kinard, Chancellor Johnston said: "If it be a mortgage, it suits the description of the Act, and is entitled to what the Act gives it, and that is a rank above not only simple contracts but bonds and all other specialties." "The assets of a deceased debtor are distributable among his creditors with reference to the rank of their demands at the time of his

death."—Tucker v. Condy, (7 Rich. Eq., 281,) affirming what is said in Morton & Courtenay v. Caldwell, 3 Strob. Eq., 164, and Ex parte Ware, 5 Rich. Eq. 473.

The instruments in question here were executed by the intestate in his lifetime, and were valid and effective at his death. By

*334

the *Act they are entitled to share in the distribution of the assets in the hands of his administrator or the Court according to the rank which, by its provision, is accorded to them.

With the doubts expressed by the Court as to its judgment in Young v. Kinard, we do not feel ourselves constrained to follow it as authority by which we must be controlled. It is with respect that we differ, and can well interpose for our justification, if necessary, its own misgivings as to its construction of the statute.

The remaining question to be considered is whether the mortgage debt of Dargan to the Commissioner, assigned to Edwards, has not been satisfied by his purchase of the land under the proceeding for the foreclosure of the mortgage, and cannot, therefore, as the respondents contend, take rank as such under the said Act of 1789. It is true that McCown, under the sale of Dargan's interest in the land, which was still subject to the mortgage of the Commissioner, acquired by his purchase only the right and title which Dargan held therein, and this was nothing more than the right to redeem. He thus held what in the Court of Equity is considered to be the real and beneficial interest, tantamount to the fee at law.—Williams v. Beard, 1 S. C., 324. Where the mortgagee acquires this right through a Sheriff's sale, by a purchase under a judgment junior to the mortgage, the debt which it was to secure is extinguished;—the like result follows where the mortgagor releases to the mortgagee the equity of redemption.—Mounce v. McLure, 2 McC., 423; Schnell v. Schroder, Bail Eq., 334; McLure, Brawley & Co. v. Wheeler, 6 Rich. Eq., 345; Allen v. Richardson, 9 Rich. Eq., 56. The same doctrine was announced in James v. Johnson & Morey.—6 John. Ch., 416. All the right reserved by the mortgagor is transferred to the mortgagee, who then holds in the premises the interest both of the creditor and debtor, and there is nothing left on which the lien of the mortgage can operate. Where the sale is under a junior judgment, a third party purchasing must not only pay the bid which he has made for the only interest which the Sheriff can sell, but, to enjoy an unencumbered estate in the land, he must satisfy the mortgage, which still retains its lien. If the mortgagee purchases, to whom is such payment to be made? Not only is the lien destroyed, but the debt also. In McLure, Brawley & Co. v. Wheeler, Chancellor Dunkin said: "As has been intimated, it makes no difference whether the mortgagee is the purchaser at Sheriff's sale or a stranger. Purchasing the equity of

*335

*redemption, a stranger would take the land subject to the obligation to discharge the encumbrance." If the mortgagee buys, the encumbrance is necessarily discharged by the operation of his own act.

The Circuit decree, applying these principles, while it holds not only that the lien of the mortgage but the mortgage debt also is destroyed by the purchase of Edwards at the sale for foreclosure, still gives effect to the bond, for the security of which the mortgage was executed. Following the authorities on which it relied for its conclusions, it would seem that the extinguishment of the bond also would have been an unavoidable consequence.

The question here is not, however, to be decided by the principles which prevail where the equity of redemption is lost to the mortgagor by its transfer to the mortgagee. Edwards, the assignee of the mortgage, holds through his purchase at a judicial sale for foreclosure, and all his rights and interests under his purchases depend upon the effect of such a proceeding. A foreclosure of a mortgage by judicial process in South Carolina differs in its results from that which prevails in England.

There, on default of payment of the debt at the time fixed by the Court, an absolute foreclosure is decreed. Action on the bond may be brought at law at the same time the bill for foreclosure is filed in equity, or it may follow. In this State, the proceeding is for the enforcement of the security for the debt. So far from the purchase or transfer through the sale of the equity of redemption, its effect is to bar and defeat it.

The interest of both mortgagor and mortgagee is sold. The title, freed and discharged of the encumbrance imposed by the equity of redemption, vests in the purchaser, the usual order, which was made, directing a sale, acting on the property.

It was competent for the plaintiff (and such is now the prevailing practice) to take a money decree, by force of which an execution could issue against the property of the mortgagor for any unpaid balance after the application of the proceeds of the sale.

If, under the prayer of the bill, a money decree cannot be given, the creditor, after a sale, may proceed at law upon the bond for any balance remaining due.—Gray, Commissioner, v. Toomer, executrix, 5 Rich., 261; or, where the bill is not only for foreclosure but also for the payment of the debt, or includes a prayer for general relief, the plain-

*336

tiff, after foreclosure, may apply to the *Court where the bill is filed for further decree for the money still due on the debt. The sale under an order for mere foreclosure does not extinguish the debt and leave the mortgagor

without remedy for the unpaid balance, and such appears to be the view of Chancellor Wardlaw, from his language in pronouncing the opinion of the Court in Allen v. Richardson, 9 Rich. Eq., 56.

We have already expressed our views in regard to the rank to which a debt secured by a mortgage of personal property is entitled under the Act of 1789 in the appropriation of the assets of a deceased debtor. In our conception, there is no difference where the mortgage is of real estate. In South Carolina, the whole estate is chargeable with the payment of debts. "By law, the lands of one deceased are assets to pay debts." They are expressly made so by 5 George, II, C. 7, and in this respect put on the same footing with real property. The Act of 1789 uses the comprehensive term "mortgages," assigns them to one rank, and in its application we do not see how any distinction can be made, whether they are of land or personal chattels.

The motion is granted, the judgment of the Circuit Court reversed, and the case remanded for further proceedings in conformity to the opinion of this Court.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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6 S. C. 336

JOHNSON v. HARRELSON.

(Columbia. April, Term, 1875.)

[*Wills* ⇐852.]

Devise and bequest of real and personal property to A for life, with remainder to her issue surviving her: but if she should die without issue surviving her, then over. A died in the lifetime of the testator, without issue: *Held*, That there was no lapse, and that the limitation over took effect.

[Ed. Note.—Cited in Clark v. Clark, 19 S. C. 349, 352.

For other cases, see Wills, Cent. Dig. § 2167; Dec. Dig. ⇐852.]

Before Townsend, J., at Marion, July, 1873.

This was a bill in equity, filed in 1869 by A. P. Johnson and wife and others against John E. Harrelson, executor of Hugh H. Harrelson, deceased, and others, for partition of the real estate left by the testator and for account.

*337

*The testator died in June or July, 1866, leaving some real and personal property, and also leaving a last will and testament, bearing date October 9th, 1860, and containing the following clause amongst others:

"I give, devise and bequeath five portions of the residue of my real estate, consisting of the lands on which I now live, the whole tract, including the devise to my wife, containing ————; and is bounded North by ————; East by ————; South by ————; and West by ————; and the balance of my negroes, viz., Jim, Calvin, Sarah and children, and such others as may be belonging to me at the time of my death; and personal property of every description whatsoever, not hereinbefore bequeathed, unto my sons respectively, John E. Harrelson, Hugh G. Harrelson, David J. Harrelson and George W. Harrelson, and my grandsons, Samuel H. Jordan and David F. Jordan, together receiving one share, and their heirs and assigns. And the five remaining portions I devise, give and bequeath unto my sons, John E. Harrelson, Hugh G. Harrelson, David J. Harrelson, or their survivors or survivor of them and their heirs, executors and administrators, upon this special trust and confidence that they shall stand seized and hold the said portions respectively of real and personal property to the sole and exclusive use of my five daughters, viz., Martha J. Adkinson, wife of William Adkinson, Elizabeth Adkinson, wife of James Adkinson, Prudence Collins, wife of Joel B. Collins, Celia Ann Harrelson and Theresa Ann Harrelson, for and during the term of their respective lives: and that they will pay the rents, income, hire and profits of the portions of the property aforesaid, respectively, to the separate use of my daughters aforenamed; and from and immediately after the determination of their respective lives, then upon the trust that they will stand seized and hold the portions respectively aforesaid to the use of such child or children as my daughters shall leave surviving them respectively; the issue of a deceased child or children to represent the parents freed and discharged from all trusts. But in case either of my said daughters shall die without leaving issue surviving them, the portion or portions held in trust for such daughter or daughters shall be considered as my estate, and be divisible among my surviving children or their heirs; the property mentioned in this clause to be divided, as aforesaid, according to the manner and subject to the provisions as are hereinafter indicated and expressed."

*338

*Theresa Ann Harrelson, one of the daughters named in the above clause, died shortly before the testator, unmarried and without issue, and the principal question in the case was whether the share of real and personal estate to which she would have been entitled under the above recited clause had she survived the testator lapsed by her death in his lifetime or whether the limitation over took effect. His Honor held that it lapsed, and was subject to distribution among the heirs of the testator.

The parties who would be entitled if the limitation took effect appealed.

Evans, McIver & Shaw, for appellants.

Sellers, Johnson & Johnson, contra.

October 14, 1875. The opinion of the Court was delivered by

MOSES, C. J. Hugh R. Harrelson executed his last will and testament in October, 1860, and died in June or July, 1866. Concurring with the Circuit Judge in his conclusions on all of the exceptions taken by the appellant to the report of the Referee for the reasons which he has given in his judgment, save that which relates to the lapse of the share devised and bequeathed by the testator to his daughter Theresa Ann, it will only be necessary to refer to so much of his will as will afford a proper understanding of the question presented for decision, which must depend entirely on the operation of a single clause, the effect of which is not controlled by any other portion of it.

After certain devises and bequests to his wife, for life or widowhood, he directs a division of his property into ten parts, five of which he gives to certain of his sons, by name, "or the survivor or survivors of them, upon this special trust and confidence, that they shall stand seized and hold the said portions respectively of real and personal property to the sole and exclusive use of his five daughters, Martha J. Adkinson, wife of James Adkinson, Providence Collins, wife of Joel B. Collins, Celia Ann Harrelson and Theresa Ann Harrelson, for and during the term of their respective lives, and that they will pay the rents, income, hire and profits of the portions of the property aforesaid, respectively, to the separate use of his daughters aforenamed; and from and immediately after the determination of their respective lives, then

*339

upon the trust that *they will stand seized and hold the portions respectively aforesaid to the use of such child or children as his daughters shall leave surviving them respectively: the issue of a deceased child or children to represent the parents, freed and discharged from all trusts. But in case either of his said daughters shall die without leaving issue surviving them, the portion or portions held in trust for such daughter or daughters shall be considered as his estate and be devisible among his surviving children or their heirs." Provision is made by the same clause for the division of the shares conveyed by it; but its particular mode has no bearing on the question now submitted. The daughter Theresa Ann died in the lifetime of her father, unmarried. His Honor the Circuit Judge held that although the limitation over in the event of the death of Theresa Ann was not void for remoteness, yet, being contingent on an event, which did not happen, the death of the first taker during the life of the testator without issue prevented the remainder from taking effect, and the devise therefore lapsed. No authority is cited for this conclusion, save an incidental suggestion by Chancellor Dargan in delivering the opinion of the Court in Lesly v. Collier, (3 Rich. Eq., 125,) "which," he himself said, "it was unnecessary to sustain by authority or illustration, as it was not immediately involved in the question which the Court deemed it incumbent upon it to decide." Whether the remainder is vested or contingent, if the event has happened on the occurrence of which it is to take effect, and there are those alive at the death of the testator who, by the words of the bequest, can be held to be the objects of the testator's bounty in substitution of the prior legatee, who may have died in his lifetime, they take the share of such legatee. The intention must be express, or satisfactorily implied from the language employed by the testator. Where the gift is absolute, and the object of it dies in the lifetime of the testator, it must necessarily fall into the residue of his estate, for there would be no one to claim it by substitution through a limitation over. It is, therefore, said by Mr. Ward, in his Treatise on Legacies, P: "It seems also settled, notwithstanding some former doubts, that where a person gives a legacy at a future time, and bequeaths it over to another on the death of the legatee before the time of payment, as in the case of a gift to A at twenty-one, and if he die before that age to B, the legacy will not lapse by the death of A under twenty-one, in the lifetime of the testator, but will vest in B as a new substantive and

*340

original devise *to him. But if A should attain twenty-one, and afterwards die in the testator's lifetime, the legacy will lapse."

The principle is fully sustained by the authorities to which he refers. Mr. Jarman, in his notes to Powell on Devisees, (2 vol., p. 202,) says: "It is clear that if property be given to a person with a limitation over, if he die under twenty-one, or any other event, and he die under the prescribed age, or such other event happens in the lifetime of the testator, the devisee or legatee over is entitled." The rule, too, is recognized by Mr. Hawkins in his work on Wills, p. 243.

The principle is fully carried out in Mowatt v. Corrow, 7 Paige, 328. The testator there, after a devise of the whole income of his estate, real and personal, to his wife for life, directed his executors to sell and convert the whole of it into money, after making provision for the widow of a deceased son, in case she survived his own widow. He directed the remainder of his estate to be divided into four equal parts—one of which he gave to his son, John Mowatt, Jr.; but in case he died before his (testator's) wife, he gave "his said share to be divided equally amongst his children, the survivor or survivors of them, share and share alike." John died in the lifetime of his father, who was survived by his mother. It was claimed not only that the devise to John had lapsed by reason of his death in the lifetime of the testator, but in consequence of that result the devise over had failed. But the Court, recognizing the rule already referred to, held that the limitation over was good, and was not affected by the

death of John leaving the testator still living. Walworth, C., delivering the judgment of the Court, said: "However much it may have been once doubted, it is now clearly settled that where an interest in property is given by will to one person with a limitation over of the same interest, either to his children or to any other persons, upon the death of the first devisee or legatee before the time appointed for such interest to vest in possession, the death of the first devisee or legatee, although in the lifetime of the testator, does not produce a lapse of the limitation over of that interest to the substituted objects of the testator's bounty."

Under the rule thus recognized, they who take over acquire their right not as representatives of the first taker but as purchasers claiming an express gift conferred by the will and not derived from the devisee, who would have taken for life if he had survived

*341

*the testator. Referring to the authorities upon which Chancellor Walworth relied for this judgment in Mowatt v. Corrow, he further says:

"It was probably urged in those cases as in this, that there could be no legacy unless the legatee survived the testator, and that the legacy intended by the testator being lapsed, there was nothing to go over to the substituted legatees. The short answer to that, however, is, that the bequest to the substituted legatees in such a case is an original legacy to them at the death of the testator, the event having then happened upon which their substitution in the place of the first named legatee depended. And this is so, whether such legacy to the substituted legatee is then vested or is contingent and depending upon some future event."

In the case before us, the daughter Theresa Ann died in the lifetime of the testator unmarried, and in that event, by the words of the will, her portion was to be considered as part of the estate "of the testator and be divisible among his surviving children or their heirs." Mr. Williams, in his work on Executions, (2d vol., 1039,) treating of the rule which prevails generally where a devisee dies in the lifetime of a testator, says: "But this general rule may be controlled by the manifest intention of the testator, appearing on the face of the will, that the legacy shall not lapse, and by his distinctly providing a substitute for the legatee dying in his lifetime." The testator in the case here provides for the failure of the event on which the interest of the daughter Theresa Ann was to vest in her children, by requiring that "it shall be considered as his estate," and then making a disposition of it among his surviving children. His intention, apparent from the terms of the devise, was that the share originally given to Theresa Ann for life, and after her death to her children, was subject to his final disposition in the event of her dying without leaving issue surviving her.

The conclusion which we have reached on this part of the case is sustained by that at which the Court arrives in Mathis et al. v. Hammond, 6 Rich. Eq., 121.

Nor can the judgment of the Circuit Judge find support in the further ground on which he rests it, that, as the daughter Theresa Ann, had she survived the testator, would have taken a fee conditional, the remainder over would have been cut off and the limitation, therefore, failed. What might have been the effect of such a contingency it is not necessary to inquire, for in our view the estate

*342

*which she would have taken, had she survived the testator, was not a fee conditional. The word issue in the limitation over, even if it had not been qualified by a restriction to such issue as Theresa Ann might leave surviving her, must be held in the context where it is found as synonymous with child or children.

We have considered the clause under review without any reference to the distinction at common law between the effect of a lapse on real estate devised and personal property bequeathed by a will. The testator executed his will in 1860, and the Act of 1858 (12 Stat., 700; Gen. Stat., 440,) has removed the grounds of the distinction as to lapsed devises and legacies, and in a proper case it will be held to have abolished it.—Cureton v. Massey, 13 Rich. Eq., 109 [94 Am. Dec. 151].

It is ordered that so much of the judgment of the Circuit Court as holds that the share of the said Theresa Ann, under the will of her father, lapsed at her death into his estate be reversed. In all other respects it is affirmed. It is further ordered that the case be remanded to the said Court, that so much of the order of 26th November, 1873, as directs a partition may be so amended as to conform to the judgment of this Court according to the principles set forth in this opinion.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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6 S. C. 342

GREEN v. RAILROAD COMPANY.

(Columbia. April Term, 1875.)

[*Trial* ⇦6.]

Where service of notice of trial is made by mail, as allowed by § 427 of the Code, it is irregular unless sixteen days are allowed between the day of mailing and the first day of the term —the term "day of trial" in that Section meaning the day fixed by law for the commencement of the term.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 16; Dec. Dig. ⇦6.]

[*Trial* ⇦6.]

Where the service of a notice of trial is irregular and the cause is placed on the calendar,

advantage of the irregularity can only be taken by a proper motion to the Court. Defendant waives the irregularity by failing to make such motion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 13–18; Dec. Dig. ⟸6.]

[*Appeal and Error* ⟸766.]

Where a brief prepared for the Supreme Court is, for any reason, incorrect or improper, advantage thereof can only be taken by a proper motion to the Court before the hearing of the cause upon its merits. It is too late to make the objection after argument on the merits commences or the case is submitted on printed argument.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3101; Dec. Dig. ⟸766.]

*343

*Before Carpenter, J., at Edgefield, March Term, 1874.

These were two actions—one of John E. Green and another of James E. Green against the Charlotte, Columbia and Augusta Railroad Company, in which the issues were tried before juries and verdicts given for the plaintiff.

From the brief it appeared that the cases were noticed for trial on the 15th day of June, 1872, at a Court to be held on the second Monday of June, 1872; that the notices were served on the 30th May, 1872, by depositing copies in the postoffice addressed to defendant's attorneys at Columbia; that on the 31st March, 1874, defendant's attorneys moved His Honor the Circuit Judge to set aside the verdicts and have the cases reinstated on the docket, on the ground that notices of trial had not been served; that the motion was sustained by an affidavit made by one of the attorneys for defendant that notices of trial had not been served on the attorneys of defendant, and that he was surprised when he heard that the cases had been called and verdicts taken; that the motion was denied and that defendant appealed.

A supplemental brief filed by the attorneys for respondents contained, besides other statements, a "statement of facts," dated July 9th, 1875, and signed by His Honor the Circuit Judge, as follows:

"At the hearing of the motions, made before His Honor Judge R. B. Carpenter, at Chambers, on March 31st, 1874, to set aside the verdicts on the above stated actions, it appeared, in addition to the facts stated in defendant's brief, that said actions had been upon the calendar for several terms, and had been regularly continued. That in the year 1872 defendant's counsel agreed in writing with plaintiff's counsel, after the June and prior to the November Term, 1872, to waive the transfer of said actions to Aiken County and try the same at Edgefield. Defendant's counsel having admitted the agreement, the defendant's counsel object to the granting of this order."

Monteith & Bauskett, for appellant.

Youmans & Sheppard, Bacon & Talbert, contra.

November 12, 1875. The opinion of the Court was delivered by

WILLARD, A. J. Notice of trial in each of the above entitled cases was given for the 15th day of June, the term of Court com-

*344

*mencing on the 10th of that month. The service of the notice was by mail, allowing sixteen days' notice to the opposite party prior to the day for which the cause was noticed, but less than sixteen days intervening between the day of mailing and the first day of the term to which notice was given.

The Code (Section 278) requires notice to be given fourteen days before the commencement of the term. This period of time is, in the case of service by mail, extended to sixteen days by Section 427. It is contended that Section 427 fixes the day on which the case is actually tried as that to which the sixteen days' service by mail must be measured, and not the first day of term. Such an interpretation cannot result when Sections 278 and 427 are properly construed together. Section 278 refers the length of notice to the first day of term. The object of this is manifest; it is to enable attorneys to prepare their cases before the commencement of the term. The propriety of such a rule is apparent.

The primary object of Section 427 is to provide service by mail or a substitute for the personal service contemplated in Section 278. It lengthens the period of notice where service is by mail. It is true that this Section says that such service must be made "sixteen days before the day of trial"; but by the "day of trial" we can well understand as intended the day appointed by law for trial. That day is fixed and is a proper day to measure from. The day of actual trial cannot be known until it arrives, and, therefore, does not properly subserve the object for which the day of trial is mentioned in that Section. A proper construction of Section 427 leads to the conclusion that where service is made by mail, sixteen days should elapse before the first day of the term to which notice is given.

The plaintiff's notice was, therefore, irregular; but advantage could only be taken of such irregularity, where the cause was placed on the calendar, by a proper motion on the part of the defendant. The failure of the defendant to make a proper motion in such case is a waiver of the irregularity. It appears by an amendment to the brief that the cause was continued at that term and at subsequent terms. It is also a necessary inference, from the statements contained in the amendments to the brief, that the defend-

ants had notice of the cause being on the calendar and took no steps to avail themselves of the irregularity of the plaintiff.

*345

*The defendants allege that the amendment just referred to was improperly made while the appeal was pending and without leave of this Court. If the brief prepared for this Court is for any reason incorrect or improper, it is required that the party seeking to take advantage of such fact should make a proper motion to this Court previous to the hearing of the cause on its merits. After argument on the merits is entered upon, or the case is submitted on printed argument, as in the present case, it is too late to make an objection of that character.

Looking, then, to the brief as it stands amended, it must be concluded that the defendants have waived the irregularity in the notice of trial.

The motion should be denied.

MOSES, C. J., and WRIGHT, A. J., concurred.

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6 S. C. 345

SOUTHERN v. FISHER.

(Columbia. April Term, 1875.)

[*Bankruptcy* ⇐296.]

The District Courts of the United States have exclusive jurisdiction over the assigned estates of bankrupts, and no action can be maintained in a State Court against an assignee or trustee in bankruptcy to enjoin his collection of assets.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 414; Dec. Dig. ⇐296.]

[*Courts* ⇐478.]

Where assets have been placed by a Court of competent jurisdiction in the hands of its officer, they are considered in law as being in the custody of the Court, and no other Court has jurisdiction to interfere with the officer's control and authority over them.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1261; Dec. Dig. ⇐478.]

[This case is also cited in Smith v. Grant, 15 S. C. 151, without specific application.]

Before Carpenter, J., at Richland, January Term, 1875.

This was an action by John P. Southern and L. D. Childs against John Fisher, as trustee of the Citizens' Savings Bank of South Carolina, bankrupt.

The complaint alleged that the said bank, a body corporate under the laws of the State, was, on the 1st December, 1873, duly adjudged bankrupt under the bankrupt laws of the United States, and that the defendant, John Fisher, had been appointed trustee of its estate; that at the time of the adjudication the bank held as part of its assets two promissory notes signed by the plaintiffs and others, payable to the bank, which were now in the possession of the defendant as trustee; that the plaintiffs were induced to sign said notes

*346

by the *fraudulent concealment of certain facts, which were stated, and which, it was alleged, rendered the notes void as to the plaintiffs; and that the defendant had threatened to commence actions against the plaintiffs on said notes.

The prayer of complaint was that the defendant be enjoined from commencing such actions and that said notes be delivered up to be cancelled.

The defendant demurred to the complaint upon several grounds, two of them being: first, that the Court had no jurisdiction of the action, it being against the defendant as trustee of the estate of a bankrupt; and, second, that the complaint does not state facts sufficient to constitute a cause of action.

His Honor the Circuit Judge overruled the demurrer, with leave to answer, and the defendant appealed.

McMaster & Le Conte, Rion & Barnwell, for appellant.

Melton & Clarke, Melton & Chamberlain, contra.

November 13, 1875. The opinion of the Court was delivered by

MOSES, C. J. The motion to reverse the order overruling the demurrer must prevail. The exception to the jurisdiction of the Court, in our judgment, admits of no question, notwithstanding the able argument of the counsel for the appellees. It is admitted that the jurisdiction of the District Court of the United States extends to "the collection of all the assets of the bankrupt." If, therefore, the conclusion of the Circuit Court is well founded, it can only be exercised at the forbearance of the State Courts. They would thus be converted into Courts with full power to administer all the provisions of the Bankrupt Act by withdrawing from the District Court the assets of the bankrupt, subjecting them to the supervision, management and control of a Court which has no jurisdiction "in matters and proceedings in bankruptcy." Such a consequence was never designed by the Act, which, by the face of its various provisions, taken as a whole, contemplated a uniform system by which the property of an insolvent might be disposed of by a single Court, "so as to secure the rights of all parties and due distribution of the assets among all the creditors." The marshaling of the different funds and assets implies their collection and retention by the Court, which is charged with their distribution

*347

*among the creditors. If they cannot, to this end, pursue their own remedies and modes of procedure, but are subject to restriction through the process of a State Court, the jurisdiction vested "in the Courts of the United States of all matters and proceedings in bankruptcy" would not be "exclusive."

Mr. Bump, in his Law and Practice of Bankruptcy, at page 162, (eighth edition,) says: "The property and estate of the bankrupt, so far as any interference therewith is concerned, is thereby brought eo instanti into the Court of Bankruptcy and placed in its custody and under its protection as fully as if actually brought into the visible presence of the Court. Its jurisdiction is superior and exclusive in all matters arising under the statute. No court of an independent State jurisdiction can withdraw the property surrendered, or determine in any degree the manner of its disposition." At page 199, he says: "The jurisdiction of the Bankrupt Court is exclusive of the Courts of the several States, extends over the bankrupt, his estate, and all parties and persons connected therewith. The estate surrendered is placed in the custody and under the protection of the Court of Bankruptcy as fully as if brought in its immediate possession, and the officer appointed to manage it is accountable to the Court appointing him, and to that Court alone."

Numerous cases might be cited to show that the jurisdiction of a District Court of the United States, sitting as a Court of Bankruptcy, is superior and exclusive in all matters arising under the statute; that the estate surrendered is placed in the custody of the Court so sitting in bankruptcy, and the officer appointed to manage it is accountable to the Court appointing him, and to that Court alone, and that no Court of an independent State jurisdiction can withdraw the property surrendered or determine in any degree the manner of its disposition. Of these, it is enough to refer to In re Barrow, 1 B. R., 481 [Fed. Cas. No. 1057]; In re Vogel, 2 B. R., 427, S. C.: 7 Blatch. 18 [Fed. Cas. No. 16,982]; Pennington v. Sale & Phelan, 1 N. B. R., 572 [Fed. Cas. No. 10,939]; Buckingham v. McLean, 13 How., 151 [14 L. Ed. 90]; Watson v. Citizens' Savings Bank, 11 B. R., 161 [Fed. Cas. No. 17,279].

The Bankrupt Act of 1841 did not confer as full and explicit powers on the District Court in its administration as are granted by that of 1867. Mr. Justice Story, in his able opinion in Ex parte City Bank, (3 How., 292 [11 L. Ed. 603],) in which the powers of the said Court under the Act of 1841 are brought into examination, elaborately re-

*348

views *the whole subject, and his learned argument fully sustains the conclusions which he reaches as to the controlling powers of such Courts in the collection of the assets of the bankrupt, with a view to a speedy close of the proceedings in such cases by the national machinery, which is adequate to all the exigencies of the Act.

But, independent of the relation which the State and United States Courts maintain to each other under the Bankrupt Act, another principle intervenes which forbids any control by the State Courts over the assets of the said bank now in the hands of its trustee. Where a Court, in the exercise of a competent jurisdiction, takes possession of assets and places them in the hands of its appointee, they are held by him as the officer of the Court, to be administered only by its order. They are in the possession of the Court, and remain there until disposed of by its direction. No other Court can rightfully interfere with assets thus held. The officer is amenable to the Court for their safe custody, of which he cannot be dispossessed by the act of any other tribunal. His possession, like that of a Receiver, is the possession of the Court, and process against him in regard to them would be process against the authority which appointed him, "and a Court will not allow itself to be made a party in another Court."—Angel v. Smith, 9 Ves., 335; Johns v. Claughton, Jacobi C. R., 179; Parker v. Browning, 8 Paige, 388. In Peale v. Phipps, (14 How., 365 [14 L. Ed. 459],) the charter of a bank was adjudged forfeited by the laws of Mississippi and a trustee appointed by the Circuit Court of that State for the purpose of collecting its assets. A petition was filed in the Circuit Court of the United States for rent due and compensation for injuries to certain real estate which the plaintiff had previously recovered from the bank and of which they were in possession. The trustee filed exceptions, one of which was that he had been appointed by the Circuit Court of Mississippi for the purpose of collecting the assets of the said bank and was not amenable to any Court but the one which had appointed him. The Circuit Court of the United States overruled the exception, and its judgment was reversed by the Supreme Court. Chief Justice Taney, delivering the opinion of the Court, said: "We see no ground upon which the jurisdiction of the Court can be sustained. The plaintiff in error held the assets of the bank as the agent and Receiver of the Court of Adams County and subject to its order, and was not authorized to dispose of the assets or to pay any debts due

*349

from the *bank except by the order of the Court. The property in legal contemplation was in the custody of the Court of which he was the officer, and had been placed there by the laws of Mississippi; and while it thus remained in the custody of the Court, awaiting its order and decision, no other Court had a right to interfere with it or to wrest it from the hands of its agent and thereby put it out of his power to perform his duty." The judgment of the Court was in conformity with Wiswall v. Sampson, decided at the same term. In Freeman v. Howe, (24 How., 450 [16 L. Ed. 749],) it was held "that the possession of the Marshal was the possession of the Court, and that pending the litigation no other Court of merely concurrent jurisdiction

could be permitted to disturb that possession."

It by no means follows, as is contended on the part of the appellee, that because the assignee or trustee may have the aid of the State Courts for the collection of the debts which he holds by virtue of his appointment, he is amenable to the control of such Courts, in regard to the management of the assets entrusted to his care by the Court under whose authority he holds them. It is true, "if the aid of the State Court is demanded by an assignee to recover property, he must submit to the terms prescribed, and recover or not, as the principles of law and equity bearing on the rights of the contesting party demand."

He is estopped in such "a case to deny the jurisdiction of the State Court to decide the merits of the controversy."—Pindell v. Vimont, B. Mon., 400. But its right to determine a controversy thus voluntarily submitted to its judgment by an assignee does not confer the power to interfere with the assets in his hands not drawn in question by the issues submitted to it. "The assignee can properly institute a suit in a State Court only under the direction of the District Court."—Chenning Canal Bank v. Judson, 8 N. Y., 254. And where he does submit one it is always supposed to be by its permission, for even after institution it may compel its discontinuance. The right of the assignee to entertain a suit in the State Courts in regard to the assets of the bankrupt does not imply a correlative liability to be enjoined by the process of the said Courts from their collection. Where he claims as plaintiff he is in the execution of a duty imposed by the Act; but if as a defendant he can be controlled by the process of the State Courts, the administration of the assets may be withdrawn entirely from the Court entrusted with it by the statute and transferred to a jurisdiction not within its intention or design.

*350

*By one of the provisions of the Act, the assignee may, if he requires it, be admitted in his own name to prosecute an action pending at the time of the commencement of the proceedings in the name of the bankrupt, for the recovery of a debt or other things which might or ought to pass to the assignee by the assignment; and if any suit at law or in equity in which the bankrupt is a party in his own name is then pending, the assignee may defend the same with like effect as it might have been defended by the bankrupt. Mr. Bump, in his treatise, 137, says: "The power of State Courts to proceed with pending suits is thus, under certain prescribed limits, recognized by the statute itself." But even this provision is not compulsory on the assignee. In the opinion of the Court, in Traders' National Bank v. Campbell, (14 Wall., 95 [20 L. Ed. 832]) Mr. Justice Miller says: "It is said that the assignee should have applied to the State Court for an order on the Sheriff to pay over the proceeds of the execution to him. But it cannot be maintained that the assignee who is pursuing the assets of the bankrupt in the hands of third parties is bound to resort to the State Courts because there is a litigation there pending. The language of the 16th Section, that the assignee may prosecute and defend all suits pending at the time of the adjudication of bankruptcy in which the bankrupt is a party does not oblige him to seek a remedy in that way." So even where the assignee may prosecute or defend a suit pending at the time of adjudication, brought by or against the bankrupt, he is not compelled to resort to the State Courts thus having cognizance of the action and abide by its judgment, but may apply directly for relief to the District or Circuit Court, as the character of his case may require.

It would seem to follow, as a legitimate and necessary consequence, that if, under the statute, the State Courts are not permitted to retain cognizance of causes pending against the bankrupt in regard to his property at the time when he is so adjudged without the consent of his assignee to become a party thereto, they would be without jurisdiction to compel him by their process to appear as a defendant in suits brought to affect the assets entrusted to his charge by the District Court. His position would indeed be anomalous, if he cannot be made a party to a suit pending in a State Court against the bankrupt in relation to his estate, that he may be brought into the same Court by original process issued against himself in regard to the same subject matter. Such consequences are too contradictory to be legitimate results of the statute.

*351

*While the State Courts must be permitted to administer their functions to the full extent provided by the Constitution, to which they owe their origin, without encroachment, the lines which separate them from the jurisdiction of the Federal Courts must be duly regarded and respected. An infringement of the powers of either would only lead to a conflict which would impair both their dignity and usefulness.

The motion to reverse the order overruling the demurrer is granted, and the complaint dismissed.

WRIGHT, A. J., and WILLARD, A. J., concurred.

6 S. C. 351

CONWAY v. CUNNINGHAM.

(Columbia, April Term, 1875.)

[*Evidence* ⟸448.]

The construction of written instruments is for the Court, and, as a general rule, parol evidence as to the intention will not be received.

[Ed. Note.—Cited in Sullivan v. Latimer, 38 S. C. 420, 17 S. E. 221.

For other cases, see Evidence, Cent. Dig. §§ 1756, 2066–2082, 2084; Dec. Dig. ⟸448.]

[*Guaranty* ⟸42.]

A bond conditioned for the payment of "two thousand dollars (or so much thereof as may be due upon an account stated between them) within nine months from the date hereof and all interest that may be due" was given as a guaranty for goods to be furnished a merchant, though his name did not appear in the contract: *Held*, That the guaranty was not intended to limit the amount of goods to be furnished, but to limit to $2,000, the amount for which the guarantor was to be liable at the end of nine months.

[Ed. Note.—Cited in Witte v. Wolfe, 16 S. E. 273; Frost & Co. v. Weathersbee, 23 S. C. 365.

For other cases, see Guaranty, Cent. Dig. § 52; Dec. Dig. ⟸42.]

Before Carpenter, J., at Kershaw, January Term, 1875.

This was an action by Anna M. Conway against William R. Cunningham to enjoin the defendant from selling, under a power of sale contained in a mortgage, the mortgaged property, and to deliver up the mortgage to be canceled. The case was as follows:

On the 7th day of October, 1872, the plaintiff gave to the defendant her bond in the penal sum of $4,000, with a condition thereunder written as follows: "The condition of the above obligation is such, that if the above bound Anna M. Conway, her heirs, executors and administrators, shall and do well and truly pay or cause to be paid unto the said Wm. R. Cunningham, his certain attorney, executors, administrators or assigns, the full and just sum of two thousand dollars (or so much thereof as may be due upon an account stated between them) within nine months aft-

*352

er the date hereof, with all *interest that may be due, then this obligation to cease, determine and be utterly null and void, or else to remain in full force and virtue;" and also a mortgage of a lot in the town of Camden to secure the payment of the bond. The mortgage contained a power of sale on default of payment. The complaint alleged that the plaintiff is the wife of Edward J. Conway, a merchant of the town of Camden, in this State, and the defendant is a merchant of the city of Baltimore; that at the time the said bond and mortgage were given the said Edward J. Conway became the agent of the defendant for the purpose of conducting the business of merchandise for him in said town; that they represented to the plaintiff that the amount of goods to be shipped by the defendant to the said Edward J. Conway was not to exceed in the whole cost thereof the sum of $2,000; that this was done to induce the plaintiff to become the guarantor of her husband for goods to that amount, and that, confiding in said representations, she gave the said bond and mortgage with the express understanding that she became liable for goods to be shipped to the amount of $2,000 and no more; that of the amount so guaranteed there has been paid the sum of $1,462.02, leaving a balance of $538.98 which the plaintiff is ready and willing to pay; that the plaintiff is informed and believes that the advances made by the defendant to the said Edward J. Conway amounted to $2,814.10; that the defendant now pretends that his dealings were directly with the plaintiff, that the advances were made to her, and that she is liable under said bond and mortgage for the whole balance due on account of said advances, and that he has advertised the said lot for sale under the power contained in said mortgage. The prayer of the complaint was that the defendant be enjoined from selling said lot, and that on payment of the said admitted balance of $535.98 the said bond and mortgage be delivered up to be canceled.

The defendant by his answer stated that the said Edward J. Conway was indebted to him at the time said bond and mortgage were given in the sum of $252.76, and that the said bond and mortgage were given to secure the payment of the said sum and also as a security for such advances as he might within nine months thereafter make to the said Edward J. Conway, the plaintiff's liability at the end of nine months not to exceed the sum of $2,000; that there was no stipulation, understanding or agreement that the amount of goods to be shipped was not to exceed said sum of $2,000; that the amount of goods shipped

*353

within the nine months was $3,089.86, *inclusive of the said sum of $252.76 due at the time the said bond and mortgage were given, and that after deducting payments to the amount of $1,464.02 there remained a balance due the defendant of $1,605.84 and interest to the amount of $54.79—in all $1,660.63—and he exhibited with his answer a statement of the account.

It was admitted, at the hearing, that the defendant had been allowed to take judgment in this action against the plaintiff for the admitted balance of $525.98, and that it had been paid.

The defendant offered evidence to sustain certain allegations of the answer, but His Honor refused to hear it and made an order that the temporary injunction theretofore granted be made perpetual, and that each party pay his own costs.

The defendants appealed on grounds as follows:

1. Because His Honor the presiding Judge should have heard testimony before deciding,

as tendered by defendant's counsel in support of the allegations of the answer.

2. Because the true construction of the bond obliges the plaintiff to pay the defendant the balance due of his account as claimed in the answer.

3. Because His Honor the presiding Judge having declined to hear testimony in support of the answer of defendant, the statements of the answer, for the purposes of this case, must be taken as true; and it is respectfully submitted that, under the circumstances there stated, the plaintiff was bound to pay the balance of said account as claimed by the defendant.

Kershaw, for appellants.
Leitner & Dunlap, contra.

November 18, 1875. The opinion of the Court was delivered by

MOSES, C. J. It is not to be denied, as a general rule, that the construction of all written instruments belongs to the Court. Where, too, there is no ambiguity in the terms of the contract, parol testimony will not be allowed to prove an intention different from that which is to be inferred from the language which the parties have adopted to express their purpose. While these principles urged on the part of the appellee must

*354

be admitted, it *is not perceived how their application can aid her resistance of the motion submitted by the appellant.

The bond expresses the condition upon the performance of which by the obligor it was to be null and void; and if extrinsic evidence was to be resorted to for the purpose of showing that the words in which it is expressed lead to an inference which was not intended, the necessity of a recourse to it was on the appellee and not on the appellant. What is there in the bond to show that it was executed as a security for the debt of Edward J. Conway already due and as a guaranty for the payment of merchandise to be thereafter furnished him? It is on the face of it a mere money bond, whereby the obligor binds herself to pay a certain sum to the obligee within a certain time, or so much as may be due at the expiration of such time, "on an account stated between them." There is nothing to point to a transaction in which any third party was to be concerned. The obligor was forced to refer to extrinsic evidence not only to show the nature of the liability assumed by her bond but the payment made by her husband, on which she relies as a bar to any further claim by the appellant.

The account current rendered by the appellant accompanies the complaint, and it exhibits not only the amount paid by the husband but the extent of goods supplied, and its correctness is admitted. In fact, it is the evidence on which she relies for proof of the payment of $1,464.02, which, with the $535.98, the amount of the judgment heretofore recovered in this case, discharged her, as she contends, from all further liability on the bond. As the allegations in the complaint, of the circumstances which attended and led to the execution of the bond, were directly contradicted by the answer in the most material points, we are necessarily forced to conclude that the presiding Judge rejected the offer of evidence to sustain the answer because he proposed to render judgment by a construction of the instrument from its terms, independent of any extrinsic testimony. Looking alone to the instrument, we differ from his conclusion.

For what possible purpose were the words included in the parenthesis inserted, unless to reduce the two thousand dollars, for the payment of which the bond was conditioned, by the state of the "account," at the termination of the nine months, if it therefrom appeared that the amount due was less than that limited by the bond? The obligor could not be held liable, in any event, for more

*355

*than two thousand dollars, while she might be relieved from the full amount by showing at the end of the nine months that "the account stated" proved that a less sum was due. The security was to extend to and cover all dealings within the time the bond was to run, but the sum for which the obligor was to be bound was limited to that which it expressed. Technical words are employed: "account stated," which implies that an accounting was to be had by which the debit and credit side were to be adjusted and a balance due ascertained. It looked to a continuance of dealings of some kind for the space of nine months, and an obligation to pay the balance due "on the account stated," provided it did not exceed two thousand dollars.

It is contended that the words "within nine months after the date thereof" were only to designate the time within which the two thousand dollars were to be paid.

This view entirely ignored the words included in the parenthesis, which were inserted to protect the obligor from the payment of the whole of the said sum, if, on the account stated, it should appear that less was due. Without the insertion of the words, she would have been at liberty to reduce the sum named in the condition by any actual payment made on the bond either by herself or on her account.

The rule is well established, that in the construction of a contract regard must be had to it as a whole, and "every part of it shall be, if possible, made to take effect."—Chit. on Contr., 84. The words referred to would not have been inserted unless some design had been intended by their use. So far from the purpose to restrict the whole dealing to $2,000, they point to a result, to

follow future transactions, which might reduce the sum to be collected on the bond below the amount named in the condition.

Assuming (as we have done) that the judgment of the Circuit Court rested on its construction of the instrument, without regard to the extrinsic circumstances referred to, both in the complaint and answer, we have not felt at liberty to allow them to influence our conclusion. In the argument before us, they were discussed on both sides, and the force they were to have on our decision was pressed according to the opposing views of the parties who urged them. We may be allowed, however, to say that confidence in the conclusion which we have reached is not the least weakened by the fact that it was a guaranty for goods to be furnished a mer-

*356

chant with *which to carry on business, and that the credit was not only to continue for nine months, but that the liability incurred by the guarantor to the extent of two thousand dollars was to be reduced at the end of that time by the "account stated" of the dealings between the parties in whose favor the guaranty was given and the party to be secured by it, provided the balance exhibited as due fell short of the maximum sum for the security of which the bond was executed.

There is no dispute as to the amount of goods supplied by the appellant, of the payments made to him in cash or otherwise. It is conceded that the account current accompanying the complaint contains a true and correct statement. It is not necessary that a reference should be ordered to ascertain a fact admitted by the parties. The amount due on the bond must, therefore, be held to be the sum of $1,660.63, with interest on $1,605.84 from October 11, 1873, until paid, less the sum of $535.98 which appears to have been paid since complaint filed, with interest thereon from the date of such payment.

The mortgage provides the mode for its foreclosure. The motion is granted and the complaint dismissed. With the order of the Circuit Court as to the costs, we will not interfere; it will, therefore, remain of force.

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6 S. C. 356

ROGERS v. HUGGINS.

(Columbia. Nov. Term, 1874.)

[*Descent and Distribution* ⟸130.]

Under a judgment against an administrator recovered in 1869, land which was of the intestate at the time of his death may be sold by the Sheriff and conveyed to the purchaser, even though the heirs of the intestate, and not the administrator, are in possession.

[Ed. Note.—Cited in Adger & Co. v. Pringle, 11 S. C. 546; Smith v. Grant, 15 S. C. 149; Mauldin v. Gossett, 15 S. C. 580; Wilson v. Kelly, 19 S. C. 161; Huggins v. Oliver, 21 S. C. 153, 159, 161; Hendrix v. Holden, 58 S. C. 530, 36 S. E. 1010; Brock v. Kirkpatrick, 69 S. C. 339–342, 348, 38 S. E. 779, 85 Am. St. Rep. 847.

For other cases, see Descent and Distribution, Cent. Dig. § 180; Dec. Dig. ⟸130.]

Before Townsend, J., at Marion, March Term, 1873.

This was an action by Barfield Rogers against Mary Ann Rogers to recover the possession of a tract of land.

The plaintiff gave evidence tending to show that at November Term, 1869, of the Court of Common Pleas for Marion County, Giles Elvengton recovered a judgment against Robert R. Rogers as administrator of Neal C. Huggins, deceased, for $710.22, on a prom-

*357

*issory note of the intestate dated November 26th, 1860; that execution was issued on the judgment, under which the Sheriff levied on the tract of land in dispute and sold and conveyed the same to the plaintiff in September, 1870; that the defendant was the widow of the intestate, and that she, with her children, had resided on the land since the death of the intestate and used the same, with the rents and annual value, worth from $60 to $100.

The defendant offered no evidence, but moved the Court for nonsuit, on the ground that, as the heirs were in possession, the judgment and execution did not authorize the Sheriff to make the levy and sale and convey the estate to the plaintiff. The motion was granted and the plaintiff appealed.

Harllee, for appellant:

The Act of 1732 (2 Gen. Stat., 271,) declares lands assets subject to the payment of debts, and subject to the same remedies "for selling, seizing or disposing, &c., in like manner as personal estate is seized, extended, sold or disposed of for the satisfaction of debts."

Martin v. Latta (4 McC. Rep., 128,) is a case directly in point. It is there held that "the lands of an intestate may be sold under an execution obtained against the administrator, without making the heirs parties to the proceedings, notwithstanding there may be sufficient personal assets to satisfy the debts."

The Court in that case quote D'Urphey v. Nelson, (2 Brev., 23,) and the decision is appended in a note to Martin v. Latta, which meets fully the objections urged in the Court below in this case.

In Jones v. Wightman, (2 Hill, 579,) the Court say "the cases of D'Urphey v. Nelson and Martin v. Latta are regarded by the Court as authority not now to be questioned by either the bar or the bench upon the point decided by them." "It may be that D'Urphey v. Nelson was decided wrong on a true construction of the statute of 5 George II, C. 7, but it is now thirty-two years since it was decided; proceedings in our Courts have conformed to it; under executions issued in

conformity to precedents settled by it, an unknown amount of property has changed owners." &c. "Under these circumstances, the Court would not only act unwisely, but with a rashness utterly reckless of consequences, were they now to undertake to review and reverse those cases."

*358

*The same doctrine is announced in Vernon & Co. v. Valk, 2 Hill Ch., 260; also in Bird v. Houze, 1 Sp. Eq., 250; Hull v. Hall, 2 Rich. Eq., 65. It is true, in the three last cases other circumstances intervened which modified the general rule to a certain extent, as in Jones v. Wightman partition of the land had been had before judgment and the parties in exclusive possession of their shares. In Bird v. Houze the widow and child were in the exclusive possession for twelve years before the sale, which gave them a title by the Statute of Limitations; and in Vernon v. Valk there was no judgment against the representative of Valk in this State, and the bill was filed to subject the land here to satisfy a judgment in the State of New York. But in the case under consideration the heirs had done no act before judgment which would entitle them to come within the cases of Jones v. Wightman, Vernon v. Valk and Bird v. Houze; they were simply living on the land, and fall fully under the holding of D'Urphey v. Nelson and Martin v. Latta, which are recognized as authority in all those cases on the subject, and the maxim of "stare decisis" applied expressly to them.

Gilliland & Howell v. Caldwell, (1 S. C., 195,) recognizes the decisions in D'Urphey v. Nelson and Martin v. Latta as the law. That case held that the Statute of Limitations was a good bar in favor of the heir, and was not the case of a judgment against the administrator and a sale before partition or long-continued possession.

Mobley v. Cureton, (S. C., 140.) recognizes the same doctrine, but there had been a partition and thirteen years had elapsed.

The recognition of these two leading cases, which are precisely the same as the case under consideration, is so full and uniform in all of the authorities of this State, that it is deemed a work of supererogation to multiply authorities from elsewhere.

McDuffie & Blue, contra:

1. "The primary fund for the payment of the debts of a deceased is the personal estate. That must first be pursued in the hands of the personal representative until exhausted, or until it appears that, by proper diligence on the part of the creditor, it cannot be made available for his demand."—Goodlue v. Barnwell, Rice Eq., 198; Mobley v. Cureton, 2 S. C., 140.

2. The statute of George II does make descended lands in the possession of the heirs liable for the payment of the debts of the ancestor; but the cause of action must be es-

*359

tablished against them in a *suit to which they are parties, and they are not bound by a judgment against the administrator to which they are neither parties or privies.—Bird v. Houze, Sp. Eq., 250; Vernon & Co. v. Valk, 2 Hill Ch., 257; Drayton v. Marshall, Rice Eq., 387; Gilliland & Howell v. Caldwell, 1 S. C., 191; Mobley v. Cureton, 2 S. C., 140.

November 13, 1874. The opinion of the Court was delivered by

MOSES, C. J. This was an action for the possession of certain real estate described in the complaint. Plaintiff claimed title through a Sheriff's sale, under an execution on a judgment recovered against the administrator of the husband of the defendant, she having continued in the possession of the premises since his death. His Honor the presiding Judge nonsuited the plaintiff, holding that a title thus derived was not sufficient to divest the right of the defendant, an heir of the intestate, in possession. Exception by the appellant to this ruling brings the question to this Court. In our view, the conclusion of the Court below is in conflict with the law as understood and recognized in this State for over seventy years; and although dissatisfaction from time to time has been expressed by the bench in regard to the decisions to which it owes its sanction, it has been uniformly accompanied by the declaration that they were not now to be questioned. In D'Urphey v. Nelson, (1 Brev., 289,) (decided in 1803 by the Constitutional Court, which then consisted of all the law Judges,) the question of the effect of a judgment against the administrator or executor on a debt of the intestate or testator on the land descended to the heirs or devised by a will was fully considered. The conclusion of the Court was the result of its construction of the statute of 5 George II, C. 7, and it is thus set forth in its own language:

"Being made liable in like manner as personal estates, the Act cannot be construed to make any distinction between lands and personal chattels, but they must be considered as equally liable for satisfaction of debts, and to be assets for that purpose in the hands of the personal representative of the debtor; and, therefore, in this case, where the judgment was recovered against the administratrix for the debt of their intestate, after the lands of the intestate had descended (as it has been contended) to his heirs at law, and never came into the hands of his administrators, although, upon the principles of the common law, the heir should have notice, and

*360

an *opportunity of defending his estate before he can be divested of it, and it might be reasonable (as it has been argued) that a scire facias should first go to call upon him to show cause why the lands should not be

taken to satisfy the debt before the execution should issue to seize and sell the land, yet as the Act of 5 George II makes no distinction between lands and chattels, and contains nothing to show that it was the intention of the Act to make the lands liable only in cases where there should be a deficiency of personal estate, the lands of the intestate must be regarded as liable to execution as personal property and to be taken and sold as such without discrimination or exception."

It is full and comprehensive, extending to all the lands of which the testator or intestate died seized and possessed, at least while in the hands of the heirs or subject to their control. Martin v. Latta (4 McC., 128,) followed, and was decided in 1827. The suit was for partition among the demandants of a tract of land sold under an execution on a judgment against the administrator on a debt due by the intestate and claimed by the defendant, the purchaser "in his own demesne as of fee." Although it was alleged without contradiction that there were personal assets in the hands of the administrator sufficient for the payment of the debt, yet Judge Nott, who tried the case in Circuit, held that the land was liable and nonsuited the demandant. He was sustained by the Appeal Court, the opinion of which was delivered by Judge Colcock; carrying out to the fullest extent the doctrine declared in D'Urphey v. Nelson. In the course of the opinion, referring to the construction which this case had given to the statute 5 George 2, he says: "But even if the objections were greater, we could not at this day depart from the construction which the statute had received for twenty or thirty years; for, by doing so, we should jeopardize one-half of the landed estates in the country." After the lapse of over seventy years from the decision in D'Urphey v. Nelson, during all which period a uniform practice has prevailed extending the lien of the judgment against the administrator to all the lands of which the intestate died seized, whether in the actual or constructive possession of the heir, the argument on behalf of the respondent here contends for an exception, so limiting the rule as, in our own view, to destroy its whole bearing and effect. The proposition is, "that the judgment against the administrator and a sale under it are not sufficient to divest the title of the heir in possession, but to do so it was neces*sary to have a judgment against the heir also." Whether the decisions already referred to as the authority by which the case before us must be governed are right or wrong, they are the consequences of the construction of the statute by the Courts which heard them, and in conformity to it a rule of property was established which to this day has uninterruptedly prevailed. In the language of those decisions, "both lands and personal chattels are equally liable for the satisfaction of debts and are assets for that purpose in the hands of the personal representatives of the debtor." Such, too, seems to have been the view which Mr. Justice O'Neall took of the rule prescribed by D'Urphey v. Nelson, as may be gathered from his commentary on it in Jones v. Wightman (2 Hill, 581,) where he refers to the language of the decision. And yet this very case of Jones v. Wightman is quoted as authority to sustain the proposition now submitted on the part of the respondent. But Jones v. Wightman announces no such doctrine; it strictly enforces the rule laid down in D'Urphey v. Nelson, applying it while the heirs hold the land as descended estate, whether in actual possession or not, but denying its application, when, by partition or other acts of law, the character of the possession is changed and becomes exclusive in the heir. At page 583, he says: "According to the decision in D'Urphey v. Nelson and Martin v. Latta, if the lands had not been partitioned, are not in the exclusive actual possession of the heirs entitled to them, they would also be liable to execution on a judgment recovered against the executor or administrator." He distinguishes between the actual and exclusive possession, thus evidently making a difference between the mere pedis possessio and an actual possession so exclusively conferred by act of law as to free the land from all liability as assets in the hands of the administrator. The whole review of the said cases by the learned Judge conclusively shows that, in his regard, they proceeded on the assumption by the Court that, under the statute, the executor or administrator was considered in possession until partition or some other act would make the heir not only in actual "but exclusive" possession. The statute, in the view of the Courts which heard D'Urphey v. Nelson and Martin v. Latta, regarded the real estate in the hands of the administrator at least for the satisfaction of the debt of the intestate. The mere possession of the heir was not in conflict with the right of the creditor to subject the land to the satisfaction of his judgment against the administrator. Until partition, where the administrator should al-

*361

*362

ways *be a party, or some act of law so vesting the title in the heir as to disconnect it from the incumbrance which the statute imposes, it must remain subject to the restriction which the Courts in D'Urphey v. Nelson and Martin v. Latta declare the statute has placed upon it. We have refrained from saying anything (because not necessary to the case in hand) as to the effect of a bona fide alienation by the heir before recovery of judgment against the administrator.

Bird v. Houze, (Sp. Eq., 250,) is interposed as an authority so affecting the doctrine of D'Urphey v. Nelson as to render it inapplicable where the heir has been in actual possession. If this is so, then, notwithstanding the oft-repeated announcement of the bench, that the authority of that case was not to be dis-

turbed, the rule which it established would be of little practical avail, for in the very large proportion of the instances in this State (and the case before us presents one) they upon whom the inheritance is cast are in possession at the very moment of the death of the ancestor, for in nine cases out of ten they are members of his own household. But all that was held in Bird v. Houze, on the branch of the case we are now considering, was "that the exclusive possession of the complainants and the acts of ownership exercised by them as heirs of the intestate protected their inheritance from levy and sale under an execution against the administrator." There the Court might well apply the term "exclusive" to the possession of the widow and children, for on the death of his intestate the administrator took charge of the land in question, leased it out for two years and received the rents. At the expiration of that time, without complaint on his part, the distributees (the wife and children) took possession, holding it undisturbed for over ten years after the purchase by the defendant at Sheriff's sale. Bird v. Houze was a case in equity, and the Court, notwithstanding what it said in regard to the right of the complainants acquired by their "exclusive possession," did not rest its judgment on that ground alone, but fortified it by the right which they acquired through the laches of the defendant in enforcing his debt against the administrator.

It is not an unmeaning or profitless mode of ascertaining the true principle of a decision to look to the practice which has uniformly prevailed in regard to its subject matter. So settled has been the opinion that the decision in D'Urphey v. Nelson was to be understood in the sense of the language of the Court which pronounced it, that the final process adopted to enforce a judgment against

*363

an *executor or administrator for the debt of the testator or intestate commanded the Sheriff to levy "on the goods, chattels, houses, lands and other hereditaments and real estate which were of A. B., deceased, in the hands of C. D., his executor or administrator, the defendant, to be administered, etc." Chancellor Johnston, though never satisfied with the decision in D'Urphey v. Nelson, said in Fretwell v. Neal, 11 Rich. Eq., 571: "it would be an alarming doctrine that a purchaser of estate property under a subsisting judgment against the executor, which judgment expressly makes that property liable, has not obtained a good title simply because the creditor did not make the distributees or legatees parties to his suit, but sued the executor (not being allowed by the forms of law to sue any other) for his debt. Every day furnishes us with instances in which the executor or administrator necessarily represents distributees and legatees in such suits; and if, under such proceedings, a devastavit is committed, the remedy must be against the executor." In Drayton v. Marshall, (Rice Eq., 388 [33 Am. Dec. 84]), Chancellor Harper said: "It is true that it has been determined (unfortunately, I think,) that the lands in the hands of the heir may be seized and sold under a judgment against the executor himself when the heir has had no opportunity of being heard or making defense. These decisions are too well settled and too many rights have vested under them to permit their being questioned."

It should not be forgotten that the question before us is not as to the nature of the property of the intestate which is to be first applied to the payment of his debts. The case is one at law, for the recovery of real estate, to which the plaintiff asserts title through a sale under an execution on a judgment against an administrator on a debt of his intestate, bringing himself clearly within the established rule in D'Urphey v. Nelson and Martin v. Latta.

While these cases may not have been entirely satisfactory to some of the Judges who have followed those who decided them, they have been adhered to as prescribing rules of property now well understood and accepted by the community. The indisposition of our predecessors to interfere with the principles which they established may be seen in the oft-repeated declarations both of the law and equity Judges to which we have referred. A deference to the wisdom and experience of those whose places we occupy should deter us from an exploration in search of new principles affecting the regulation of the landed property of the country, when the people,

*364

*by their acquiescence without complaint, seem to be satisfied with those familiar to them by their long existence. It may be safer (at least in regard to legal principles, to which rules of property owe their origin,) to sustain the foundations on which our fathers built. So we thought in Morse v. Adams (2 S. C., 58,) and Gage v. City Council of Charleston, (3 S. C., 492,) and we see nothing in the case before us which should induce a departure from the views which there governed us.

The motion is granted and the case remanded for a new trial.

WRIGHT, A. J., concurred.

WILLARD, A. J. The action was to recover possession of land to which the plaintiff claimed title through an execution and sale under a judgment recovered against the administrators of C. Huggins, deceased, upon a debt due by C. Huggins in his lifetime. The defendant is the widow of C. Huggins, who, with her children, is in possession of the land claimed and has since the death of her husband resided on the premises and used the rents and annual value.

The answer of the defendant denies the

plaintiff's title, and sets up a claim to homestead, not alleging title in herself or her children as the distributees of her husband. It appears that the actual question on the trial of the case was whether the title of the defendant as distributee of C. Huggins was divested by a sale under a judgment recovered against the administrator of C. Huggins to which the defendant was not a party, and when the defendant was in possession claiming title as distributee. The Circuit Judge allowed a motion for nonsuit and dismissed the complaint. In order to determine the present question, it is necessary to decide whether lands in the possession of an heir or statute distributee, actually held under a claim of title as such heir or distributee, are liable to process issued on a judgment recovered by a creditor of the ancestor against his personal representative.

The question is of extreme difficulty under the various decisions of the Courts of this State bearing upon the point, and in order to approach it properly it will be necessary to review the various cases on the subject, to determine first what are the points actually and authoritatively adjudicated on the subject, and, second, what rule and doctrines have been recognized under these various decisions.

First, then, as to the exact points ruled, which, upon the principle of stare decisis, should remain undisturbed. In pursuing this

*365

*view, we must limit the scope of the various decisions to the exact point presented by the cases for determination.

The first case to be considered is D'Urphey v. Nelson. This case came twice before the Court—the first time in 1803, on an appeal taken by the defendant from a verdict rendered for the plaintiff, and a new trial was granted. This decision is reported in Brevard, 289, and also in a note to Martin v. Latta, (4 McCord, 128.) The second appeal was heard in 1805 and was in behalf of the plaintiff from a verdict rendered for the defendant, when a new trial was ordered, and is reported in 1 Brevard, 476.

In D'Urphey v. Nelson, as reported in 1 Brevard, 289, and the note to Martin v. Latta, the rule is stated in the broadest terms, that under a judgment against the personal representative on a debt of the ancestor, the lands of such ancestor in the hands of his heir by descent may be levied without resort to a scire facias, and that the fact that the heir has not had notice or an opportunity to defend does not affect the operation of the judgment. To what extent were the points considered in this decision called for by the nature of the case, and to what extent is its authority limited by the facts of the case as presented? The action was brought by the heir. The defendant claimed that he had acquired title by a sale in execution under a judgment recovered against the administrator of the plaintiff's ancestor upon a debt due by such ancestor. It is not alleged that the heir had at any time since the death of his ancestor been in possession. For aught that appears, the administrator or a stranger may have been in possession at the time the action was commenced and when the judgment was recovered. Had the heir been in possession at the time of the levy and sale, it would be reasonable to expect that the action would have been brought by the purchaser at the Sheriff's sale against the heir, whereas the reverse was the case. Assuming the heir to have been in possession, it would be necessary to infer that he voluntarily relinquished that possession to the purchaser and then turned around and sued him to regain the possession thus voluntarily relinquished. Such a presumption has not reasonable ground of probability. We are at liberty, and indeed are bound, to conclude that the case of an heir being in possession at the time of the commencement of the action against the administrator as well as at the time when judgment was recovered and executed, claiming the land by descent, was not before the mind of the Court. Had it ap-

*366

peared in that case that *the heir not only had been so possessed but that he was capable of making a good defense to the suit which the administrator had allowed to go by default, a case would have been presented full in all the elements necessary to give the fullest authority and sanction to the broad statement of the rule made in that case.

The fact that the Court then considers the question whether in such cases a sci. fa. should have issued, does not tend to show that the court had in mind the case of an heir possessed of a full defense. It was not the office of a sci. fa. to bring into question any matter existing before or at the time of the judgment as a means of enlarging or narrowing its scope and effect, of which advantage might have been taken by a plea in bar. The office of the sci. fa. was to bring into consideration matters arising subsequent to the judgment which ought to affect its binding force or capability of being executed. We have no reason to suppose that the Court understood the objection of the want of a sci. fa. as importing anything beyond a question of regularity in the mode of executing the judgment, unless, perhaps, as a means of having the personalty applied before the realty was reached. When the nature of the sci. fa. is considered, we have reason to conclude that the Court did not consider itself called upon by the nature of that objection to decide that an heir who has a defense in such cases is without remedy if the administrator neglects or refuses to interpose such defense, even though the heir has no notice of the pendency of such suit until judgment obtained. The rule that the binding force of a de-

cision, as committing the future action of the Court, is limited to so much of the opinion of the Court as was essential to determining the case actually presented, is worthy of greater attention than is bestowed upon it in ordinary practice, for upon it depends the possibility of a full and logical development of law. Its foundations are not laid in an arbitrary assumption nor in any expedient adopted on the ground of convenience. It is sanctioned by experience and springs from a vital principle underlying the operations of the human judgment. Outside of the facts and necessities of a case, judicial conclusions are speculative; it is only when confined to the necessities of the case that they are practical. The speculations of the judicial mind have no peculiar sanction and are as apt to be erratic as those of any other class of systematic thinkers. A practical conclusion derives its value from the sense of responsibility that accompanies it, calling into

*367

action *the united powers of the mind. If that sense of responsibility at times appears to check the rapid progress of the mind's action, it at all events gives the highest possible assurance that whatever progress may be accomplished will be substantial and sound. It is the nature of the common law to grow by slow and gradual accretions, and the judicial mind that is anxious to make rapid and extensive conquests to add to the stock of fixed legal ideas is in danger of laboring fruitlessly, because out of harmony with the spirit of the common law. If the rule we are considering was inflexibly adhered to when the disposition of the Judges was to confine themselves strictly to the matter in hand, it is of still greater importance at the present day, when there is a strong tendency to deal with legal subjects on speculative and theoretical grounds. D'Urphey v. Nelson is not a case to which the application of the rule just considered is obvious. The learned Judges who decided that case understood fully the importance of strict adherence to the matter in hand, and their opinion contains nothing but what is germane to the case before the Court. Under the views taken by them of the case, it was necessary to put a construction on the language of 5 George II, and they did so. The question clearly involved such a construction, and so far their determination must be regarded as settling the law. They concluded that lands descended were leviable under a judgment against the personal representative recovered upon a debt of the ancestor. So far, the case called for a determination of the point, and, so far as the principle of stare decisis, the case possesses indisputable authority. The rule for ascertaining the weight of authority steps in here not for the purpose of consulting the weight of any conclusion stated by them, but for the purpose of adding together the real sense and intention of their decision.

They certainly did not intend to hold that no intervening right of third persons, or even of the heir himself, should prevent the land being subjected to the judgment against the administrator. It is only necessary to point to the decisions in the various cases that had reviewed the ground assumed in D'Urphey v. Nelson, which will be considered hereafter, to see that it has always been held, not only that there were exceptions to the rule laid down in that case, but that they could be admitted without disturbing the rule itself.

*368

*Yet the opinion of the Court in that case gives no intimation of the possible existence of any such exceptions. It would be very unusual for a decision standing in the position of giving the first definitive statement of a rule embracing a comprehensive series of subjects to go so far as to define, with exactness on all sides, the boundaries that are to limit its applications. If this was possible, it certainly was not attempted by the Court in D'Urphey v. Nelson. If it was inconceivable that the Court should at once attempt to anticipate all the contingencies that might, in the future, affect the application of the rule of construction propounded, it is still more inconceivable that they should attempt to declare that the rule was without limitation or exception. I can find no sanction for the idea that the Court intended more than to state a general rule, like all other rules, subject to exception. And this conclusion is strengthened by the fact that the facts of this case were such as to call for nothing beyond a general rule of construction. The case was a naked case, involving no circumstances that could by possibility bring in question any exception or limitation to the rule of construction, and, therefore, we mean that a general statement was requisite. So far, then, as it regards the authority of D'Urphey v. Nelson, the law stood substantially that lands descended were assets of the ancestor of such a nature that process issued to enforce a judgment against the personal representative might subject them, leaving the question unsettled as to what rights acquired, act performed or assertions of right preferred on the part of the heir, or of third persons, should prevent such subjection of the descended lands until a sufficient cause for subjecting them is established against such heir or other claimant.

In looking into the cases following D'Urphey v. Nelson, we will find the view of that case just presented fully confirmed. We will find there distinct exceptions recognized and established, not as considered by the Court as impugning the authority or doctrine of that case, but as exceptions properly embraced within the spirit and intention of the rule laid down by it.

In Martin v. Latta, (4 McC., 128,) the suit was partition among distributees.

The purchaser under a judgment recovered against the administrator was a defendant, and pleaded that he was legally seized and possessed of the land in dispute, "in his own demesne as of fee." So far, then, as it regarded this defendant in possession, the is-

*369

sue was *equivalent to that of a suit to try titles against a defendant in possession. The report says: "The only question submitted to the decision of the Court was whether the lands of the intestate could be sold by the Sheriff under an execution obtained against the administrator, there being sufficient personal assets to pay the debt without making the heirs parties to the proceeding."

The only fact that appears in the statement of this case that introduces any question not fully considered in D'Urphey v. Nelson was the fact that there were personal assets sufficient to pay the judgment without resorting to the realty. That raised a question merely of the priority among different classes of funds bound by the judgment. The question of the liability of the lands under the judgment, independent of the question of priority in their application, stood on the same grounds as those passed upon in D'Urphey v. Nelson. In both the purchaser was in possession, leading to the inference that the distributees had never been in possession, and thus the question, being nakedly presented, as it was in D'Urphey v. Nelson, called for nothing more than adhesion to the distinct authority of that case. And this was all that the Court did beyond denying the existence of any right of prior application and sanctioning the reasons on which the decision in D'Urphey v. Nelson rests.

In Jones v. Wightman, (2 Hill, 579,) the action was trespass, quare fr.

The plaintiff was in possession as a purchaser under a judicial sale for partition. The defendant was sued for entering his close for the purpose of executing against the land final process issued upon a judgment recovered against the executors of the testator whose title plaintiff had acquired through the proceedings for partition. The question was, therefore, whether lands devised and in the possession of one who had purchased them under a sale for partition could be subjected under process issued upon a judgment recovered against the executors on a debt of the testator, when neither the devisees, nor the purchasers under them, were parties to or had notice of the pendency of the action in which such judgment was recovered.

It was held that under such circumstances the lands could not be reached. We will consider hereafter the views of the Court on the proper understanding of the decision in D'Urphey v. Nelson; at present, we are only concerned with the actual point ruled. We

*370

*may regard this case as limiting the rule that lands descended are general assets, as laid down by D'Urphey v. Nelson, so as to exclude a purchaser from a devisor or heir from its operation. Bird v. Houze (Speers Eq., 250,) was a bill for partition by distributees who were in possession. The main point of contest was with a defendant who claimed the premises sought to be partitioned in fee under a sale in execution of a judgment recovered against the administrator on a debt of the intestate. Although the case was in equity, the question was as to what legal right, if any, the defendant acquired under the judgment and execution. The complainants did not claim a right to come into equity in virtue of any equity they had to deprive the defendant of any legal right he may have acquired under the judgment and execution, but sought the Court of Equity in order to obtain partition among themselves,—the question of the defendant's claim of title arising incidentally and collaterally, its existence being independent of the partition they were seeking among themselves. We must regard the judgment of the Court as bearing upon the question of what legal rights, if any, the defendant acquired under the judgment and execution.

This was the first case of the class to which D'Urphey v. Nelson belongs, in which it distinctly appears that the distributees took and held actual exclusive possession of the descended lands at the time the action was brought and the judgment recovered against the administrators.

It was also the first where it distinctly appeared that the distributees had a defense to the action against the administrator which the administrator neglected to interpose, and which the distributees were prevented from interposing by want of notice of the pendency of the action. The defense referred to was not a favored defense, but was that of the Statute of Limitations. It was, therefore, the first case in which all the elements of the question were present to enable the Court to define with any degree of certainty the terms and limitations of the rule broadly stated in D'Urphey v. Nelson.

The Court denied the legal right of the defendant on both grounds: First, the actual and exclusive possession of the distributees; and, second, the fact that they had a valid defense to the action against the administrator.

Looking only to the necessary consequences resulting from the point actually made in this case, we are brought to the conclusion that it is authority for this proposition, that when

*371

the heir has *actual exclusive possession of the descended lands at the time of the pendency of the action against the administrator, and a good defense which might have been interposed by the administrator, but was not, the heir not having notice and an opportunity to defend, the descended lands cannot be subjected in his hands to a judgment recover-

ed in such action against the administrator. So far, the effect of Bird v. Houze will not be controverted.

It is necessary to look closely into the nature of the proposition thus advanced by Bird v. Houze in order to see what the principles are that are asserted and vindicated by it.

According to Bird v. Houze, an heir in actual and exclusive possession of descended lands has an absolute right to insist, where a valid defense exists to an action brought against the personal representative on the ancestor's debt, that such defense shall be interposed. And if such defense is not interposed, the judgment recovered against such personal representative is not a lien on the descended lands in his possession.

This proposition is in exact conformity to the point ruled in Bird v. Houze, independently of the reasons given by the Court for its decision in that case. It does not warrant the conclusion that an heir upon whom the title is cast by descent, but who has not taken actual and exclusive possession, can exercise such rights of defense. If such was the necessary conclusion from this case, it would stand in irreconcilable hostility to D'Urphey v. Nelson, as we shall hereafter see. On the contrary, it is conceded to an heir in actual and exclusive possession, arising from the nature of such possession. Such being the case, the test of the right of an heir to defend the descended title is whether or not he has had actual and exclusive possession. The right to defend, if the administrator does not, as will hereafter appear, is equivalent to a right to an absolute defense, and is of such nature that it cannot be perfectly exercised unless the heir is made a party to the action. We will now proceed to verify the conclusions just stated.

It is only possible to reconcile Bird v. Houze with D'Urphey v. Nelson by regarding the first named case as deciding that when an heir has exclusive actual possession the judgment recovered against the personal representative, without making the heir a party or in some way connecting him in privity with the judgment, shall not bind the lands descended in his hands. It will appear that if such fact of actual possession is not

*372

in itself sufficient to protect the *descended lands in the hands of the heir unaffected by privity with the judgment, the additional fact that the heir has a defense that the administrator has neglected to interpose cannot make it sufficient without completely undermining the authority of D'Urphey v. Nelson.

It is important to examine carefully the proposition just stated, which, if true, must be decisive of the present case, inasmuch as the result that flows from harmonizing D'Urphey v. Nelson with the cases depending on it, is the true result to be sought for in settling the law on this point, so long in discussion and doubt.

The first proposition to be considered is, that the two cases can be reconciled if we regard Bird v. Houze as simply deciding that the actual and exclusive possession of the heir precludes his being ousted without notice and an opportunity to defend. That these two cases, upon such construction, would not actually interfere with each other, so far as it is a question of authority between them, appears from what has been already presented, namely, that the fact of an actual and exclusive possession was before the Court in Bird v. Houze, and was not before the Court in D'Urphey v. Nelson. It is still, however, important to go a step further and see whether the ground upon which the decision in D'Urphey v. Nelson rests would be disturbed by excepting from the rule there laid down the case of an heir having actual and exclusive possession.

D'Urphey v. Nelson is based upon a construction of 5 George II alone. The clause of the statute on which that case rests is that which declares that lands in the plantations shall be "subject to like remedies for seizing, extending, selling and disposing thereof for such debts in like manner as personal estate in the said plantations are seized, extended, sold or disposed of for satisfaction of debts." The object of the statute, according to the construction given in that case, was to assimilate the remedies for satisfying judgments out of both realty and personalty. D'Urphey v. Nelson holds that the naked fact that lands have descended by operation of law does not prevent them from being treated as general assets for the payment of the debts of the ancestor chargeable as against his personal representative. So far, the analogy between the situation of realty and personalty considered as assets is perfect, satisfying what the Court considered to have been the intention of 5 George II. If it is held that actual and exclusive possession by the heir prevents the descended

*373

assets from being seized under a *judgment against the administrator alone, will the analogy between the cases of realty and personalty similarly situated be destroyed? If not, the whole object of the decision in D'Urphey v. Nelson will remain intact, notwithstanding such a conclusion. In a case approaching very closely in principle to the one first stated, personalty loses its character of general assets and cannot be seized under an execution upon a judgment recovered against the personal representative. It is the case of a legacy after assent and actual possession by the legatee.

It was distinctly held in Alexander v. Williams (2 Hill, 522,) that after assent and actual possession taken by a legatee, a creditor of the testator cannot seize the property which was the subject of such legacy,

in the hands of the legatee, under a judgment against the executor. It is said that the remedy in such cases is, in equity, for contribution, in which suit may be pleaded title by possession matured by lapse of time. The reason assigned for this in the charge of the Circuit Judge in the last named case is that, inasmuch as assent places the subject of the legacy beyond the reach of the executor, it placed it equally beyond the reach of the creditor, there being no allegation of fraud as affecting the assent.

If the reason thus assigned is regarded as the ground of the decision in Alexander v. Williams, then, applying that reason to a case where it is attempted to follow realty into the hands of an heir in actual possession, and the answer is that, inasmuch as the administrator cannot in his own right take the descended lands as assets, a creditor of the intestate in the right of the administrator can do no more than the administrator in his own right could do. If the administrator finds it necessary to make the land descended available as assets for the payment of the debt of the estate, he is compelled to obtain an order for the sale of the realty, and to that proceeding the heir is a party and can defend his own interest. To allow the creditor of the intestate to seize the land under a judgment against the administrator alone, would be to allow to him a remedy better than that which the administrator possesses as the representative of all creditors according to their priorities over the assets. But, apart from the particular ground stated in Alexander v. Williams, if we compare the relative positions of a legatee in possession after assent and a distributee in actual possession, we will find that in every way the reason for not extending the operation of the judgment to the property in the hands of the heir or dis-

*374

tributee *is stronger than those for not extending the operation of the execution against the executor to the property in the hands of the legatee. The title of the legatee is derived from the will of a testator—that of the heir from the law itself. The right of the legatee to enter upon the enjoyment of his legacy is dependent, to a certain extent, upon the will of the executor, and possession and enjoyment can only rightfully be had when it is seen that ample provision is made for the payment of all the testator's debts; the right of the heir to enter is conferred by operation of law, and arrives at once upon the death of the ancestor, and is absolute. A legacy assented to diminishes the fund primarily devoted to the payment of debts, while the estate of the heir is of so much importance that in equity all legacies must fail before it is subjected to the ancestor's debts.

If, then, execution for the satisfaction of a judgment against the executor cannot be levied in the hands of a legatee after assent and actual possession taken, and if, following the ruling in D'Urphey v. Nelson, the realty ought to stand in the same position in relation to such a judgment as the personalty does, then, as it follows that the realty should be exempt where the personalty is, lands in the actual possession of the heir ought not to be subject to levy under a judgment against the personal representatives to which the heir is neither party nor privy.

Assuming, then, the real ground of decision in Bird v. Houze to be the fact of actual and exclusive possession by the heir, and the relation of that case to D'Urphey v. Nelson can be clearly and satisfactorily stated. D'Urphey v. Nelson declares that, according to the true intent of 5 George II, real estate must be subjected to a judgment where under similar conditions personal estate would be so subjected. Personal property derived by a legacy after assent and actual possession had is not so liable. Land in the actual and exclusive possession of the heir or distributee is in like condition with personalty held by a legatee after assent, and accordingly Bird v. Houze declares that, under the authority of D'Urphey v. Nelson, land so circumstanced is not so subject.

It is not possible to bring D'Urphey v. Nelson and Bird v. Houze into harmony on the idea that the last named case turned upon the fact that the heir had a defense which the administrator had failed to interpose.

Let us state the law as it would have to stand under such a view of Bird v. Houze as that last mentioned: The creditor of a

*375

de*ceased person may bring an action against his personal representative; and if he shall recover judgment in such action, he shall be entitled to process against the personal property and also against the lands of such deceased person in the hands of his heir, and that the heir shall not object that he has not been impleaded to answer as to assets descended; but there shall be a good defense to such action against the personal representative. And if the defendant shall fail to set up such defense, the creditor obtaining judgment therein shall not have execution against the lands of the deceased in the hands of his heir, but shall only have execution against the personal assets in the hands of such personal representative. Such disjointed relations would result under the views now being examined. The right of the creditor as it regarded the nature and effect of the process allowed for satisfying his judgment would be dependent on the will and conduct of the personal representative, and upon the way in which he discharged some assumed duty of protecting a third person neither a party nor a privy to the judgment from what might be an incidental consequence of the recovery of a judgment upon such third person. This is practically sub-

ordinating the remedy of a creditor to the duty that a personal representative owes to those in whose interest he ought to exercise his representative powers. It will not be necessary to point out the complication, both as it regards the nature of the rights and remedies of the parties, that would result if the idea of Bird v. Houze, under immediate consideration, should prevail, as they are obvious. It is enough to say that it is a sacrifice of all the simplicity that should characterize the nature and operations of remedies.

Chancellor Harper held in Vernon v. Valk (2 Hill Eq., 257,) that the heir is not bound by a judgment against the personal representative, and is not by operation of law either a party or privy to it. This is evidently said of the personal relation of the heir to such a judgment, and does not necessarily touch the question whether lands to which he has title by descent can be levied when under such judgment. This being the case, it would be difficult to see how the heir could justly complain that an administrator had not pleaded properly in an action to which he is neither a party nor a privy. But it may be said that the effect of the judgment is such that his lands will be taken away for its satisfaction. If the heir has a right to make such a com-

*376

plaint, legatees and distributees in*terested in the personalty alone have still greater grounds to complain, for their interest relates to the fund that must primarily suffer from any unjust demand established against the personal representative, while the heir, even if he loses his lands, may possibly be able to throw the loss on those interested in the personalty. Such a complaint could not be listened to as a means of shielding the personal assets from a judgment recovered against the administrator, however, negligent the administrator may have been in making a defense. How then, consistently with D'Urphey v. Nelson, that assimilates the remedies as affecting realty and personalty, can the heirs enjoy a privilege that is denied to those interested in the personalty alone? It may be said that such a discrimination against those interested in the personal estate results from the fact that the law casts the title to the personalty upon the administrator, and his act, in default, necessarily binds it. Conceding that where the title is cast, there the right and duty to defend that title should be lodged, it would follow that in the case of the heir, inasmuch as the law casts the title upon the heir, the right to defend that title should be lodged in his own hands, and should not be subjected to the control of another, who may either be without a motive to exercise it or absolutely hostile to its exercise. It is not just to ascribe to D'Urphey v. Nelson any purpose so inconsistent with justice and convenience as would warrant such a purely arbitrary means of limiting its effect as that of holding that the effect of a judgment, as it regards lands in the hands of an heir, should depend upon the degree of zeal and fidelity with which the administrator seeks to protect the lands of the heir. That case, properly understood, may have misconceived the object and intent of 5 George II, but can lead to no inconvenience. While the descended lands remain undistinguished from the other assets of the estate, with no visible and actual claimant and occupant upon whom process can be served, no inconvenience can result from subjecting it in common with other assets to those general remedies that are usually employed for the satisfaction of the debt of the estate. If the heir wishes an opportunity to make a personal defense, he has but to enter and take actual and exclusive possession, and then he must be made a party to a suit seeking to subject such realty.

Thus far the cases have been considered apart from the reasoning adduced by the Judges for the support of their conclusions, and it is clear that their harmony and con-

*377

sistency is not only possible but *certain if we regard them as supporting the doctrine that actual exclusive possession by the heir prevents a judgment recovered against the personal representative alone from being enforced as against the descended lands so held. It remains to gather from the opinions delivered by the various learned Judges who have passed upon the question, in the various aspects in which it has heretofore been presented, the conclusions of their minds as to the principles involved, and the degree of authority to which the respective cases are entitled. In deciding a question that has seriously embarrassed the bench and bar for a long period of time, no means of throwing light upon the subject should be overlooked or neglected. The tax that is imposed upon the attention by a full consideration of all the lights thrown upon the subject is due to the importance of a question that has been able to elicit so much labor, care and anxiety in the past.

The reasons assigned in D'Urphey v. Nelson for its conclusions are dependent wholly upon the idea that the intent of 5 George II was to abolish any difference that had previously existed between realty and personalty as it regarded processes issued for the satisfaction of a judgment. The cases contain no warrant whatever for holding that lands would be subject to execution when personalty under like circumstances would not.

In Martin v. Latta, the Court do not seek to enlarge the rule laid down in D'Urphey v. Nelson. Some explanations are made for the purpose of showing the reasonableness of that rule, but they all point to the conclusion that the most that was to be understood of the intention of D'Urphey v. Nelson was to place realty on the same footing with

personalty, as it regards the effect of a judgment against an administrator.

In Vernon v. Valk, (2 Hill Ch., 257,) Judge Harper says: "Notwithstanding our decisions that lands in the hands of the heir may be sold by an execution upon a judgment against the executors or administrator, (decisions which, however much we may regret them, have yet obtained too long, and too many rights have vested under them to interfere with them,) yet I suppose an action at law might be sustained against the heir alone." We may safely assume that the Court that used this language did not feel inclined to enlarge the scope and effect of decisions in regard to which they could not suppress the expression of a regret that they had ever existed. We may then conclude that when lands in the hands of the heir are

*378

*spoken of, what is meant is that the fact that the legal title is cast upon the heir does not operate to prevent their being subjected to the judgment against the personal representatives. The language quoted above was not called for by the case in hand, the real question there being to what extent, if any, the heir or devisee was personally bound by a judgment against the personal representatives. In Jones v. Wightman, (2 Hill, 579,) Judge O'Neall states his understanding of D'Urphey v. Nelson and Martin v. Latta in the following language: "So long as they remain [the lands descended] in the hands of the heir, they are liable to be seized in execution under a judgment recovered against the heir for the debt of the ancestor. According to the decisions in the cases of D'Urphey v. Nelson and Martin v. Latta, if the lands have not been partitioned and are not in the exclusive and actual possession of the heir entitled to them, they would also be liable to execution on a judgment recovered against the executor or administrator."

As we have already seen, the case of Jones v. Wightman turned on the fact that the heir had alienated the lands in question. If, then, the language of Judge O'Neall is not to be regarded as a final exposition of these cases called for by the case before the Court, still it is of great authority and importance as showing that the view of D'Urphey v. Nelson, already presented, was fully considered and understood by the bench at that early day. Judge O'Neall refers to Alexander v. Williams, already noticed, as sanctioning the view of this case presented by him. Although he does not point out the exact features of Alexander v. Williams that support that view, yet he affords, by his reference to that case, a clear intimation that, directly or indirectly, it limits or explains those cases. It has already been seen that Alexander v. Williams, when properly understood in its relation to the previous cases, does in fact, though indirectly, sustain the views above quoted from the language of Judge O'Neall in Jones v. Wightman. In Bird v. Houze, (Speers Eq., 250,) Chancellor Dunkin sustains, in the Circuit decree, the construction contended for by Judge O'Neall in Jones v. Wightman. Although, as in this case, the fact appeared that the complainants had been in actual and exclusive possession for upwards of ten years, and it, therefore, did not necessarily call for a decision as to the effect of an actual and exclusive possession of short duration, yet it is not clear that the Court intended to confirm its reasons to a case where possession had ripened into title,

*379

*but to include every case of actual and exclusive possession, however short might be its duration. The following language from the opinion of Chancellor Dunkin favors the latter conclusion, and is of especial value as the expression of a Judge of great prudence. He says "the rule in D'Urphey v. Nelson is held by the Court in Jones v. Wightman to apply only to cases where the heir has done no act as heir asserting his right of possession before suit brought against the administrator and a recovery had. Recognizing the authority of these cases, the Court is of opinion that the exclusive possession of the complainants and the acts of ownership exercised by them as heirs of the intestate protected their inheritance from levy and sale under an execution against his personal representatives." It may admit of question whether the authority of this case ought to be regarded as finally settling the law in accordance with the opinion in Jones v. Wightman; but, at all events, it brings to bear on the present question a weight of judicial opinion entitled to the greatest respect, and supporting the views already presented in regard to the authority of D'Urphey v. Nelson and the cases following it.

It appears, then, that, whether we have regard to the direct authority of the decided cases or to the current of judicial opinion, we are brought to the same conclusion, namely, that when the heir or distributee has actual and exclusive possession of descended lands, such lands cannot be subjected under a judgment recovered against the personal representative to which the heir is not a party.

For the reasons above stated, I am compelled to differ from the majority of the Court.

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6 S. C. 379

ZIMMERMAN v. AUTLEY.

(Columbia, April Term, 1875.)

[*Reference* ⇐89.]

The report of a Referee upon questions of fact set aside as against the evidence, although concurred in by the Circuit Judge.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 135; Dec. Dig. ⇐89.]

Before Graham, J., at Orangeburg, October Term, 1874.

This was an action by Thomas H. Zimmerman against J. W. Autley and others to subject certain real estate to the claims of the

*380

*judgment creditors of Rufus P. Autley on the allegation that it was purchased and paid for by him, and that he, with the intent to defraud his creditors, of whom the plaintiff was one, procured the conveyances to be made to another for the benefit of himself and family, and also to set aside a confession of judgment made by Rufus P. Autley to the same party to whom the conveyances were made. The transactions all took place in 1868 and 1869, and the action was commenced in 1870. The issues in the case were referred to a Referee, and the case came before the Circuit Court on exceptions by the plaintiff to his report in favor of defendants.

The case on the report and exceptions was first heard at May Term, 1873, when His Honor, after stating that the report appeared to the Court to be irregular and defective, made an order that the report be set aside and the case placed on the calendar for trial by a jury. At May Term, 1874, this order was rescinded and an order made that the case be reheard by the Court on the Referee's report.

At this term, the case was reheard on the report and exceptions, and His Honor made an order confirming the report.

The plaintiff appealed upon grounds which presented no questions of law, but objections only to the report for numerous alleged errors in reference to the facts and the evidence.

Izlar & Dibble, for appellant.

Glover & Glover, DeTreville, contra.

November 23, 1875. The opinion of the Court was delivered by

WILLARD, A. J. The Circuit Judge and Referee, who tried the case on a reference of the whole issues, agree in their conclusions. They hold that the evidence is not sufficient to establish fraud as affecting the deeds set forth as the subject of complaint. Had they, in drawing their conclusions as to the facts of the cases, passed upon all the questions of fact involved and put at issue by the pleadings and properly applied the rules of law having a bearing on the case, according to the established practice of this Court, their conclusions would not, ordinarily, be disturbed. There is, however, a radical defect in the report of the Referee that ought to be corrected on appeal. The question at issue was, whether certain deeds of land, executed in form to D. D. Autley, were intend-

*381

ed for the benefit of *R. P. Autley and were made in the name of D. D. Autley for the purpose of defeating the creditors of R. P. Autley. The facts are, briefly, as follows: R. P. Autley was active in negotiating a purchase of two tracts of land from different parties. Title was taken in the name of D. D. Autley. D. D. Autley shortly afterwards conveyed the same land to Jacob W. Autley in trust for the use of R. P. Autley and wife, with certain limitations, intended to make provision for themselves and their children. It is in proof that R. P. Autley was largely indebted at the time, among others to the plaintiff. The errors of the Referee consisted in his attaching undue importance to the question as to who furnished the money for making the cash payments on the purchase and paying too little attention to the other badges of fraud afforded by the evidence. The fact of R. P. Autley's indebtedness is undisputed. It is clear, from subsequent events, that the purchase was intended for the benefit of R. P. Autley and as a means of support to himself and family. The fact appears that R. P. Autley was an active agent in conducting the negotiations, and the inference is irresistible that the scheme of the purchase originated in his mind. It is also in proof that R. P. Autley, immediately upon the purchase, occupied the purchased lands ostensibly as owner. Even if it is assumed that the money that paid the cash portion of the purchase money was D. D. Autley's money, that fact is not conclusive, for it might have been a loan or advanced for R. P. Autley for the express purpose of enabling him to consummate a fraud upon his creditors.

We are satisfied that the evidence affords clear and distinct badges of fraud which might have been cleared up and explained had the transaction been an honest one, but which the defendants have altogether failed to explain.

The Circuit Judge appears originally to have been of the opinion that the report of the Referee was defective; for, on the 17th of May, 1873, he vacated the order of reference upon hearing the Referee's report, and ordered the case to be tried before a jury. However, upon objection on the part of the defendants to a trial by jury, he, on the 26th day of May, 1874, rescinded that order and ordered the case to be reheard on the Referee's report. A hearing was had and the report of the Referee was confirmed without any statement of the grounds or reasons for such confirmation, and without any explanation of the apparent inconsistency between the two orders based on the Referee's report.

*382

*On the whole evidence, it is clear that the plaintiff has proved that the deeds referred to for that purpose in the complaint were intended for the benefit of R. P. Autley, and that they were made in the name of D. D. Autley with a fraudulent intent to hinder, delay and defraud the creditors of R. P. Aut-

ley, and that the creditors of R. P. Autley are entitled to have recourse to the lands in question for the satisfaction of their debts.

One of the questions passed upon by the Referee was as to the validity of a judgment confessed by R. P. Autley to D. D. Autley which the plaintiff alleges to be void as intended to defraud creditors.

The Referee held the judgment free from fraud and valid, and that conclusion was sustained by the Circuit Judge. It would appear from the finding of fact on which the Referee based his judgment as to the validity of the confession of judgment, that an error in the application of the rules of law accrued in reference to this part of the case similar to that already pointed out as affecting the determination of the question of the validity of the deed. The finding of fact in question is as follows: "That the confession of judgment from Rufus P. to D. D. Autley, 1st May, 1869, is based on a note for money lent."

In order properly to support a judgment, the findings of fact should be such that the judgment is a necessary conclusion of law from them. The finding in the present case does not necessarily lead to the conclusion embodied in the judgment. The fact might exist that the note on which the confession of judgment was based was for money loaned, and yet the transaction might have been fraudulent. It might have been loaned for the express purpose of enabling R. P. Autley to consummate a fraud upon his creditors. It is not for us, in the present state of the case, to determine from this evidence whether the loan of money in question was so far connected with the fraudulent deed as to become affected by it. The evidence was conflicting, and questions of credibility entered into its solution. Such questions ought to be distinctly passed upon by the Court below, and where that duty is neglected this Court will ordinarily remand the cause for a full determination of all the questions properly involved.

The question of the validity of the judgment may have depended in the mind of the Referee upon the other question of the validity of the deed; and as, in our judgment, he

*383

arrived at an erroneous *conclusion on that question, that question may have affected his determination in reference to the validity of the confession.

The report must be set aside. The question of the validity of the confession of judgment must be submitted to a jury under issues to be framed for that purpose, and the cause remanded to the Circuit Court to carry into effect the directions and conclusions hereinbefore stated; and so it is ordered.

MOSES, C. J., and WRIGHT, A. J., concurred.

6 S. C. 383

THE STATE v. DENT.

(Columbia. Nov. Term, 1875.)

[*Criminal Law* ⟸323.]

On a trial for murder, it is not necessary to prove the venue by affirmative evidence. If the witnesses state the name of the place where the killing occurred, the jury, from their own knowledge, may conclude that it was within the County as laid in the indictment.

[Ed. Note.—Cited in State v. Vari, 35 S. C. 177, 14 S. E. 392; City of Florence v. Berry, 61 S. C. 243, 39 S. E. 389.

For other cases, see Criminal Law, Cent. Dig. § 726; Dec. Dig. ⟸323.]

Before Maher, J., at Aiken, May Term, 1875.

The prisoner, Louis Dent, was tried for murder, the indictment alleging the offense to have been committed at Graniteville, in the County of Aiken. He was found guilty, and moved an arrest of judgment. The motion was overruled, and, after sentence, he appealed to this Court.

Jordan, Elliott, Lee & Clyde, Sparnick, for appellant.

Wiggins, Solicitor, Finley & Henderson, contra.

December 6, 1875. The opinion of the Court was delivered by

WRIGHT, A. J. The indictment charges that the assault upon the deceased was made by the prisoner at Graniteville, in the County of Aiken.

The prisoner was found guilty of murder. The counsel for the prisoner moved an arrest of judgment on the following grounds:

1. That His Honor the presiding Judge erred in refusing a motion of the defendant that the jury then and there charged with the trial of the above mentioned case be directed

*384

and in*structed to find a verdict of "not guilty," the State having failed as it appears from the minutes of His Honor the presiding Judge, to support by affirmative proof the venue as laid in the indictment.

2. That His Honor the presiding Judge erred in submitting the case to the jury in the absence of affirmative proof to establish the jurisdiction of the Court in the above mentioned case.

The Court refused to grant the motion in arrest of judgment, and by appeal it is brought to this Court.

The testimony of Jerry Tillman, as applies to venue, is as follows:

"Was at Graniteville that day and saw the affray. It was at Thorp's bar-room. Deceased was on East side of road, prisoner on West side. I was standing up there in the road. Deceased and I had been talking friendly."

As to the killing, the same witness says:

"After a while, prisoner said to deceased: 'God d—— n you, I will cut your guts out,' and made a lick with his right hand in stomach. Then deceased turned off, holding his stomach with his hands. As he turned off, prisoner struck at him in the side."

Dr. W. B. Samuels, in his testimony, states that he lives in Graniteville; is a practicing physician; attended deceased; that deceased's wounds were mortal; that he held a post mortem examination, and that "it was in Aiken County."

The testimony referred to was sufficient evidence to go to the jury, and the jury rightfully considered it sufficient to establish the fact that the killing was in Aiken County and within the jurisdiction of the Court. It was the right of the jury to pass upon the evidence submitted, as to whether or not the venue had been proven, and to arrive at a conclusion. Such evidence might be associated with any facts within their own knowledge.—State v. Williams, 3 Hill, 91.

The motion must be denied, and the prisoner remanded to the custody of the Sheriff of Aiken County.

MOSES, C. J., and WRIGHT, A. J., concurred.

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6 S. C. *385

*RHODES v. RAILROAD COMPANY.

(Columbia. Nov. Term, 1875.)

[*Courts* ⊂⊃472.]

Courts of Trial Justices have jurisdiction in actions ex delicto where the damages claimed do not exceed one hundred dollars.

[Ed. Note.—Cited in Walker v. Russell, 10 S. C. 85, 88; State v. Glenn, 14 S. C. 125, 134.

For other cases, see Courts, Cent. Dig. § 465; Dec. Dig. ⊂⊃472.]

Before Maher, J., at Aiken, January Term, 1874.

M. Rhodes and R. Red brought separate actions ex delicto before a Trial Justice against the Wilmington, Columbia and Augusta Railroad Company. The defendant demurred in each case to the jurisdiction of the Court. The Trial Justice overruled the demurrer and gave judgment for the plaintiff.

Appeals were taken to the Circuit Court and His Honor the Circuit Judge filed his opinion and decree as follows:

Maher, J. These cases come up on appeal from a Court of Trial Justice. The actions were brought to recover damages not exceeding one hundred dollars for injury to the personal property of the plaintiffs. The defendants demurred to the jurisdiction of the Court by law. The demurrers were overruled, and, the cases being tried on their merits, judgments were rendered for the plaintiffs respectively. The appeals renewed here the question of law raised by the demurrers, and the only matter brought into controversy is the constitutionality of subdivision 2, Section 74, of the Code of Procedure, which confers upon Trial Justices' Courts civil jurisdiction in "an action for damages pertaining to the person, or the personal or real property, if the damages claimed do not exceed one hundred dollars." Section 1, Article IV, of the Constitution, after apportioning the judicial power of the State among certain Courts therein named, authorizes the General Assembly to "establish such municipal and other inferior Courts as may be deemed necessary."—The State v. Fillebrown, 2 S. C., 401. This clause received construction, and it was there held that the term "inferior Courts" is used in its technical sense, as signifying Courts of limited and special powers, whose jurisdiction must appear on the face of the proceedings to give validity to their judgments. And upon very full and satisfactory reasoning, it was further considered by the Court that where the jurisdiction of Justices of the Peace is not made exclusive by the Constitution, either expressly or by necessary implication, a like jurisdiction co-ex-

*386

tensive in its limits may *be vested by Act of the Legislature in Courts of Trial Justices or other inferior Courts established by authority of Section 1, Article IV. "It does not follow," says the Court, "that such other inferior Courts are to be of more limited jurisdiction than the Court of the Justice of the Peace. It is by the authority of the Constitution that they are to be established; and if by the same Section it had already provided for a Court which is already recognized as an inferior Court, it clearly shows an intention not to limit such Courts to the one expressly named, but to leave it to the discretion of the Legislature to multiply them if in its judgment necessary." Section 15 of Article IV (Cons.) provides that the Courts of Common Pleas shall have "exclusive original jurisdiction in all cases and actions ex delicto which shall not be cognizable before Justices of the Peace." This Section relates exclusively to Courts of Common Pleas, and Justices of the Peace are evidently referred to only to indicate in general terms certain cases within their cognizance which alone are excepted from the exclusive jurisdiction of the Courts whose powers are under definition. The particular actions which shall not be cognizable before the Justices, and the character of the jurisdiction to be exercised by them in such actions, whether exclusive or concurrent, are not determined by this Section. Reference must be had to other provisions of the Constitution for definite information on these points. Section 22 of the same Article relates to Courts of Justice of the Peace, and declares among other things that they shall have "such jurisdiction as may be

provided by law in actions ex delicto when the damages claimed do not exceed one hundred dollars."

The inquiry is, what cases and actions ex delicto shall not be cognizable before Justices of the Peace within the meaning of Section 15? Section 22 defines the actions which shall be cognizable before the Justices, though it makes their jurisdiction dependent upon the discretion of the Legislature. But in restricting the power of the Legislature in conferring such jurisdiction to actions where the damages claimed shall not exceed one hundred dollars, a definite answer is afforded to the inquiry what actions shall not be cognizable before Justices of the Peace. Manifestly, they are actions where the damages claimed do exceed one hundred dollars. Actions ex delicto claiming damages not exceeding one hundred dollars are potentially cognizable before Justices of the Peace, since the Legislature is expressly authorized to con-

*387

fer the jurisdiction; and, when *so conferred, the Justices, though deriving it immediately from the enabling Act, nevertheless, like the appointee of a power, may be said to hold by virtue of the original grant—the express warrant of the Constitution itself. But by no possibility short of an amendment to the Constitution could Justices of the Peace exercise rightful jurisdiction in actions ex delicto where the damages claimed exceed one hundred dollars. These are emphatically, in the language of Section 15, cases and actions which shall not be cognizable before Justices of the Peace and in all respects answer the description of the cases and actions which by that Section are placed within the exclusive jurisdiction of the Courts of Common Pleas. Reading Sections 15 and 22 in connection, my construction is that the exclusive jurisdiction of Courts of Common Pleas extends to all cases and actions ex delicto in which the claim of damages exceeds one hundred dollars.

The jurisdiction of Justices of the Peace in actions ex delicto is not exclusive by the terms of the Constitution: on the contrary, it is left to the discretion of the Legislature whether to confer or withhold it in whole or in part. The concurrent jurisdiction of Courts of Common Pleas in cases cognizable before the Justices may confidently be affirmed, since these Courts of superior and general jurisdiction are recognized by the Constitution as pre-established and could be outside of their cognizance in all case of tort only by express provisions or necessary implication.—State v. Walker, 14 Rich., 36. And upon the authority of State v. Fillebrown, it must be adjudged that the Legislature has the authority under the Constitution to vest in Courts of Trial Justices, and other inferior Courts which it may establish under Section 1 of Article IV, a like concurrent jurisdiction in actions ex delicto where the damages claimed do not exceed one hundred dollars, and accordingly that subdivision 2 of Section 74 of the Code of Procedure is a valid and competent act of legislation, not being in conflict with the provision of the Constitution. There was, therefore, no error in the judgments of the Court below overruling the demurrers. Wherefore, it is ordered that the judgments rendered below in these cases be affirmed, and that the plaintiffs have leave to enter judgment of affirmance, with costs, to be taxed by the Clerk of this Court.

The defendant appealed.

*388

*Rion, for appellants:

According to Section 15, Article IV, Constitution, "The Courts of Common Pleas have exclusive original jurisdiction in all cases and actions ex delicto which shall not be cognizable before Justices of the Peace."

Section 22 of the same Article gives Justices of the Peace "such jurisdiction as may be provided by law in actions ex delicto where the damages claimed do not exceed one hundred dollars."

There has been no provision of law giving Justices of the Peace any jurisdiction in actions ex delicto, therefore the jurisdiction of the Common Pleas remains exclusive.

The trial Justices are not the Justices of the Peace of the Constitution—the former being appointed by the Governor, and the latter elected by the people.

It is respectfully submitted that the error of his Honor the Circuit Judge consists in not considering:

1. That under the Constitution the General Assembly might have provided by law for the jurisdiction of the Justices of the Peace in actions ex delicto for any amount less than one hundred dollars, (e. g., twenty dollars,) and that in such case the jurisdiction of the Common Pleas would remain exclusive for amounts over the one provided.

2. That there has been no provision by law for jurisdiction of Justices of the Peace in actions ex delicto for any amount whatever.

The case of State v. Fillebrown, (2 S. C., 404,) does not apply. That was a criminal proceeding, and the jurisdiction was sustained under Section 19, Article I, of the Constitution.

Croft, contra:

1. Trial Justices have jurisdiction in actions for damages for injury to personal property.—Code of Procedure, § 74, sub. 2.

2. Article IV, Section 1, of the Constitution, after apportioning the judicial power of the State in the several Courts therein named, gives the General Assembly authority to establish such municipal and other inferior Courts as may be deemed necessary. In The State v. Fillebrown, this Section of the Constitution received construction, and

it was then held that "power is given the General Assembly to establish inferior Courts to any extent they may deem necessary."

*389

*3. The jurisdiction of Trial Justices is not exclusive.—Article IV, Section 22, Constitution; State v. Fillebrown. The General Assembly, having the right to establish such other inferior Courts as may be deemed necessary, may confer upon them the same jurisdiction as Trial Justices' Courts have, because there is nothing in the Constitution prohibitory to this.

4. In construing constitutional questions, the Courts should be governed by the following rules:

"Legislative department is not made a special agency for the exercise of specifically-defined legislative powers, but it is entrusted with the general authority to make laws at discretion."—Cooley Const. Lim., 87.

"In inquiring, therefore, whether a general statute is constitutional, it is for those who question its validity to show that it is forbidden."—Cooley Const. Lim., 88; People v. Draper, 15 N. Y., 543.

"Except when the Constitution has imposed limits upon the legislative power, it must be considered as practically absolute."—Cooley Const. Lim., 168.

"The legislative power is only limited by express constitutional provision."—Cooley Const. Lim., 171, 172, 173.

"The law-making power of a state recognizes no restraints, and is bound by none except as are imposed by the Constitution."—Cooley Const. Lim., 173, 174.

"The constitutionality of a law must be presumed until its violation of the Constitution is proved beyond all reasonable doubt."—Cooley Const. Lim., 183.

"A reasonable doubt must be solved in favor of the legislative action, and the Act be sustained."—Cooley Const. Lim., 182, and authorities there cited.

December 14, 1875. The opinion of the Court was delivered by

WRIGHT, A. J. A single question is raised by the appeal in these cases, and that is: Whether a Trial Justice has jurisdiction in actions ex delicto.

Section 1, Article IV, of the Constitution reads as follows: "The judicial power of this State shall be vested in a Supreme Court, in two Circuit Courts, to wit, a Court of Common Pleas, having civil jurisdiction, and a Court of General Sessions, with criminal

*390

*jurisdiction only, in Probate Courts and in Justices of the Peace. The General Assembly may also establish such municipal and other inferior Courts as may be deemed necessary." Under this provision the Courts of Trial Justices have been established and their civil jurisdiction defined by Section 74 of the Code, the first subdivision of which extends it to contracts to a limited amount, the second to an action "for damages for injury to rights pertaining to the person, or the personal or real property, if the damages claimed do not exceed one hundred dollars, and in cases of bastardy."

By Section 24, Article IV, of the Constitution, Justices of the Peace may exercise such jurisdiction as may be provided by law in actions ex delicto where the damages claimed do not exceed one hundred dollars, &c.

In the case of the State v. Fillebrown, (2 S. C., 404,) it is held that the General Assembly, by said Section 1 of Article IV of the Constitution, may confer upon an inferior Court created by itself the same jurisdiction which that instrument proposed for Justices of the Peace.

The General Assembly having established Courts of Trial Justices, and vested them with jurisdiction in actions ex delicto "where the damages claimed do not exceed one hundred dollars," they have, to such extent, concurrent jurisdiction in suits of that character with the Circuit Court.

The motion in each of the cases is dismissed.

MOSES, C. J., and WILLARD, A. J., concurred.

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6 S. C. 390

CORWIN v. COMPTROLLER GENERAL.

(Columbia. Oct. Term, 1875.)

[*Statutes* ⇐34.]

A Bill, which originated in the House, was presented to the Governor on Thursday, March 11, and on the same day the House adjourned to Monday, March 15, when the Speaker took the chair, but, no quorum being present, it adjourned to Tuesday, March 16. On Wednesday, March 17, the Governor returned the Bill to the House with his objections: *Held*, that the Governor had not returned the Bill within three days, the time fixed by Section 22, Article III, of the Constitution, and, therefore, it had become law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 37; Dec. Dig. ⇐34.]

[*Statutes* ⇐30.]

The word adjournment, as used in Section 22, Article III, of the Constitution, means an adjournment by the concurrent action of both Houses of the General Assembly.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 32; Dec. Dig. ⇐30.]

*391

[*Time* ⇐9.]

*The three days, Sundays excepted, within which by the same Article the Governor is to return a Bill, are to be computed by excluding the day on which it was presented to him.

[Ed. Note.—For other cases, see Time, Cent. Dig. § 13; Dec. Dig. ⇐9.]

[*Statutes* ⇐32.]

It is competent for a House which is in session without a quorum to receive a Bill returned

to it with the Governor's objections, though it may not be able to act upon it on that day.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 35; Dec. Dig. ⟸32.]

[*Constitutional Law* ⟸142; *States* ⟸115.] The "Act to provide for the settlement and redemption of certain claims against the State," 15 Stat., 997, neither violates Section 10, Article I, of the Constitution of the United States, nor is it prohibited by the Constitution of the State as contemplating a mode of raising money outside of the powers conferred by that instrument for the purpose.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 317–321; Dec. Dig. ⟸142; States, Cent. Dig. § 114; Dec. Dig. ⟸115.]

This was a petition to the Supreme Court, entitled "The State of South Carolina, ex relatione Henry C. Corwin, against Thomas C. Dunn, Comptroller General of the State of South Carolina," praying for a writ of mandamus to issue to the petitioner four warrants pursuant to the provisions of the Act of March, 1875, "to provide for the settlement and redemption of certain claims against the State," in payment of a certain pay certificate owned by the petitioner which had been audited and allowed by the Commission on Claims sitting under the authority of said Act.

A rule to show cause was issued, and the Comptroller General made return thereto and showed cause as follows:

"1. That the so-called Act of the General Assembly referred to in the second paragraph of the petition herein, entitled 'An Act to provide for the settlement and redemption of certain claims against the State,' and which it is alleged in said petition became a law under the Constitution and laws of this State in the month of March, A. D. 1875, is not a law of this State because the said so-called Act of the General Assembly has not been passed and enacted in the manner required by the Constitution of this State, in this that the said so-called Act was returned by the Governor of this State to the House of Representatives, the House in which it originated, without his approval and with a statement of his objections thereto, within the time prescribed in Section 22 of Article III of the Constitution of said State, and that the so-called Act was not thereafter reconsidered by the said House of Representatives and passed by two-thirds of said House of Representatives nor by two-thirds of the Senate, the other house of the General Assembly.

"Wherefore, this respondent shews for cause that the said so-called Act of the General Assembly is wholly inoperative and void and gives no authority of law to this respond-

*392

ent, and imposes no *duty on this respondent to do the acts demanded of him by the relator in this cause.

"2. And for a second cause why said writ of mandamus should not issue to this respondent, as prayed for in the petition herein, this respondent shews: That the said so-called Act of the General Assembly, which it is alleged in said petition became a law in the month of March, A. D. 1875, is unconstitutional and void because it is in conflict with and is forbidden by Section 10 of Article I of the Constitution of the United States, which, among other things, declares that 'no State shall pass any law impairing the obligation of contracts,' in this that the said so-called Act of the General Assembly impairs the obligation of the contract made and entered into by the State of South Carolina by the Joint Resolution of the General Assembly, approved January 29, 1873, whereby it was made a part of the Constitution of said State that the General Assembly should not thereafter create any further debt or obligation, either by the loan of the credit of the State, by guaranty, endorsement or otherwise, except for the ordinary and current business of the State, without first submitting the question of the creation of such debt to the people of the State at a general election, and unless two-thirds of the qualified voters of the State, voting on the question, shall be in favor of the creation of such debt.

"That, relying on the contract embodied in said Joint Resolution amending the Constitution of said State, many persons have since purchased the public securities and evidences of indebtedness issued under the Act of the General Assembly of said State, approved December 22, 1873, entitled 'An Act to reduce the volume of the public debt and to provide for the payment of the same;' that the said so-called Act of the General Assembly, under the authority of which the relator herein now asks for a writ of mandamus to this respondent, violates the contract expressed in said Joint Resolution amending the Constitution of the State and impairs the obligation thereof by authorizing the creation of a debt of said State contrary to the provisions and requirements of said Joint Resolution and the amendment to the Constitution therein contained, and without the consent of those persons who hold and own the public securities and evidences of indebtedness of this State issued by the State and purchased by the owners thereof under the contract herein set forth.

*393

*"Wherefore, this respondent shews for cause that the said so-called Act of the General Assembly which it is alleged in said petition became a law in the month of March, A. D. 1875, is unconstitutional and void and gives no authority of law to this respondent, and imposes no duty on this respondent to do the acts demanded of him by the relator in this cause."

Bachman & Youmans, for relator.
Melton, Attorney General, contra.

The opinion of the Court was delivered by

MOSES, C. J. The return of the respondent to the rule requiring him to show cause why the writ of mandamus should not issue contests the validity of the Act under which the relator seeks to enforce his alleged right: First, because it was not passed in conformity with the mode prescribed by the Constitution; and, second, if not obnoxious to the said objection, it is void because in conflict with the tenth Section of the first Article of the Constitution of the United States. The question arising under the first exception involves the rights and powers of the Executive in regard to the legislation of the General Assembly, which can only be effective when in the form of a Bill or Joint Resolution, either by the approval of the Governor or his failure to return it, with his objections, to the house in which it originated within the time fixed by the Constitution, or its passage over his veto by a two-thirds vote of both branches.

The Bill in question was not signed by the Governor; but it is contended that it has acquired the constitutional force of an Act because he failed to return it to the House of Representatives (that being the body in which it originated) within the period limited by the Constitution.

The facts are as follows:

The Bill was duly passed by both houses and presented to the Governor Thursday, March 11, 1875, at 11:30 A. M. The House adjourned on that day to 7 o'clock P. M. of Monday, March 15, when the Speaker took the chair. The roll was called by the Clerk, but, a quorum not answering, at 7.30 P. M. it adjourned till Tuesday, the 16th, on which day it was in session. The Senate adjourned on Friday, March 12th, to Tuesday, March 16th,

*394

and *was in session March 11th, 12th and 16th. The Bill was returned by the Governor to the House on Wednesday, March 17, with a message, expressing his objections, dated on the same day.

The twenty-second Section of the third Article of the Constitution provides as follows:

"If a Bill or Joint Resolution shall not be returned by the Governor within three days after it shall have been presented to him, (Sundays excepted,) it shall have the same force and effect as if he had signed it, unless the General Assembly, by their adjournment, prevent its return, in which case it shall not have such force and effect unless returned within three days after their next meeting."

It is admitted that the Bill was not returned within three days after its presentation to the Governor, but it is claimed that the General Assembly, "by their adjournment," prevented its return within the time prescribed, and that the veto was sent to the House "within two days after their next meeting."

It becomes, therefore, necessary to inquire what, in the view of the Constitution, is an adjournment of the General Assembly.

Section 1 of Article II vests "the legislative power of the State in two distinct branches, one to be styled the 'Senate,' and the other the 'House of Representatives,' and both together the 'General Assembly of the State of South Carolina.'" The separate and independent action of each house to the same end, if not in conformity with the forms required by the Constitution, would fail to impress it with the sanction of law. Certain separate powers, too, are confided to the House and Senate. These they exercise by virtue of the exclusive authority granted to each by the Constitution. But action so permitted and recognized as valid for the proposed purpose is not the action of the General Assembly. A component part cannot assume a right which, in the language of the grant conferring the power, can only be enforced by the concurrent will of the several parts constituting the whole.

The General Assembly, under the Constitution, must have at least one session annually. By Section 12 of Article II it "shall be convened on the fourth Tuesday in November annually;" and the election for Senators and Representatives, by Section 11 of same Article, "shall be held on the 14th, 15th, and 16th days of April, in the year 1868, and the second or third Wednesday in October, 1870, and forever thereafter on the same day in every second year." [Changed, by amend-

*395

ment of Constitution, to "first *Tuesday following the first Monday in November in every second year."]

The first session terminates on a day fixed by the concurrence of the two branches; the other must close before the second Monday after the next general election, because, by the thirteenth Section of the second Article, the "terms" of the Senators and Representatives then elected begin. The General Assembly is to convene on the day named in the Constitution; but, by the twenty-fifth Section of the same Article, "neither house, during the session of the General Assembly, shall, without the consent of the other, adjourn for more than three days." It would thus seem that there could be no final close of a session of the General Assembly, where it does not expire by constitutional limitation, except by the concurrent action of both houses. The General Assembly cannot be said to have adjourned because each house has exercised its separate right to adjourn for three days. As well might it be said that the daily closing of the sitting of each house is an adjournment of the General Assembly. Not a single clause of the Constitution can be brought into requisition to aid the conclusion pressed on the Court by the argument for the re-

spondent, while several may be cited to show that when the Constitution speaks of the adjournment of the General Assembly it refers to a final close of the session, which, as Mr. Cushing says, in his Law and Practice of Legislative Assemblies, 200, "is the period of time during which both the branches of the Legislature sit from day to day, with occasional intermissions of a day or two at a time, by one or both, until the business before them is completed and the daily sittings are brought to a close." Thus Section 17 of Article II: "The members of both houses shall be protected in their persons and estates during their attendance on, going to and returning from the General Assembly, and ten days previous to the sitting and ten days after the adjournment thereof." So, too, the sixteenth Section of the third Article: "The Governor, in case of disagreement between the two houses in respect to the time of adjournment, may adjourn them to such time as he shall think proper, not beyond the time of the annual session next ensuing."

In this State, the body in which the legislative power is vested is termed in the Constitution "The General Assembly;" in New York, Maine and some other of the States, "The Legislature." Whether called by the one name or the other, it is usually composed

*396

of a *Senate and House of Representatives. The clauses of their Constitutions conferring the veto power on the Governor provide for a prevention of its exercise by the "adjournment of the Legislature" within the time allowed for the return of the Bill to the house in which it originated. If, in our Constitution, the word Legislature had been used in the place of General Assembly, could there have been a doubt that the adjournment had reference not to the adjournment of either house by its own action, but to that of the two houses by the separate but concurring vote of both? In its political acceptation, the phrase General Assembly has the same significance as Legislature, and must be understood in the same sense.

The views which we have expressed in regard to the interpretation of the clause of the Constitution now in question are strengthened and confirmed by the concurrent reply of all the Justices of the Supreme Court of New Hampshire to an inquiry submitted by the Legislature of that State in conformity with a provision of its Constitution declaring "the soldiers' voting Bill a valid and binding statute of the State."

The facts are not unlike those in regard to the Act before us, and two of the questions made are identical with those presented for our decision. The Bill, which originated in the House, was duly passed and engrossed, and about noon on Wednesday, August 17th, left by the Clerk of the Senate in the Executive Chamber. Both Houses adjourned from Saturday, 20th, to Tuesday, 23d August, and were not in session on Monday, August 22d. On Wednesday, August 24th, the Governor sent a message to the House, which was laid on the Speaker's desk, the Secretary of State, who bore it, stating it to be a message from His Excellency the Governor. The House was then engaged in taking the yeas and nays on a motion to adjourn, which was carried in the affirmative. On a subsequent day, it was referred to a committee and by them found to contain his veto. By the Constitution of New Hampshire, "if any Bill shall not be returned by the Governor within five days after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Legislature, by their adjournment, prevents its return, in which case it shall not be a law." One of the questions submitted was, whether Monday, August 22d, was to be counted as one of the five days specified in the Constitution, and the Justices, by their unanimous opinion,

*397

answered in the affirma*tive.—45 N. H., 607. The argument of the Court is so direct and conclusive that we will be excused from quoting a large portion of it. The Court says, at page 640:

"Is Monday, August 22d, when neither house was in session, to be counted as one of the five days specified? Upon this point there can be no doubt. The adjournment referred to in this provision of the Constitution is not, we think, the ordinary recess or adjournment from time to time during the continuance of the session, but the final adjournment at the close of the session. In fact, this is the only adjournment, we think, which could prevent a return of the Bill within the time limited. If we are right upon the views expressed upon the first point, viz., that it might be sufficient for the Governor to return the Bill, &c., to the Speaker after the adjournment for that day, if within the five days, then it follows, of course, that the House could not prevent the return of a Bill by adjourning over any one of the five days, even though it should be the last one of the five, because the Bill might, in that case, be returned within the time limited to the Speaker or to the Clerk, or some other proper officer. But when a final adjournment of the Legislature for the session occurs before the expiration of the five days, then the bill cannot be returned, nor could the two houses act upon it if it could be then returned. In the case before us, it is clear, we think, that the return was not prevented by the adjournment in question any more than it might have been by the adjournment from day to day. The time for consideration on the part of the Governor, which was the great object of this provision, was not interfered with, but was all the more at his command and free from interruption and care on that account. The Constitution provides, in Articles XIX and

XXXVI, against any adjournment of the House and Senate during the session for more than two days at any one time. It could not have been expected that any such adjournment would or could operate to defeat the return of any Bill within the time there specified that the Governor might wish to veto. Although, in the case before us, both houses adjourned for the same time, yet it often happens, and may at any time happen, that one house will adjourn for a day or two while the other is in session. Now, a Bill must be returned to the house in which it originated; and if it should be held that it must be returned to that house while in session, then an adjournment of that house over one day would prevent the return of the

*398

Bill during that day as *much as an adjournment of both houses; and if it had been intended to provide against such an adjournment for a day, or two at the longest, the constitutional provision should have been that the Bill should be returned in five days to the House in which it originated unless that house shall prevent it by an adjournment. But no such provision was made. The only adjournment that was to prevent the return of the Bill was an adjournment of the Legislature; that is, of 'both houses of the General Assembly,' and not of either house alone. The language used would seem to be sufficiently indicative of the intention of the framers of the Constitution. Their opinion was, most evidently, that an adjournment of either house for a term not exceeding two days, whether the other house adjourned for the same time or not, was not to prevent such return of any Bill, but that it was only the final adjournment of the Legislature of both houses for the session that could have had that effect. We concur with them in that opinion. Monday, August 22d, is, therefore, to be reckoned as one of the five days specified."

The opinion commends itself, not only by reason of the learning and character of the Court from which it emanated, but by the impressive argument through which it is enforced. If, therefore, as in the case before us, the return of the Bill by the Governor in three days, Sundays excepted, was not prevented by the adjournment of the General Assembly, it must have the same force and effect as if he had signed it, no matter what other cause prevented it.

In our judgment, too, the Bill might have been returned to the Speaker or Clerk on any day of the three days after it was presented to the Governor, (Sunday excepted); and the House not being in session on Friday or Saturday, and, assuming, for the argument, that it was not in session on Monday, did not prevent his compliance with the constitutional requisition. From the commencement to the close of a session, the Speaker and the Clerk may, by fair inference, be supposed to be present at the seat of government, although the House may have adjourned for three days. Certainly the Clerk has a known office where the papers committed to his keeping, both during the sitting and vacation of the House, are kept, and where persons having official business may confer with him. If the Governor cannot return a Bill except when the House is sitting, that body can prevent the exercise of the veto power by adjourning on the third day, as soon as it meets, and thus prevent the Governor having the benefit of the three days allowed him by

*399

*the Constitution. To the same conclusion came the Justices of the Supreme Court of New Hampshire, in the matter already referred to, as is thus expressed on page 609: "Nor are we by any means prepared to say that the legislative day was ended, necessarily, by the adjournment of the House, even though it might have been at the usual hour in the afternoon; or that the return of the Bill at any convenient time during the day to the Speaker, although after the House had adjourned for the day, would not have been sufficient.

"The provision of the Constitution in relation to this subject should receive a reasonable construction, and it can hardly be supposed that the time limited for the return of the Bill has expired because that branch of the Legislature in which the Bill originated had adjourned for the day, if the five days limited by the Constitution have not expired. The word 'day,' in its common acceptation, means a civil day of twenty-four hours, beginning and ending at midnight."

But what was to prevent the reception of the veto message if the Governor had caused it to be delivered to the Speaker on the evening of Monday, August 15th, to which time the House had adjourned, and of which fact he had notice through the journal, with which he is daily furnished? His message bore date the 17th. How was he to know, in advance, that there would then be no quorum, and what official information did he have that on the said evening, when the Speaker had called the House to order, the Clerk and the other officers in their places in the Representative chamber, there was no quorum present?

If the message had been presented on that evening to the Speaker when in the chair, might not the business to which it related have been considered of such public importance as to demand the attendance of a quorum? and if a sufficient number could not be found to form one, and the members present had adjourned to the next day, and a quorum then attended, could the reading of the message have been refused and the constitutional right of the Governor defeated, when within the three days he had delivered his message to the Speaker, he in

the chair and presiding in the Representative chamber over the members present?

The view which we take of the first point raised by the return might render it necessary to consider whether, in the computation of time allowed to the Governor, the day on

*400

which the Bill is to be *submitted to him is to be included. Such a construction must actually deprive the Governor of the full three days intended by the Constitution for the examination of the Bill or resolution presented to him.

Without citing the various cases which have induced the Courts to change the rule including the day of an act done, or an event happening, it may be enough to say, in the language of Mr. Justice Field, in delivering the opinion of the Supreme Court in Sheets v. Selden, 2 Wallace, 190: "The general current of modern authorities on the interpretation of contracts, and also of statutes, where time is to be computed from a particular day or a particular event, where an act is to be performed within a specified period from or after a day named, is to exclude the day thus designated and to include the last day of the specified period." The illustration of Chief Justice Kenyon in Ex parte Fallon and wife (5 T. R., 287,) shows that any other rule would defeat the intention and diminish the time allowed for the performance of the act. He says: "Suppose the direction of the Act had been to enroll the memorial within one day after the granting of the annuity. Could it be pretended that that meant the same as if it were said that it should be done on the same day on which the act was done? If not, neither can it be construed inclusively where a greater number of days is allowed." So here, if the first day is to be included, the Senate or the House charged with the presentation of the Bill to the Governor might, in fact, restrict him to two days by not causing it to be delivered to him until the hour of midnight.

The objection made by the return that "the Act to provide for the settlement and redemption of certain claims against the State," (15 Stat., 997,) referred to in the petition of the relator, is unconstitutional, because in violation of Section 10 of Article I of the Constitution of the United States, together with the further one made on the argument, that it is repugnant to the Constitution of the State as contemplating a mode of raising money outside of the powers conferred by that instrument for the purpose, cannot be maintained. In regard to the last, it is only necessary to refer to the conclusions of this Court, so well and ably pronounced and enforced by Mr. Justice Willard in the opinion in State v. Hayne, (4 S. C., 403,) to show that the tax proposed to be raised by the Act is not in violation of the taxing power vested by the Constitution in the Legislature.

*401

*We have failed, too, to perceive how the Act violates Section 10 of Article I of the Constitution of the United States, which declares that "no State shall pass any law impairing the obligation of contracts." The pay certificate through which the relator claims that he is entitled to the provisions of the Act, by the very language of the Act, is recognized as a "liquidated debt of the State," and the same term is applied to the other claims to be audited by the "Commission" appointed by its first Section. It directs a tax for the payment of debts "fixed in amount and ordered to be paid" by the prior action of the Legislature, and interferes with no tax already provided for the payment of other claims against the State. It leaves unaffected and undisturbed the levy directed and appropriated for the satisfaction of the bonds and other obligations of the State; and in no single particular does it attempt to interfere with their binding efficacy, or withdraw from their payment any previous provision, but leaves them in full force, with all the guaranties pledged for their security.

Nor has the proposition any better foundation when it seeks to enforce the unconstitutionality of the Act as impairing the contract made with the bondholders of the State, under the Act of December 22, 1873, (15 Stat., 518,) "to reduce the volume of the public debt and provide for the payment of the same," and for this purpose draws into requisition Article XVI of the Constitution, which forbids the creation of any further debt or obligation, either by the loan of the credit of the State by guaranty, endorsement or otherwise, except for the ordinary and current business of the State, without first submitting the question as to the creation, &c., to the people at a general State election, &c. It is enough to say that the Act of 1875 creates on the part of the State "no further debt or obligation," and in no way increases "the public debt of South Carolina," which it was the purpose of the said Article to prevent, unless all the formalities it prescribes are first observed.

In the judgment of the Court, the writ prayed for must issue, and it is so ordered.

WILLARD, A. J. I concur in the results to which the opinion of the Chief Justice arrives, and in its reasonings, so far as, in my judgment, they are applicable to what is necessary to a decision in this case. That is to say, I concur in the conclusion that the three days within which the Governor

*402

is to return a Bill with his objec*tions is to be computed by excluding the day in which the Bill is transmitted to him. Under the case before us, the last day for returning the

Bill was Monday, March 15. On that day the House of Representatives, the proper body to which the Bill should be returned, was in session, but without a quorum, as it appears. I am of opinion that the House of Representatives was competent to receive the bill, with the Governor's objections, on that day, although not able to act upon it by reason of the want of a quorum. I regard this conclusion as inevitably resulting from the reasonings of the opinion of the Chief Justice. As it regards the competency of the Speaker or the Clerk to receive such a communication while the House is not in session, I deem it unnecessary to express any opinion, as no such contingency is involved in the facts of the case.

WRIGHT, A. J., concurs with WILLARD, A. J.

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6 S. C. 402

SMALLS v. WILDER.

(Columbia. April Term, 1875.)

[*Pleading* ⇐301.]

The verification of an answer consisting of a general denial of all the facts stated in the complaint was "that the above answer is true and correct in all particulars:" *Held*, That the verification was fatally defective because of the omission to state that the denial was founded on defendant's knowledge, and that plaintiff had the right to return the answer immediately, and, treating it as a nullity, take judgment on his complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 314, 318, 892–897, 904–906; Dec. Dig. ⇐301.]

[*Pleading* ⇐301.]

A verification is defective in substance where it does not expressly appear, either by the verification or by the pleading verified, that every material averment or denial, except such as relate to matters expressly averred or denied according to or for want of information and belief, is made according to the knowledge of the party.

[Ed. Note.—Cited in Hecht & Co. v. Friesleben, 28 S. C. 186, 5 S. E. 475; Burmester v. Moseley, 33 S. C. 254, 11 S. E. 786; State v. Port Royal & A. Ry. Co., 45 S. C. 482, 23 S. E. 380.

For other cases, see Pleading, Cent. Dig. § 894; Dec. Dig. ⇐301.]

[This case is also cited in State v. Port Royal & A. Ry. Co., 45 S. C. 471, 23 S. E. 383, and distinguished therefrom.]

Before Maher, J., at Barnwell, August Term, 1874.

Action by Robert Smalls, plaintiff, against F. E. Wilder, defendant, on a money demand.

The complaint, which was verified, set forth a copy of a due bill alleged to have been given by the defendant to the plaintiff for $700, on which $300 had been paid, and demanded judgment for $400, the balance due thereon, and interest and costs.

An answer in the following words: "The defendant, answering the complaint herein, denies each and every allegation thereof,"

*403

and *verified by the following affidavit, signed by the defendant before a notary public: "Personally appeared before me and made oath that the above answer is true and correct in all particulars," was served on plaintiff's attorney within twenty days from the service of the complaint.

The answer was immediately returned by plaintiff's attorney, with notice endorsed thereon that it was returned for want of verification.

At the next term of the Court the plaintiff's attorney applied for and obtained an order for judgment for failure to answer, and judgment was accordingly entered.

The defendant then, after notice, moved His Honor, at Chambers, to set aside the judgment. His Honor held that the verification was fatally defective, in this, that it was not to the effect that the answer was true to the knowledge of the defendant, as required by Section 180 of the Code of Procedure, and that plaintiff's attorney, in promptly returning the answer as an unverified pleading, and in proceeding to judgment as if no answer had been served, pursued the proper and regular course; wherefore he denied the motion, with $10 costs.

The defendant appealed.

Whipper, for appellant.
Elliott, Youmans, contra.

December 22, 1875. The opinion of the Court was delivered by

WILLARD, A. J. The plaintiff obtained judgment in the Circuit Court for want of an answer, and the Circuit Court refused, on motion, to set that judgment aside.

The complaint was duly verified and an answer thereto was served, consisting of a general denial of all the facts stated in the complaint and verified as follows:

"Personally appeared before me and made oath that the above answer is true and correct in all particulars. F. E. Wilder.

"Sworn to and subscribed before me this 10th day of June, 1874.

"James M. Crofut,
"Notary Public."

*404

*The plaintiff's attorney, regarding this verification as defective, returned the answer immediately, and, treating it as a nullity, took judgment on his complaint.

Two questions arise: Was the verification defective as to matter of substance? And, if so, was it properly treated as a nullity?

The Code (Section 179) declares that "when any pleading is verified, every subsequent pleading, except a demurrer, must be verified also." Section 108 provides as follows: "The verification must be to the effect that the same is true to the knowledge of the person

making it, except as to those matters stated on information and belief, and as to those matters he believes it to be true," &c.

In the present case the defendant omitted to state that his denial was based on knowledge. Was this a departure from the requirement of the Code in a substantial respect? The words "to the effect" show clearly that the words of the statute need not be followed literally as a form in order to give validity to the verification, but do not warrant the omission of any of the substantial requirements of the verification as indicated by the statute. The great object enforced by the statute in prescribing what is essential to verification is to make it appear on the face of a pleading and its verification what matters therein contained are set forth, according to the knowledge of the party making such pleading, and what matters are stated according to information and belief only. Any mode of verification that does not accomplish this end defeats the object of the statute and accordingly must be held defective as to matter of substance.

If all matters pleaded are set forth to be according to the knowledge of the party pleading, it is unnecessary to add to the verification the words "except as to those matters stated on information and belief, and as to those matters he believes it to be true."

So, on the other hand, if it appears by the pleading that all matters pleaded are on information and belief only, he may omit the statement that the same is true of his own knowledge. In both the cases of omission just supposed, it must appear distinctly on the face of the pleading whether the matters are so pleaded according to knowledge or information and belief.

Any matter set forth in a pleading requiring verification which is not stated on the face of the pleading to be so pleaded according to information and belief must be supported

*405

by the affidavit of the *party, affirming two distinct propositions—first, that he has knowledge of the matters pleaded; and, second, that they are pleaded truly, according to that knowledge.

It is clear that the omission of the statement that the party verifying has knowledge of the facts pleaded is a substantial departure from the statute in every case where there are matters pleaded other than those expressly stated to be upon information and belief.

Where the matter of the answer is a negative merely of the matter set forth in the complaint, the same form of verification is required as in the case of pleading affirmatively; and in order to bring the force of the verification to bear distinctly upon such negations, the Code prescribes (Section 172) that the same, so far as it is a denial of the complaint, must contain "a general or specific denial of each material allegation of the complaint controverted by the defendants or any knowledge or information thereof sufficient to form a belief."

When a denial of any fact is conformed to this rule of pleading and properly verified, it will appear on the face of the pleadings, and its verification just what matters the party has assumed to deny, with the force due to the state of our having competent knowledge of the facts, and what matters he has denied on the ground solely of ignorance of the facts to which such denial relates.

It is obvious, therefore, that the statute form of verification is as applicable to the case of a denial of matters of fact as to affirmative pleading.

It is unnecessary to decide in the present case whether, if the fact clearly appears on the face of the pleading as to each material fact affirmed or denied that such affirmance or denial is made according to the knowledge of the party pleading, the omission of the statement as to knowledge from the verification would be a substantial defect, for the answer in the present case, while denying all the material facts alleged in the complaint, does not comply with Section 172 of the Code, for it does not appear whether such denial is based on knowledge of the facts to which the denial relates or proceeds on want of knowledge.

It is only necessary to hold, in the present case, that a verification is defective in regard to a substantial matter where it does not expressly appear, either by the verification or by the pleading verified that every material averment or denial, except such as

*406

relate *to matters expressly averred or denied according to or for want of information and belief, is made according to the knowledge of the party.

As Section 179 prescribes a necessary requisite of an answer requiring verification, under the words "must be verified," and as Section 180 declares what "must" be the effect of the verification, it must be regarded as mandatory so far as it regards the question of the sufficiency of the pleading in point of law.

An answer failing to comply with substantial requirements of this character can be properly regarded as a nullity, and judgment for failure to answer may be taken.—Waite's Practice, (N. Y.,) vol. 2, p. 343.

The appeal is dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

6 S. C. 406

GILLILAND, HOWELL & CO. v. GASQUE.

(Columbia. April Term, 1875.)

[*Appeal and Error* ⇐1022.]

Where the action is at law, the Supreme Court has no power to interfere with a Referee's conclusion of fact confirmed by the Circuit Judge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4015; Dec. Dig. ⇐1022.]

[*Attorney and Client* ⇐101.]

An attorney at law has no power to release his client's claim.

[Ed. Note.—Cited in McCreery v. Garvin, 39 S. C. 383, 17 S. E. 828; Armstrong v. Hurst, 39 S. C. 506, 18 S. E. 150; Ex parte Jones, 47 S. C. 396, 25 S. E. 285; Wieters v. Gideon, 76 S. C. 463, 57 S. E. 193.

For other cases, see Attorney and Client, Cent. Dig. §§ 209, 210; Dec. Dig. ⇐101.]

Before Townsend, J., at Marion, November Term, 1874.

This was an action by the survivors of Gilliland, Howell & Co. against E. H. Gasque.

The issues in the case were referred to W. D. Johnson, Esq., who filed his report as follows:

The Referee to whom it was referred to hear and to determine the question of fact and law in the above stated case, and to report his conclusion to the Court, respectfully reports that the defendant made his sealed note for sixty-four dollars and forty-nine cents, on the second day of May, 1860, payable to Gilliland, Howell & Co. six months after the day aforesaid; that the defendant made his other sealed note for $677.25 on the eighteenth day of September, A. D. 1860, payable six months after day last aforesaid to Gilliland, Howell & Co.; and that the de-

*407

fendant made his other sealed *note for $113.99, on the eighteenth day of October, 1860, payable to Gilliland, Howell & Co. six months after the day last aforesaid. The execution of these sealed notes was admitted, and the defense set up was that on the second day of February, 1861, the defendant made to Neil C. McDuffie an assignment of his whole estate for the benefit of his creditors, and that the fourth class of creditors, in which Gilliland, Howell & Co. were placed, were only to share in the benefit of the assigned estate by consenting to take a pro rata share of the same, if it should turn out that the estate was not sufficient to pay all the debts, and, after a reasonable notice, to be given by the assignee, to signify the same, and to execute a release in writing from all further liability. The notice was given to the plaintiffs and other creditors, and a meeting of creditors was held, and notes sued on were in the hands of Col. N. Phillips, a lawyer, at that time, of Marion, S. C. He held, in the aggregate, more than one-half the claims against the assigned estate, and had C. D. Evans appointed agent of creditors, and he drew up a paper by which the terms of the assignment were accepted and a release was executed to the defendant. This was signed by Col. Phillips, representing the plaintiffs and various other creditors, by W. W. Sellers, Esq., representing several creditors, and by C. D. Evans, representing one or more creditors. This paper was lost, and the parol evidence of its contents were not very satisfactory, though the conclusions I drew were as above stated.

The notes were all endorsed in blank by the payers, a fact which was not in any way called to my attention during the trial. If Col. N. Phillips had accepted the assignment, and made the release in his own name as assignee, I would hold the release as binding. If he held the notes separately, as an attorney at law, and accepted and released in that capacity, I would say he transcended his authority. There was no evidence as to when these endorsements were made, but I presume they were made before they came into the hands of Col. Phillips. Did he accept and release as attorney at law, or did the possession after notes endorsed confer on him the right to accept or release as attorney in fact?

This question is the only one that creates any embarrassment in the case; and whilst the evidence is not satisfactory on the subject, I am forced to the conclusion that Col. Phillips acted in the whole matter as attorney at law, and this I infer from the character of the endorsement herewith filed. I find

*408

as a question in fact, that the *three sealed notes were executed by the defendant; that Col. N. Phillips accepted and released as attorney at law; and I find that, as a question of law, that in so doing he transcended his authority, and that the release was inoperative. The sealed notes amounted to $1,594.23 on the 20th day of June, 1873, and I recommend that the plaintiffs do have judgment for same from date of this report.

The defendant excepted to the report of the Referee:

I. On his conclusion of fact.

Because, by the testimony, N. Phillips, Esq., at the time of the meeting of creditors, was in possession of the notes of plaintiffs, duly endorsed, and as such was admitted to participate in the election of agent of creditors, which he did, and by his possession of the notes of the plaintiffs, so endorsed, and sued on against defendant, controlled the election of such agent of creditors. The conclusion of fact, therefore, should have been that he was attorney in fact, or agent of the plaintiffs, and as such was authorized to act as he did, the notes being then due.

II. As to his conclusion of law.

1. Because N. Phillips had possession of the said notes, sued on and endorsed by plaintiffs, which was, in fact or in law, an assignment of the same, as the holder saw fit. The

conclusion of law should be that he was the agent and attorney in fact, inasmuch as by such possession he was enabled to control the election of agent of creditors, and thereby divest the estate of the assignor (the defendant) from the hands of those confessedly authorized to act for other creditors.

2. Because any other conclusion would result in the just imputation of fraud of the said N. Phillips, thus aided and assisted by the plaintiffs, and, under the circumstances, it is the more proper inference, and due to all the parties, that such conclusion should not prevail.

3. Because, whether the said N. Phillips was attorney at law or attorney or agent in fact, he was enabled by the plaintiffs to control the election of agent of creditors, by the fact that their sealed notes, duly assigned and endorsed before due, were in his possession; and having by this means controlled the assets of the defendants, the plaintiffs are bound, both in law and equity, to abide his actions and acquiesce in his agency,

*409

there exhibited and executed; and to *repudiate it after the lapse of time and acquiescence shown is a fraud upon the defendant and his other creditors which the Court cannot allow them to perpetrate.

His Honor confirmed the report and ordered that it stand as the judgment of the Court.

The defendant appealed.

Harllee, for appellant.

McIver & Shaw, contra.

June 26, 1875. The opinion of the Court was delivered by

WRIGHT, A. J. The Referee found as a matter of fact that N. Phillips acted throughout the whole transaction as an attorney at law.

There appears to be sufficient evidence to warrant such a conclusion. The presiding Judge confirmed the report of the Referee, and this Court has no power in a case at law to interfere with the findings of fact.—Abrahams & Son v. Kelly & Barret, 2 S. C., 235; Byrd v. Small, idem, 388.

The question of law involved in these cases is, had N. Phillips, as an attorney at law, the power to bind his clients by executing a release as such attorney? This question has been so ably argued and well settled by an opinion delivered by Chief Justice Moses, in the case of Mayer v. Blease, (4 S. C., 10,) that we deem it unnecessary to do more than to refer to that case and others there cited as settling it.

The second ground of appeal sets up that any other conclusion than that arrived at by the attorney for the appellant "would result in the just imputation of fraud of the said N. Phillips, &c."

All attorneys at law are liable to make mistakes. Fraud is nowhere charged or imputed to Mr. N. Phillips; on the contrary, it is expressly disclaimed. But even if there was such a charge, the law should be justly applied and administered for the good and protection of the people, and not to shield or save any particular individual from "just imputations of fraud."

The motion in each of the above entitled cases must be dismissed.

MOSES, C. J., and WILLARD, A. J., concurred.

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6 S. C. *410

*TROTTER v. ROBINSON.

(Columbia. April Term, 1875.)

[*Appeal and Error* ⇐757.]

A brief for the Supreme Court is defective if it does not contain a general or specific statement, as the case may require, of the nature of the issue to which the judgment or ruling complained of relates.

[Ed. Note.—Cited in Devereux v. Champion Cotton Press Co., 17 S. C. 72; Murphy v. Valk, 30 S. C. 267, 9 S. E. 101.

For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. ⇐757.]

[*Appeal and Error* ⇐757.]

The reasons for the rules stated fully.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. ⇐757.]

Before Orr, J., at Pickens, November Term, 1873.

This was an action by Susan Trotter, plaintiff, against W. W. Robinson, defendant, to recover the possession of real estate. The plaintiff was the appellant. The brief prepared for this Court contained an agreed statement of facts, the grounds of appeal and a copy of a power of attorney referred to in the statement of facts, but nowhere was it stated in the brief what was the nature of the issue submitted to the jury.

Earle & Blythe, for appellant.

McBee & Holcombe, contra.

The case was remanded to the Circuit Court with leave to the parties to make and settle a case and exceptions.

December 22, 1875. The opinion of the Court was delivered by

WILLARD, A. J. The brief in this case is defective in not showing the nature of the issue submitted to the jury.

There are two specific reasons why a brief or statement of facts prepared as the ground of asking relief from this Court on appeal should contain either a general or specific statement, as the case may require, of the nature of the issue to which the judgment or ruling complained of relates. One of these reasons arises out of the conditional grant to this Court of larger powers in the case of issues of a particular class than of other issues. If the issue is one that prior to the

Constitution of 1868 would appropriately have arisen in "cases of chancery," we are authorized by the Constitution to consider errors committed in the determination of matters of facts as well as errors of law affecting the judgment growing out of it, or in a ruling or decision bearing on it. The nature of our jurisdiction in such cases was examined by us in Sullivan v. Thomas, 3 S. C., 544. As to issues arising in actions at

*411

law, as contradistin*guished from "cases in chancery," our authority is limited to the correction of errors at law, and we are excluded from examining the correctness of the determination of the questions of fact involved in such issues.

It is obvious, therefore, that, in order to define the limit of our authority in each particular case, the general nature of the issue should appear in the brief or statement of facts submitted.

The other specific reason arises out of the rule that governs the exercise of the power of correcting errors at law. That rule demands that two things be made clear by one alleging an error at law: first, that an erroneous decision has been made, and, secondly, that the party complaining of such error was prejudiced thereby as it regards the merits of his case. It is important, therefore, to the appellant, in order to make clear the bearing of the error of law complained of, that not only the general nature of the issue should be disclosed in the papers laid before us, but that the questions of law and fact involved in that issue should be stated to such an extent as to make the bearing of the error complained of upon the substantial merits of the case appear.

The authority granted by the Legislature to parties to come before us upon an agreed statement of the case does not affect the present question. It is not a question of the sufficiency of the statement to satisfy the rules of Court governing the course of procedure, but to warrant the exercise of the power of this Court to set aside a judgment of the Circuit Court.

As the defect in the brief may be the result of excusable inadvertence, an opportunity will be afforded to the appellant to make such application to the Court on the subject as may be deemed requisite.

MOSES, C. J., and WRIGHT, A. J., concurred.

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6 S. C. *412

*GLENN v. COUNTY COMMISSIONERS OF YORK.

(Columbia., Nov. Term, 1873.)

[*Counties* ⇐154.]

An Act incorporating a railroad company provided in one of its Sections that it shall be lawful for any County or town interested in the construction of the road to subscribe to the capital stock of the company "such sum, and to be payable in such manner, as the people or proper authorities of such County or town shall deem best, determine and authorize," and that at all meetings of the stockholders the County Commissioners of any County shall appoint some one to represent the stock of their County: *Held*, That by "proper authorities of such County" was meant the County Commissioners thereof, and that they had the power to subscribe to the stock without referring the matter to the people or electors of the County.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 228; Dec. Dig. ⇐154.]

[This case is also cited in State ex rel. Brown v. C. & L. R. Co., 13 S. C. 305–308, 310–315, as to the facts, and as to the effect of the judgment on the right to maintain the subsequent action, and in Mauldin v. City Council of Greenville, 33 S. C. 21, 11 S. E. 434, 8 L. R. A. 291, as an example of the practice of maintaining an action in the name of several taxpayers for the benefit of themselves and others.]

Before Mackey, J., at York, August Term, 1873.

Action by E. L. Glenn and others against H. K. Roberts and others as County Commissioners of York County.

The plaintiffs, taxpayers on real and personal property in York County, exhibited their complaint before His Honor Thomas J. Mackey, on the 3d day of July, A. D. 1873, setting forth their character as such taxpayers; that the defendants are the County Commissioners for York County; the Act incorporating the Chester and Lenoir Narrow Gauge Railroad Company, and the 11th Section thereof, in words as follows, (15 Stat., 395):

"Sec. 11. That it shall be lawful for any County or town interested in the construction of the said Chester and Lenoir Railroad to subscribe to the capital stock of said company, or of any company with which it may consolidate or unite, such sum, and to be payable in such manner, as the people or proper authorities of such County or town shall deem best, determine and authorize; and in all meetings of stockholders, the County Commissioners of the respective Counties, and the Town Councils of the respective towns, shall appoint some person to represent the stock of their respective Counties and towns: Provided, That the property of the said railroad company situated in this State shall be subject to taxation during the existence of their charter."

The complaint further sets forth "that the defendants, on the eleventh day of April, A. D. 1873, held a meeting as County Commissioners, and adopted the following preamble and three resolutions as the official action of the Board of County Commissioners:

"Whereas the General Assembly of South Carolina did, by an Act approved February 26, A. D. 1873, incorporate the Chester and Lenoir Narrow Gauge Railroad Company,

*413

and did authorize the *said company to construct a narrow gauge railroad from the town of Chester, by the way of Yorkville, to some point on the line dividing the States of North and South Carolina, in the direction of Dallas, in the County of Gaston, in the State of North Carolina; and whereas, by Section 11 of said Act, it is declared that 'it shall be lawful for any County or town interested in the construction of the said Chester and Lenoir Railroad to subscribe to the capital stock of said company, or of any company with which it may consolidate or unite, such sum, to be payable in such manner, as the people or proper authorities of such County shall deem best, determine and authorize;' and whereas it is manifest to us that the County of York is greatly interested in the construction of the said Chester and Lenoir Railroad, as a valuable and much needed internal improvement, which will tend to advance the greatest good of the largest number of the people of York County; and whereas the best guaranties are furnished that the said railroad will be constructed within a brief period; therefore,

"Resolved by the County Commissioners of York County, That the sum of $100,000 be, and the same is hereby, subscribed for and on behalf of the County of York to the capital stock of the Chester and Lenoir Narrow Gauge Railroad Company.

"Resolved, That the said subscription of $100,000 shall be by bonds of the County of York, bearing interest at the rate of seven per cent. per annum, and redeemable in twenty years from the date of issue; and for the punctual payment of the interest, and the redemption of the same at maturity, the faith and credit of York County shall be inviolably pledged.

"Resolved, The said bonds shall be issued in the denomination of one hundred dollars only, and an annual tax sufficient to pay the annual interest thereon shall be levied on the real and personal property in the County of York subject to taxation."

That the defendants will soon issue the said bonds; that this will subject the plaintiffs to an additional annual tax; and the complaint then prays for an injunction against the issuing of said bonds upon several grounds, all of which were abandoned on the argument, except the following:

X. That the said defendants have no lawful authority to make the aforesaid subscription of $100,000, nor to issue the said bonds, for—

*414

*1. They derive no such authority from their office as County Commissioners.

2. They are not the people of the County, nor the proper authority of any town.

3. The aforesaid Act of the General Assembly only gives them authority to appoint persons to represent the stock which York County may own in the said railroad company.

7. The issuing of the said bonds by the defendants is not authorized by law.

His Honor thereupon granted the following order:

On the sworn complaint in the above entitled action, and upon the same submitted as an affidavit, a motion being made by Mr. Rion, of counsel for the plaintiffs, for a preliminary injunction against the defendants, and upon the case as stated in said complaint, sufficient reason appearing why the same should be granted, it is hereby ordered that, until the further order of this Court, the defendants be enjoined and restrained from issuing the bonds proposed to be issued by the defendants as the County Commissioners of the County of York in payment of a subscription of $100,000 towards the construction of the Chester and Lenoir Narrow Gauge Railroad.

And on the said complaint, and the same submitted as an affidavit, let the defendants or their attorney shew cause before me on the sixteenth day of July, instant, being Wednesday, at ten o'clock in the forenoon, at York Court House, why the foregoing order, or some order to be made of like purport and effect, should not be continued in full force, and until the final judgment and decree in this suit; and until the foregoing order is modified, let the same be in full force and effect.

This the 3d July, A. D. 1873.

The papers having been served, the defendants filed their answer denying that Section 11 of the Act incorporating the Narrow Gauge Railroad Company was correctly set forth in the complaint; denying that the proceeds of the aforesaid subscription were applicable to the construction of the roadbed and track of a railroad outside of the limits of York County, and alleging that it was distinctly understood and agreed with said company that the proceeds of said bonds were to be expended in the construction of

*415

the afore*said railroad within the limits of York County, and that more than the amount of said subscriptions would be necessary for the construction of said railroad through York County, alleging that said railroad was necessary for the internal improvement of York County; that said County would be greatly benefited thereby, and that said subscription, as made, was much needed and required for the building of said railroad, and alleging that, by the Constitution of South Carolina, and the Acts of the General Assembly of said State, and more especially by the aforesaid Act incorporating the said railroad company, the defendants, as County Commissioners of York County, are lawfully authorized to make the aforesaid subscription and issue the aforesaid bonds.

The defendants admitted as true all other

matters of fact alleged in the complaint; and the plaintiffs, before trial, admitted as true the matters of fact alleged in the answer.

On the 16th day of August, 1873, the cause was heard upon its merits before His Honor Judge Mackey, who, on the 12th day of September, 1873, filed the following order and decree:

Mackey, J. An interlocutory injunction was granted in this action on the 3d day of July, 1873, restraining the defendants from issuing the bonds proposed to be issued by them, as the County Commissioners of York County, in payment of a subscription of one hundred thousand dollars to the capital stock of the Chester and Lenoir Narrow Gauge Railroad Company, which said subscription was made by the defendants for and on behalf of the County of York. The defendants having been acquired to show cause why the said injunction should not be continued in full force, the case came up on the 16th day of the said month for a final hearing upon the merits, under the general issues involved in the pleadings.

It appears that the respondents, as County Commissioners of York County, have subscribed, as alleged by the plaintiffs, and now propose to issue, bonds in the name of the County of York, in payment of said subscription, such bonds to be redeemable in twenty years from the date of issue and to bear interest at the rate of seven per cent. per annum; and for the payment of the annual interest on such bonds, the said defendants, as County Commissioners, propose to levy an annual tax on the real and personal property subject to taxation in the County of York.

*416

*The plaintiffs, who are taxpayers of York County, deny the right of the defendants, the County Commissioners, to subscribe and issue the said bonds, and allege that the issuing of the said bonds by the defendants is not authorized by law and will subject the plaintiffs to an additional annual tax upon their real and personal property in the County of York, which tax, the plaintiffs allege, will be wrongful and illegal, and will inflict upon them, as taxpayers of York County, a loss and damage to the extent and amount of such proposed tax.

The defendants reply that they are authorized by law to subscribe and issue the said bonds, and that they derive such authority directly from Section 11 of an Act of the General Assembly of South Carolina, approved February 26, 1873, entitled "An Act to incorporate the Chester and Lenoir Narrow Gauge Railroad Company, and to authorize the consolidation of said company with the Carolina Narrow Gauge Railroad Company and the King's Mountain Railroad Company." Section 11 of said Act is as follows, to wit:

"Section 11. That it shall be lawful for any County or town interested in the construction of the said Chester and Lenoir Railroad to subscribe to the capital stock of said company, or, of any company with which it may consolidate or unite, such sum, and to be payable in such manner, as the people or proper authorities of such County or town shall deem best, determine and authorize; and in all meetings of stockholders the County Commissioners of the respective Counties, and the Town Councils of the respective towns, shall appoint some person to represent the stock of their respective Counties and towns: Provided, That the property of the said railroad company situated in this State shall be subject to taxation during the existence of their charter."

The real issue, the questio vexata, in this case springs from the diverse interpretations given to the words in the above Section—"the people or proper authorities of such County or town," etc.

The learned counsel for the plaintiffs presented an exposition of these words hostile to the powers claimed by the defendants, which exposition was marked by the greatest opulence of legal research, and a most profound analysis and rational and plausible application of the rules of grammar, which should guide the judgment in its interpretation of spoken and written language.

It is an exposition, however, which, while it strikes the mind with invincible force when applied to the words in question,—

*417

*isolated from the body of the Act of which they are an integral part—yet, in the judgment of the Court, it is not supported by the context. The conclusion of the learned counsel upon this point appears to be the result of viewing the statute in question unequally, and without due regard to kindred legislative enactments under which several Counties of this State have subscribed to the capital stock of railway companies and issued bonds in payment of such subscriptions.

That illustrious jurist, Chancellor Kent, laid it down as an established rule in the exposition of statutes that "the intention of the lawgiver is to be deduced from a view of the whole and of every part of a statute taken and compared together. The real intention, when accurately ascertained, will always prevail over the literal sense of terms. When the expression in a statute is special or particular, but the reason is general, the expression should be deemed general."—Kent Comm., vol. 1, part. 3, 510.

It was urged by the learned counsel for the plaintiffs that the words "the people or proper authorities of such County or town" should be construed to mean "the people of such County or proper authorities of such town." In other terms, the plaintiffs contend that "the people," or, what is synonymous with the people, the majority of the duly qualified electors of the County, must first authorize the subscription by their votes in the case of the County; but the Intendant

and Council of the town may subscribe directly, on behalf of the town, they being the "proper authorities of such town."

The plaintiffs, in support of this construction, refer to the fact that hitherto no such power of subscription has ever been exercised or even claimed by the County Commissioners of any County in this State, and that no County in South Carolina has ever issued its bonds in aid of the construction of railroads until after the majority of the people of such County had, by their votes at the ballot box, authorized such issue. The fact cited by the plaintiffs, so far from re-enforcing the plaintiffs' construction of the words now immediately under review, would appear to be fatal to the conclusion based upon that construction. While it is true that no County of this State has subscribed or issued bonds to the capital stock of a railroad company except pursuant to a vote of the people of such County, it is also true that every Act heretofore enacted which authorized a

*418

County to issue its bonds in aid of the *construction of a railroad specially and expressly provided that as a condition precedent to such issue, the majority of the qualified electors of the County should authorize such issue by their votes. The only Act of our General Assembly in relation to County subscriptions to the capital stock of railroad companies which does not expressly provide for a popular vote on the question of such subscription is the Act under which the defendants claim to exercise the power of subscription to such capital stock without being authorized thereto by a popular vote.

In expounding statutes, we should have regard to what may properly be termed the comparative interpretation of laws; that is, we should not only collate and compare the several parts of the statute in question, but we should compare the whole statute with other statutes enacted by the same legislative body in reference to the same subject, and thus determine the real purpose and intent of the legislator, both by what is expressed and by what is omitted in the statute under consideration.

It is true that the County subscriptions hitherto made in aid of railway construction in this State have been made by the authority and under the sanction of a popular vote. It is also true, however, that the several Acts of the General Assembly which have heretofore authorized and empowered a County to make such subscription not only provided in expressed terms, in totidem verbis, that such subscription should first be authorized by the majority of the legal voters of the County, but also supplied the means or agencies by and through which the judgment of the majority might be expressed, such as authorizing the County Commissioners and the Mayors or Intendants of towns to call conventions of the taxpayers in the County and towns respectively to consider the question of submitting the proposed subscription to the popular vote; and also prescribing the mode in which such submission should be made, the appointment of managers and the manner of declaring the result of the vote.

All of this elaborate machinery for securing an expression of the popular will at the ballot box is wanting in the Act of the General Assembly now under consideration. Is it not, therefore, a conclusive presumption of law and of sound reason that the General Assembly in this Act designed that the Counties interested in the construction of the Chester and Lenoir Narrow Gauge Railroad might subscribe to the capital stock of that

*419

company without *being authorized thereto by a popular vote? To conclude otherwise is to assume that the Legislature, in dispensing with an important condition which it has heretofore invariably annexed to a grant of power, meant to qualify and restrict the exercise of the power granted, the same as if it had expressed that condition. Such assumption would be an unwarrantable depreciation of the law-making power. The Courts are bound to hold that the General Assembly of the State means what it says and says what it means, although we may sometimes be reminded that Lord Coke complained, even in his day, that "great questions have oftentimes arisen upon Acts of Parliament overladen with provisos and additions, and many times penned or corrected by men of none or very little judgment in law."

I am constrained to conclude, after a careful survey of the authorities cited and the arguments adduced by the learned counsel for the plaintiffs, that when the General Assembly declared, in Section 11 of the Act to incorporate the Chester and Lenoir Narrow Gauge Railroad Company, "that it shall be lawful for any County or town interested in the construction of the said Chester and Lenoir Railroad to subscribe to the capital stock of said company, or of any company with which it may consolidate or unite, such sum, and to be payable in such manner, as the people or proper authorities of such County or town shall deem best, determine and authorize," it intended to vest the power of subscription, on behalf of the County, in the "proper authorities" of the County, without the intervention of a popular vote. Any other conclusion would demand also a transposition of the words of the statute, which would carry the Court into the forbidden domain of legislation.

It was urged, however, by the plaintiffs that the term "proper authorities" does not necessarily designate the County Commissioners rather than the County Treasurer. I cannot perceive any difficulty in defining the term "proper authorities," viewing it in the light of the context and in relation to the subject matter of the proposed subscription.

Public officers are definable by their usual functions; and when a doubt arises as to what officers are intended by a statute that vests officials with a new power, or imposes upon them new duties, that doubt may be best solved by ascertaining whether the statute relates to a matter which is germane to the office of those who propose to exercise the power or perform the duty.

*420

*The statute relates to the construction of a railroad passing through the County of York. A railway is designated in the General Statutes of this State as a "public highway," (vide G. S., Chap. 63, Sec. 75,) and it is manifestly a valuable internal improvement. Section 19 Article IV, of the State Constitution provides that "the qualified electors of each County shall elect three persons, for the term of two years, who shall constitute a Board of County Commissioners, which shall have jurisdiction over roads, highways, ferries, bridges, and in all matters relating to taxes, disbursements of money for County purposes, and in every other case that may be necessary to the internal improvement and local concerns of the respective Counties: Provided, That in all cases there shall be the right of appeal to the State Courts."

This language of the Constitution defining the jurisdiction of the County Commissioners, considered with reference to the subject matter of the statute in question, points to them with unerring index as the "proper authorities" of the County, alone empowered to act in the premises. Indeed, the statute itself clearly forbids any other conclusion in declaring that "the County Commissioners of the respective Counties shall appoint some person to represent the stock of their respective Counties."—Vide Sec. 11. But, even though the Constitution were less clear and comprehensive as to the powers of County Commissioners, their authority to act in the premises is deducible from the very nature of their office.

By the Act of 1868, (Gen. Stat. S. C., Chap. 18, Sec. 34,) each County is declared to be a body politic and corporate. The County Commissioners are those officers through whom the County performs its general functions of government. They are charged with the local administration, and constitute the highest political tribunal in the County. Under the Constitution and laws of this State, they exercise quasi judicial, legislative and executive functions. They exercise a supervisory power over all the public officers of the County. When assembled as a Board, they may punish any open or direct contempt of their authority. They are required to examine, settle and allow all accounts chargeable against the County, and draw orders on the County Treasurer for the same. They are empowered to cause to be levied, collected and paid to the Treasurer of the County such sum of money as may be necessary to construct bridges therein, and to prescribe upon what plan and in what manner the moneys so to be raised shall be expended; to

*421

make such *orders concerning the corporate property of the County as they may deem expedient, and to lay out and construct public highways.—Vide Gen. Stat., Chap. 19. They are designated by law as the only officers empowered to borrow money for the use of the County, to be expended for the purchase of any real estate; and no County can create such loan until the General Assembly shall, upon notification by the County Commissioners, authorize them to create it.

The distinction attempted to be drawn, in the argument of the plaintiffs, between Counties and municipal corporations, does not appear to be very material to the main issue, nor is it well founded. That a County is a "municipal corporation" cannot well be denied.—Vide 2 Kent Comm., 275; Bla. Comm., 4, 411; People v. Morris, 13 Wend., 325-335; Horton, Judge & Co. v. Mobile County School Comm., 43 Ala. 598; 2 Bouvier Law Dic., 193. And in Thompson v. Lee County [3 Wall. 327, 18 L. Ed. 177], the Supreme Court of the United States uses the expression "a County or other municipal corporation." In that case Mr. Justice Miller says: "Most certain it is that as to all their rights, powers and responsibilities, three grand classes of corporations exist: first political or municipal corporations, such as Counties, towns, cities," etc.—Vide also Swann v. Williams, 2 Michigan, 427; 1 Coler on Munic. Bonds, 374.

That the Legislature may authorize a County, or the proper authorities thereof, or any other municipal corporation, to subscribe to the capital stock of a railroad company within its limits, or to aid in the construction of any other internal improvement for the public benefit, and issue bonds to pay for such subscription, or borrow money on the faith of such bonds, has been repeatedly declared in decisions of the Supreme Court of the United States and the Supreme Court of many of the States of our Union.

This power, so delegated, may, if the Legislature please, be exercised without the sanction of a popular vote, its validity being dependent upon the intent of the legislative body in delegating the power to the local administration; the effectiveness of the grant of power not being subject to impairment by the absence of a popular ratification on the part of the local constituency.—Vide Thompson v. Lee County, 3 Wallace, U. S. S. C. Rep., 327 [18 L. Ed. 177]. Gilman v. City of Sheboygan, 2 Black, 510 [17 L. Ed. 305], and Barto v. Himrod, 4 Seldon, 433. In comment upon this last case, it is said in 2 Coler on Municipal Bonds, 206, "all general reasoning is rendered unnecessary by the

*422

*explicit determination in the case of Barto v. Himrod." But while general statutes must be enacted by the Legislature, it is plain that the power to make local regulations, having the force of law, in limited localities, may be committed to other bodies representing the people in their local divisions or to the people of those districts themselves. Our whole system of local government in cities, villages, Counties and towns depends upon that distinction. The practice has existed from the foundation of the State and has always been considered a prominent feature in the American system of government.

In Sharpless v. Mayor of Philadelphia, (21 Pa. St. Rep., 147–148,) the Supreme Court of Pennsylvania says: "The Legislature may lawfully authorize municipal corporations to subscribe to the capital stock of railroad companies, and such authority may be given directly to the corporate authorities or it may be made to depend upon the assent of a majority of the corporators."—Vide also City of Bridgeport v. Housatonic R. R. Co., 15 Conn., 475; Clarke v. City of Rochester, 14 Howard Prac. Rep., 214; Bank of Rome v. Village of Rome, 18 N. Y. Rep., 33; Cincinnati R. R. Co. v. Clinton County, 1 Ohio St. Rep., 77; Williams v. The New York Central R. R. Co., 18 Barb., 233–246; Carry v. Commissioners of Wyandotte County, 20 Ohio, 10.

The power to delegate authority is a distinct power of the State. The American system of government is one of complete decentralization, the primary and cardinal idea of which is that local affairs shall be managed by local authorities. In this country, beginning with the illustrious Marshall and Kent, the vast preponderance of judicial authority is with those who affirm that railways are public institutions of great and manifest benefit to communities, and the Legislature may either impose taxes directly in aid of their construction or delegate the power to the political subdivision of the State within whose immediate territorial jurisdiction such railways are to be constructed.

In the case of Rogers v. Burlington [3 Wall. 654, 18 L. Ed. 79], decided in the Supreme Court of the United States, Mr. Justice Clifford, in delivering the opinion of the Court, said: "Railways, as a matter of usage, founded on experience, are so far considered by the Court as in the nature of improved highways, and as indispensable to the public interest, and the successful pursuit even of local business, that a State Legislature may authorize the towns and Counties of a

*423

State *through which a railway passes to borrow money, issue their bonds, subscribe for the stock of the company, or purchase the same, with a view of aiding those engaged in constructing or completing such a public improvement.

In the case of Olcott v. The County Board of Supervisors of Fond du Lac County [16 Wall. 678, 21 L. Ed. 382], decided in the Supreme Court of the United States at the December Term, 1872, the Court say: "That railroads are public highways, has been the doctrine of nearly all the Courts ever since such conveniences have had any existence. It is said that railroads are not public highways per se. This is a mistake. In their very nature they are public highways. It needed no decisions of Courts to make them such. * * * If there be any purpose for which taxation would seem to be legitimate, it is the making and maintenance of highways. It is also a County purpose." etc.

In the case of The Louisville and Nashville Railroad Company v. The County Court of Davidson County, (1 Sneed, 637,) it was decided that "the object of a tax in respect to a railroad passing through the County is a 'County purpose,' within the meaning of the Constitution of Tennessee authorizing taxes for County or corporation purposes."—Vide also McCoy v. Washington, 3 Phil. Rep., 290, (United States Circuit Court, Pa.); Taylor v. Commissioners of Newberne, N. C., 3 Jones Eq., 141; Steen v. Mayor of Mobile, 24 Ala., 591; State, ex rel. James Copes, v. City of Charleston, 10 Rich., 491.

In this last named case, it appeared that under the charter of the city of Charleston, S. C., (Act August 13, 1783, 7 Stat., 98,) the City Council were "vested with full power and authority to make every by-law or regulation that shall appear to them requisite and necessary for the security, welfare and convenience of the said city," and "to make such assessments on the inhabitants of Charleston, or those who hold taxable property within the same, for the safety, convenience, benefit and advantage of the said city, as shall appear to them expedient."

The City Council of Charleston, acting upon their construction of this provision of the city charter, did, of their own motion, subscribe in the aggregate $2,300,000 to the capital stock of various railroad companies, whose lines, then in course of construction, commenced within the corporate limits and extended into neighboring States. The Court

*424

of Errors of this State sustained the *action of the City Council as warranted by the charter powers and as a not improper exercise of the authority incident to the governmental administration of a municipal corporation.

The Mayor and Aldermen of a city and a Board of County Commissioners are vested with cognate powers, from the nature of their offices, as the "proper" or representative authorities of their respective corporations.

In the case of The State, ex rel. Lartigue, v. Chairman County Canvassers [4 S. C. 485], decided by our Supreme Court at the April Term, 1873, the Court say, incidentally: "the

said County being a corporation, the representatives of which are the County Commissioners."

The plaintiffs further allege that "the subscription, in the manner proposed by the defendants, will result in taking the private property of the plaintiffs, by taxation, for the use of a corporation, without the consent of the plaintiffs, or a just compensation to them therefor, in violation of Section 23 of Article I of the Constitution of this State."

The clause of the Constitution referred to is not pertinent to the matter in issue, nor is the proposed tax in anywise repugnant thereto. Section 23, Article I, of the State Constitution relates to the exercise of the right of eminent domain by the State and imposes a restriction thereon. This is a right entirely distinct in its origin and operation from the power of taxation. In exercising the right of eminent domain, the State takes from the property owner, in property, more than the share he is bound to contribute, as a citizen, to the general good, and the State compensates him therefor. In exercising the taxing power, the State takes from the property owner his exact proportionate share, in money, for the advancement of the common interest, without compensation, save in those advantages reflected back upon the individual from the promoted welfare of the community.

The fourth and fifth clauses of the complaint were abandoned by the plaintiffs, in the argument, as untenable.

The further objection, by plaintiffs, that even though the defendants have the authority to subscribe to the capital stock of the said railroad company, they are not authorized to issue the proposed bonds, cannot be sustained. The power to issue the proposed bonds is a corollary from the authority to subscribe. In every grant of power, there is conveyed the means necessary to make it effective.

*425

*I have considered the questions at issue solely upon their merits, and without interposing those technical rules of practice which would have justified the Court, sua sponte, in dismissing the complaint. A recent eminent authority on the law of injunctions says that "the issuing of bonds and the levying and collecting of a tax in aid of subscriptions to a railroad by a County Court will not be enjoined on the ground of want of jurisdiction in the Court to take such proceedings without a vote of the people, since a sale of the taxpayer's property, under such proceedings, would not divest the owner of his title and he can maintain an action at law for the property and for damages for its detention."—High on the Law of Injunctions, 215 and 383; vide also State v. Parkville, 32 Mo., 496, approving Sapre v. Tompkins, 23 Mo., 443.

In view, therefore, of the law and the facts in the premises, I am of the opinion that in subscribing to the capital stock of the Chester and Lenoir Narrow Gauge Railroad Company, the County Commissioners of the County of York have exercised a discretion within the scope of their legal powers, and that in aiding in the construction of a railway through the said County, they will be giving a much needed impulse to the civilization and material development of the County, of which they are, by the Constitution and laws, the chief administrative officers.

I do, therefore, order and decree that the preliminary injunction heretofore granted by me in this case be, and is hereby, dissolved, and that the complaint be dismissed with costs.

To the foregoing decree the plaintiffs duly excepted, and appealed therefrom on the following grounds:

I. In that His Honor held that the only Act of our General Assembly in relation to County subscriptions to the capital stock of railroad companies which does not expressly provide for a popular vote on the question of such subscription is the Act under which the defendants claim to exercise the power of subscription to such capital stock without being authorized thereunto by a popular vote; whereas the Act of 18th September, 1868, entitled "An Act to incorporate the Air Line Railroad Company in South Carolina" (under which Act the vote of the people was taken in each County, and in York such vote was adverse to the subscription,) contained like provisions.

II. In that His Honor held that, by Section 11 of the Act of February 26th, 1873, the

*426

General Assembly intended to vest the *power of subscription on behalf of the County in the "proper authorities" of the County without the intervention of a popular vote.

III. In that His Honor held that the words "proper authorities," in said Section, are to be construed as "proper authorities of such County," and not "proper authorities of such town," and that by "proper authorities of such County" is meant the County Commissioners thereof.

IV. In that His Honor held that the authority of the County Commissioners to act in the premises, that is to make the subscription questioned, is deducible from the very nature of their office.

V. In that His Honor held that the authority of the County Commissioners to act in the premises, that is to make the subscription questioned, is deducible from the powers conferred upon them by the Constitution and laws of this State.

VI. In that His Honor held that a County in South Carolina is a municipal corporation; whereas he should have decided that in South Carolina a County is a quasi municipal corporation with limited powers.

VII. In that His Honor held that the Leg-

islature of South Carolina may authorize a County to subscribe to the capital stock of a railroad company within its limits without the sanction of a popular vote.

VIII. In that His Honor held that the defendants have the authority to issue the bonds proposed to be issued.

IX. In that His Honor held that in subscribing to the capital stock of the Chester and Lenoir Narrow Gauge Railroad Company the County Commissioners of the County of York have exercised a discretion within the scope of their legal powers.

X. In that His Honor ordered and decreed that the preliminary injunction heretofore granted by him in this case be dissolved, and that the complaint be dismissed with costs.

XI. In that His Honor did not order and decree that the said injunction be continued of force until the subscription might be sanctioned by a vote of the people of York County.

[For subsequent opinion, see State ex rel. Brown v. Chester & L. N. G. R. Co., 13 S. C. 290.]

Rion, for appellants:

I. The Section under which the County Commissioners acted is one which would be very difficult to construe if we were to be confined to the mere verbiage of the Act.

*427

It frequently happens that *an historical inquiry will explain sentences of themselves unintelligible, or which might be understood to mean something very different from their real meaning. For instance, search all our statutes through and one will fail to arrive at the meaning of "benefit of clergy," and one might well suppose those words to mean the receiving of the kind offices of a clergyman when about to be executed.

Let us make an inquiry into the history of this Section and see if we can learn what it means, and why it is apparently so obscure.

We find that it is a literal copy, mutatis mutandis, of Section 1 of the Act to aid the Air Line Railroad Company, (14 Stat., 75,) except that the word "city" is omitted. The Air Line Railroad passed through cities in North Carolina, Georgia and South Carolina, while our railroad passes through no city.

Now, in the Air Line Act, the Legislature could not say "Mayor and Aldermen of such town or city," nor "Intendant and Wardens of such town or city," and hence had the alternative of saying "the Intendant and Wardens of such town, or the Mayor and Aldermen of such city," or, more briefly, as in the Act, "the proper authorities of such town or city." When the Legislature copied this Section it struck out "city," for the reason before given, and left the words as is in Section 11.

Now the Air Line Act was passed in September, 1868, and the practical contemporaneous construction given it was a vote by the people of the Counties, including York.

After this, in February, 1873, the Legislature passed the Section in question, and must be supposed to have intended the same as Section 1 of the Air Line Act, with its meaning practically explained by a contemporaneous construction.

Contemporanea expositio, est fortissima in lege.

But why was the Air Line Act left so doubtful and no plan of taking the vote provided? We find, on inspection of the Act, that the railroad lies in the three States of Georgia, North Carolina and South Carolina. In such cases it often happens that the person who in fact drafts the statute lives in one of the States and has in view the laws of such State. The Air Line Act is evidently drafted by a North Carolinian. Such a one would find, on inquiry, that in Georgia the Constitution, Article IV, Section 6, forbids any person from being compelled to contribute to a railroad, except inhabitants of towns and cities, after an elec-

*428

tion has been had which *results in favor thereof, while in South Carolina no such prohibition existed. Hence the application in Georgia is for a legislative appropriation of so much a mile made by the State, and the proper authorities of towns and cities are allowed to vote subscriptions. In South Carolina the Section is as found, assuming (or not considering the matter) that some general law existed in South Carolina like the general law of North Carolina, which provides:

"An Act to Authorize the Several Counties of the State to Take Stock in Railroad Companies.

"Section 1. The General Assembly of North Carolina do enact, That the County Commissioners of the several Counties in this State shall have power to subscribe stock to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens of the County may have an interest.

"Sec. 2. That the Commissioners of any County proposing to take stock in any railroad company shall meet and agree upon the amount to be subscribed; and if a majority of the Commissioners shall vote for the proposition, this shall be entered of record, which shall show the amount proposed to be subscribed, to what company, and whether in bonds, money or other property, and thereupon the Commissioners shall order an election to be held, on a notice of not less than thirty days, for the purpose of voting for or against the proposition to subscribe the amount of stock agreed on by the County Commissioners. And if a majority of the qualified voters of the County shall vote in favor of the proposition, the County Commissioners, through their Chairman, shall have power to subscribe the amount of

stock proposed by them and submitted to the people, subject to all the rules, regulations and restrictions of other stockholders in such company or companies: Provided, also, That the Counties, in the manner aforesaid, shall subscribe from time to time such amounts, either in bonds or money, as they may think proper.

"Sec. 8. The election to be held as for the members of the General Assembly."—Pub. L. N. C., Chap. 174, 417.

Hence it was unnecessary to provide the manner of taking the vote. It seems that, in carrying out the Air Line Act, the elections were held as if the North Carolina law governed.

And the manner of taking the will of the people, as provided by this Act, is so very applicable, that its provisions, or ones of

*429

like *character, might well be implied. The well known maxim applicable to statutes, "quanda lex aliquid concedit, concedere videtur et id, per quod devenitur ad illud," or, as rendered by Chancellor Kent, "whenever a power is given by a statute everything necessary to the making of it effectual or requisite to attain the end is implied," is sufficient authority for this.

II. The construction which I place on Section 11 is the same as if it read: "as the people of such County or the proper authorities of such town shall deem best."

For the purpose of construction, words in an Act may be taken distributively.—Potter's Dwarris on Statutes, 230.

The word people, in the sentence "as the people or proper authorities of such County or town," cannot be intended to refer to "town." The people of a town is neither a usual nor proper legislative use of words. Hence the sentence cannot be equivalent to "as the people or proper authorities of such County or the people or proper authorities of such town." A distribution of words being necessary at once suggest the one I propose as proper. It is the same distribution that would be made in the sentence: "The Admiral or General of the navy or army may order a general court martial for the trial of officers."

The words "Town Councils," or the equivalent, were not used for the reason specified in my preceding point, and "the County Commissioners" are used in the same Section charged with another duty. If the County Commissioners were, virtute officii, the "proper authorities" of the County, then the sentence, "the County Commissioners of the respective Counties and the Town Councils of the respective towns" could have been fully expressed simply by three words, "the proper authorities." This matter of representation of stock is not found in the Air Line Act, (for some reason known to the "North Carolinian,") or else some light might thereby be thrown on this matter.

III. Where a power is claimed for an officer, it is incumbent on those who assert the power to point out the Section of the Constitution or statute conferring the power.

If the matter is left in doubt, then it is the duty of the officer not to exercise the power. —Cooley on Cons. Lim., 73.

It is, therefore incumbent on the defendants to show that "the proper authorities of the Counties" is a proper distribution of the words of the Act, and that the County Commissioners are the proper authorities.

*430

*IV. But I will take upon myself the burthen of showing that the Commissioners are not the proper authorities, as far as a negative can be shown.

1. Section 11 does not state that they are the proper authorities. This has already been abundantly shown.

2. Right reason is adverse to the claim. The construction of all laws must be reasonable. Is it reasonable to suppose that in a State, where all powers not delegated are reserved to the people, (Cons., Art. 1, Sec. 41,) where no public debt of the State can be created without a two-thirds vote of the Legislature, and other restrictions besides having to have the sanction of a vote of the people, and at a time when the welfare of the State requires all the taxing resources of the Counties to be husbanded to respond to State taxation, that a little legislature of three could, by a vote of two of its members, impose a debt upon the County of $100,000, or $1,000,000, interest to be paid annually, without or against the consent of the people?

Our construction is reasonable.

(a.) The phrase "people of a County" is the legal language for the legal voters of the County.—Cooley, 28, 29.

(b.) A reference of subscription to railroads to the people or voters not unusual.—Cooley, 119.

(c.) And legal.—Potter's Dwarris, 422, (8th and 9th.)

Again, the action of the Commissioners, in any case like this, is either such as the people would vote for, or as they would vote against. If the people would vote for the subscription, then why not submit it to them, —for this is all we ask in this case? And if the people would vote against the subscription, then no milder terms are appropriate than to say the Commissioners have perpetrated an outrage against the people.

3. Usage in the United States does not countenance the power claimed.

I have in this case made extended inquiry and research, and have been able to find no one instance where a statute has authorized County Commissioners (or the equipollent officers) to vote a subscription to a railroad; nor one instance, before this case, where such a power was attempted to be exercised.

The nearest I could find was one case where the Commissioners and the grand

jury were so authorized: and another case where the United States Court said the Legislature might authorize the Commissioners. But in this latter case (Thomson v. Lee Co.,

*431

3 *Wall., 327,) the Supreme Court of Iowa had changed its ruling, and the Act in question actually provided for a vote of the people.

If the research of the defendants has been rewarded with a nearer instance, they will cite the same to your Honors.

But usage can hardly be predicated upon exceptional cases when found.

4. The Constitution of South Carolina does not confer the power.

If conferred, it must be by Article IV, Section 19, where they are given jurisdiction over highways, and in every case of internal improvement; or in Article IX, Section 8, which provides that "the corporate authorities of Counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes."

Now, while we admit that railroads are "great public highways," and "great works of internal improvements," we deny that they are the highways or the internal improvements that Section 19 meant: and we deny that they can be included in the County purposes referred to in Section 8. Besides, Section 8 does not say that the officers mentioned in Section 19 are the corporate authorities mentioned in Section 8, and the County Auditor, for instance, is a corporate authority of a County.

If railroads are the highways meant, then it would be proper for the County Commissioners to build bridges for them and to keep them in repair. They might order out the males of the County and work them five days on the railroad tracks. This absurd result follows, or else it is true that by highways, in Section 19, the Constitution does not mean railroads.

5. No statute confers the power.

The provision much relied on, which has been transferred to Gen. Stats., 146, Section 1, is simply an extract from Article IV, Section 19, to which I have referred.

As a statute, it can give no more power than as a part of the Constitution.

I would have the Court bear in mind that Counties are only quasi corporations, (Cooley, 241,) and have such character to the extent created by law.

In South Carolina, Counties are corporations for certain expressed purposes only.—Gen. Stats., 145.

And townships are abolished, except geographically.—XIV Stats., 313.

*432

*In Gen. Stats., 149, 234, 274, the Commissioners have duties respecting highways and borrowing money for County purposes, to which the remarks made respecting the constitutional provisions are pertinent.

The General Assembly, by habitual legislation, assert that the Commissioners have not the power of themselves to levy taxes, etc., for such purposes as the court house and jails.—XV Stats., 121, 289, and nine Acts passed same session, as "Section 11" in question.

6. If the general powers conferred by the Constitution and statutes were such as to countenance a power of the character claimed, yet there must be specific legislative authority to authorize the Commissioners to subscribe to railroads.—Cooley, 215.

And see Police Jury v. Britton, (15 Wall., 566,) (decided December 1872.) which decides that the representative officers of a County invested with the usual powers of administration in specific matters, and the power of levying taxes to defray the necessary expenditures of the County, have no implied authority to issue bonds and coupons. In that case the Supreme Court of the United States well say:

"It would be an anomaly, justly to be deprecated, for all our limited territorial boards, charged with certain objects of necessary local administration, to become the fountains of commercial issues, capable of floating about in the financial whirlpool of our large cities."

7. The policy and spirit of the Constitution is adverse to the power claimed.

Article XVI had been finally ratified before the passage of the Narrow Gauge Railroad Act.

Take the Constitution as it then stood, and there seems to be an acknowledgment that it is but justice to the people that debts which they have to liquidate shall not be created without their consent.

8. The Constitution forbids the County Commissioners from exercising the power claimed.

If we show this, then it would follow that if Section 11 had, in unmistakable language, conferred the power, yet it could not be exercised.

(*a.*) It cannot be denied that this subscription of bonds and the contemplated issue is the exercise of a legislative power. By Article II, Section 1, all legislative power is vested in the General Assembly. By Article I, Section 41, all powers not delegated remain

*433

*with the people. Now, while under the rule delegatus non delegare it would be improper for the Legislature to delegate any of its powers to any other branch of government, yet it might not be improper to remit an exercise of its powers to the people.

(*b.*) The County Commissioners, as known to the Constitution, are judicial officers. They are distinctly so characterized by being placed under the heading of "Judicial Department."—Art. IV, Const., §§ 19, 25.

Section 19 of Article IV, "Judicial Department," provides:

"The qualified electors of each County shall elect three persons for the term of two years, who shall constitute a Board of County Commissioners, which shall have jurisdiction over roads, highways, ferries, bridges, and in all matters relating to taxes, disbursements of money for County purposes, and in every other case that may be necessary to the internal improvement and local concerns of the respective Counties: Provided, That in all cases there shall be the right of appeal to the State Courts."

This Section, outside of its location, is clearly judicial. The words "jurisdiction," "case," "cases" and "appeal" are conclusive.

The history of this Section shows the same. In the proceedings of the Constitutional Convention, we find this Section first reported as Section 21, ("Judicial Department," 261,) and the words "District Court," where "Boards of County Commissioners" now stand. The change of "District Court" to "Board of County Commissioners" is made on pages 629, 630. Afterwards "full jurisdiction" is changed to "jurisdiction," and the words "Provided, That in all cases there shall be the right of appeal to the State Courts" added.

And Section 369 of our Code designates the County Commissioners as an "inferior Court of jurisdiction."—Gen. Stat., 658.

The County Commissioners are therefore clearly judicial officers, and can neither, of their own authority nor by Act of the Legislature be given authority, to exercise legislative powers, for Article I, Section 26, distinctly provides: "In the government of this commonwealth, the legislative, executive and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other."

If authorized, they could not discharge the duties of the "legislative department."

*434

*V. Suppose the construction contended for by the defendants be correct, and that the Section can only be read "the people or proper authorities of the County," and that the Commissioners are "the proper authorities," and, consequently, that the Section reads "the people or County Commissioners of the County," then the power contended for does not exist, for this construction puts the "people" and the "Commissioners" at least upon an equal footing. This certainly cannot be questioned. Now this litigation may fairly be said to be a contest between the people and the Commissioners as to who shall exercise this power of determining the question of subscription; the statute, allowing the construction claimed by the defendants, only gives them an equal right with the people. In this equipoise, what is to decide the contest?

(*a.*) Need I cite your Honors to authorities holding that in construing statutes that construction most favorable to the people is to be given?

(*b.*) Or authorities holding that Acts affecting private property are to be construed favorably to property holders (or the people)?

(*c.*) Or need I again read those Sections of the Constitution which clearly acknowledge the people as the source of all power?

(*d.*) Or will your Honors allow the Commissioners to contest this matter with the people who elected them—the creature arrayed against the power which created it?

The claim of the Commissioners is preposterous. They claim to an exclusive exercise of this power. The people say: divide the exercise of this power; let the Commissioners determine what amount they think ought to be subscribed, and then let us, who have to bear the burthen, decide whether we will authorize the subscription.

VI. Sound policy and the public good demand that the Commissioners shall be enjoined from issuing the bonds.

My clients represent all parties, races, localities and interests in York County. One is a member of the Legislature, some are friends to the projected railroad, and one at least is a stockholder. The friends of the railroad do not desire the benefit however great, if thereby the County Commissioners, by a vote of two of their number, can, whenever they desire, impose a new burthen of debt upon the County. The door is not only thrown open to corruption, but corruption is invited. How easy to bribe the majority of a legislature of three! In this case, I am

*435

sure, there has been no *bribery; but I am equally sure that if the Commissioners are allowed to exercise the power claimed, that bribery will be attempted in every County in the State.

Article XVI will stand as one great door closed against corruption, and against creating burthens upon the people against their will; while thirty-two smaller doors will be flung wide open, (one in each County,) and the State will soon be made bankrupt by the detail of Counties.

Clawson, with whom was Thomson, Wilson & Witherspoon, contra:

I. The eleventh Section of the Act incorporating the Chester and Lenoir Narrow Gauge Railroad Company authorizes the "proper authorities" of York County to make the subscription they have made.—Potter's Dwarris on Statutes, 234, 198, 184 and 194; 14 Stat. S. C., 75, 595; 1 Kent Com., 431; Waller v. Harris, 20 Wendell, 561.

II. The proper authorities of a County referred to in the Act are the County Commissioners.—Sec. 11 of the Act; Constitution, Art. IV, Sec. 19; Rev. Stat., 732; Rev. Stat.

S. C., Chap. 18, Sec. 34, and Chap. 19; State of South Carolina, ex rel. Lartigue et al., v. Board of County Canvassers of Barnwell County.

III. The Legislature may authorize the people or proper authorities of a County to subscribe to the capital stock of a railroad company, and such authority may be given directly to the corporate authorities without the sanction of a popular vote.—Thomson v. Lee County, 3 Wall., 327; Rogers v. Burlington, 3 Wall., 654-666; Sharpless v. Mayor of Philadelphia, 21 Pa. St. Rep., 147, 148; Gilman v. City of Sheboygan, 2 Black., 510; Barton v. Himrod, 4 Seld., 483; 2 Coler on Municipal Bonds, 206, 207; Olcott v. County Board of Supervisors of Fond du Lac County, United States Supreme Court, December Term, 1872; State, ex rel. Copes, v. City Council of Charleston, 10 S. C., 491; Alva Gage v. City Council of Charleston.

IV. The authority of the County Commissioners to make the subscription is deducible from the powers given them by the Constitution of this State.—Art. IV, Sec. 19; 1 Bouv. L. D., 683; 2 Coler on Municipal Bonds, 207; 1 Coler on Municipal Bonds, 309; Rev. Stat., 352; Copes v. City Council of Charleston, 10 S. C., 491; Louisville and Nashville Railroad Company v. County Court of Davidson, 1 Sneed, 637.

*436

*V. Authority in the County Commissioners to make the subscription necessarily includes the power to issue the proposed bonds. —2 Coler on Municipal Bonds, 339; 1 Kent Com., 433; Dwarris on Statutes, 123; 3 Wall., 666; 41 Pa. St., 278; Reinboth v. Pittsburg, eleventh Section of the Act.

1874. PER CURIAM. In this case, it is ordered that the motion be dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

WILLARD, A. J., dissenting. The decree of the Circuit Court holds that under the terms of Section 11 of the Act to incorporate the Chester and Lenoir Railroad Company, (15 Stat., 393,) the County Commissioners of York County have authority to subscribe to the capital stock of such company an amount fixed by them for that purpose. The question raised by the appeal involves the correctness of this decision.

The Section of the Act in question is as follows: "That it shall be lawful for any County or town interested in the construction of the Chester and Lenoir Railroad to subscribe to the capital stock of said company, or of any company with which it may consolidate or unite, such sum, and to be payable in such manner, as the people or proper authorities of such County or town shall deem best, determine and authorize; and in all meetings of stockholders, the County Commissioners of the respective Counties and the Town Council of the respective towns shall appoint some proper person to represent the stock of their respective Counties and towns; Provided, That the property of the said railroad company situated in this State shall be subject to taxation during the existence of their charter."

The question is, whether in the case of a subscription under the terms of this Section in behalf of a County the County Commissioners of such County are, in the sense of the Act, "proper authorities of such County," and as such authorized to determine the fact that the County is interested in such improvement, to fix the amount of such subscription, the manner of payment, and to confer authority for the actual making of such subscription.

The question is exclusively one of the proper constructions of the statute and does not involve the constitutional authority of the Legislature to confer upon County Commissioners such powers as they claim to possess in the case under consideration.

*437

*The subject of Section 11 is the interest of certain Counties and towns in the construction of a particular work of internal improvement, and the means of advancing that interest, by conferring corporate authority upon any such County or town to acquire, in its corporate capacity, the rights and assume the obligations of a stockholder of the railroad company incorporated by that Act. The object of the provision of Section 11 was to facilitate the construction of the railroad to the extent of such sums as might be acquired to the capital of the company through subscriptions of the character named.

In order to place a proper construction upon the statute, we must apply its language to its proper subject, keeping constantly in view the object of the enactment. The construction of Section 11 cannot be materially aided by special reference to the language of other parts of the Act. On the other hand the proper sense of Section 11 cannot be appreciated without having regard to considerations of public policy, derived from experience under the principles and habits of our representative governments, and which have largely influenced and given form to legislation in cases of a like character.

We are to consider whether the powers in question were intended to be conferred, as it regards Counties, on the body of electors in the modes fixed by law, or upon the Commissioners elected by the people of the County under the authority and for the purposes prescribed by the Constitution and the laws creating the office of County Commissioner and fixing its powers and duties.

The first proposition to be brought to aid this inquiry arises out of a view of the subject under the mode in which it has generally been dealt with in legislation of the class to which the statute under consideration is properly referable. It is this: that the pow-

ers conferred by Section 11, assuming them to be conferred upon the electors of the County, are ordinary powers frequently given, and such as have been often sanctioned by both direct legislative and judicial authority, while those powers, assuming them to have been conferred upon County Commissioners, are extraordinary and unusual. They are extraordinary because they are in excess of the proper powers of such officers, and unusual in the sense that such large discretion has not generally been conferred on officers of that class.

This consideration would not be entitled to weight if the language of the Act was clear and indisputable; but as it is doubtful, and needs the aid of construction, it becomes im-

*438

portant to ascertain *whether the proposition just advanced is sound and applicable to the case.

It would not be either necessary or convenient to do more than make a general reference to the legislation of this and other States conferring authority upon Counties to aid in the construction of railroads, in order to show that where power has been conferred on Counties to determine for themselves, as corporate bodies, whether they will advance money or assume obligations in aid of the construction of railroads, the practice has been to confer such power of determination on the body of the electors of the County, to be exercised by voting on the measure proposed. If a single instance has occurred throughout the legislation of the extended system of States where such authority has been conferred exclusively upon the ordinary officers of the County, such instance has not been brought to our notice, and the probability of finding such an instance is not sufficient to warrant so extended a research. We must assume that this is the first instance where that has been attempted, if the statute indeed bears the construction put upon it by the respondents. It is clear, therefore, that, measured by the standard of common legislative practice, the powers claimed for the County Commissioners must be regarded as extraordinary and unusual.

It may be doubted whether conferring powers of this character and magnitude upon the ordinary County officers could be regarded as a wise and prudent exercise of legislative powers. Where the Legislature, acting within constitutional limits, makes a clear and explicit exposition of its will and intention, it is not for the Courts to call in question the wisdom or prudence of its determinations; but where the legislative expression is obscure, and public officers, claiming to have derived powers through such obscure expression, come into the Courts to have the limits of those powers made clear and definite through the application of the rules of construction, the Courts are bound to see that the Legislature is not made to speak language that the judgment of the community would condemn as unwise and imprudent.

It is not necessary to elaborate or fortify the proposition that lodging power in the hands of three administrative County officers, chosen without reference to the exercise of such extraordinary powers, and for the purpose of discharging the ordinary duties incident to the corporate business of a County, by which they may bind the County, as stockholders of a railroad corporation, to an un-

*439

limited *amount, is of questionable propriety, if not dangerous. The simple enunciation of the proposition is sufficient to secure for it general acceptance.

It must then be concluded that the construction contended for by the respondents will have the effect to place in the hands of the County Commissioners extraordinary, unusual and questionable, if not dangerous, powers, and, as such, cannot be admitted while any better construction is possible.

We have, then, to inquire whether the language of Section 11, fairly interpreted, independently of what may or may not be its tendency and effect, warrants the claims of the respondents. If such is not the conclusive effect of the language of the Act, then we must seek its meaning in accordance with the rules of construction, having regard to the nature of the powers sought to be conferred and the end for which they are called into existence.

The only designation under which the respondents can claim the right of subscription in the name of the County is that of the "proper authorities." If they answer to that description, then, possibly, the grant of authority to the people or proper authorities is sufficient to enable the County Commissioners to act for the County with conclusive effect and without reference to the people in any case within the provisions of that Section.

It is evident that this Section does not assume to create any new office or to confer any new class of powers on any existing office. The language quoted leaves it as a question to be determined by some means independent of the Act itself, who are the proper authorities to carry out its provisions conferring on the electors, under the designation of the people, the right to act in the matter when no proper authorities exist for that purpose. We are, then, to inquire what must be the nature of the powers and duties of any particular office to enable it to answer the description "proper authorities" as it regards the right to act for the County in the case contemplated by Section 11, and then to refer to the Constitution and laws to ascertain whether such powers are vested in the County Commissioners. For this purpose, the precise character of the power in question must be ascertained.

In the first place, the authority conferred is in its nature purely legislative, so far at least as it involves the right to determine the nature and extent of the interest of the County in the improvement and the proper limit of aid under all the circumstances of the case.

*440

*Whether determining the mode of payment may not be regarded as a proper subject for the action of administrative officers, need not be considered, as it is a question of subordinate importance as affecting the present case. It would be difficult to find any one exact and concise definition of what constitutes the difference between an act purely legislative and an administrative act, and no exhaustive definition is here attempted. There are, however, certain clearly recognizable attributes of each, about which there can be no mistake, and which will be sufficient to test the present question.

It is not the nature of an administrative act to create new rights or obligations, but to put in exercise such as have already been created by the legislative authority but may be dependent for their practical efficiency on the performance of some official act on the part of an administrative officer. It may be that such right and obligation were created in general terms, and that the persons or other subjects of the Act, or the existence of some fact or state of facts, must be ascertained through the intervention of an administrative officer before the Act can take complete effect according to the intent of the lawmaker. On the other hand, the operation of the Act, as it regards such rights and obligations, may be made to depend on some condition involving the discharge of a duty by an administrative officer,—either the performance of an act or the ascertainment of a fact,—which duty may be either discretionary or compulsive. While the principles just stated of themselves give great latitude and importance to the action of administrative officers, still they do not nor can any view taken of the nature of an administrative office sanction the idea that a public policy on a subject collateral to this constituting the subjects of ordinary legislation, such as affording public aid to railroads, can be determined upon and adopted by administrative officers as an act of administrative duty.

The Act in question does not determine that the County shall subscribe, but permits it to do so or to refrain, according to its own views of interest or duty in the matter.

Thus the question of the propriety of such aid, considered from an economic standpoint, the character of the improvement and its adaptation to the wants of the community, the extent of interest that the County has in its construction and the limit of expend-

i*; re or of the obligation assumed, as fixed

*441

by the present and pros*pective financial ability of the County, or by more general considerations of economic prudence, are all matters that are left to be considered and acted upon in an entirely independent manner by the people of the County or those that properly represent them in regard to matters of that sort. It is clear and indisputable that such matters can only be properly determined by those in whom legislative authority is vested by the Constitution, or by proper representatives of the people of the particular localities most interested, clothed with power to legislate in their behalf, or by the people acting as electors under the authority of an Act of the Legislature.

Do the County Commissioners possess authority of that kind and degree? It is clear that they do not possess general authority to exercise all such legislative powers as are, or may be, by the Constitution or laws, permitted to the Counties as bodies politic and corporate.

There is no such grant either in the Constitution or laws, either expressly or by implication conferring any such right.

The County Commissioners are, by the Constitution, administrative officers, and the powers conferred upon them must be deemed as circumscribed by the line that separates administrative from legislative functions.

There are two clear grounds for laying down the proposition just stated—the first is, that all the enumerated powers conferred upon them are of that class; and the second is, that their determinations are declared to be appealable into the Courts.—Constitution, Article IV, Section 19.

If those powers were legislative, it is clear that such an appeal would be meaningless, for the Courts cannot, under the Constitution, examine the merits of legislative acts upon the grounds on which they rest or the motives that prompted them.

Their powers as set forth in the Constitution (Article IV, Section 19.) are "jurisdiction over roads, highways, ferries, bridges and in all matters relating to taxes, disbursements of money for County purposes, and in every other case that may be necessary to the internal improvement and local concerns of the respective Counties." The term that here describes the nature of their powers over the various subjects enumerated is "jurisdiction." That term imports authority to expound or apply the laws, and excludes the idea of power to make laws. This word

*442

is often used in a broader sense, *but when employed for the purpose of indicating a partition of powers among the different departments of the government must be used in a strict sense. If the word jurisdiction, as here used, could be made as including legislative power, the constitutional grant of power to the County Commissioners would assume a magnitude and importance not only unusual and excessive but such as would threaten the balance between the different

members constituting the political body and the very integrity of the powers of the supreme legislative body. If the words "and in every other case that may be necessary to the internal improvement and local concerns of the respective Counties" import a grant of legislative power, it is clearly plenary, and, being constitutional, it would be difficult to understand on what principle the Legislature could control or interfere with its exercise, or even exercise the general legislative function over the same subject as it regards the accomplishment of ends having relation to the internal government and concerns of the Counties. No such anomalous and unprecedented clash of jurisdictions was intended by the Constitution, and we must hold that the word "jurisdiction," as there employed, was intended to describe either administrative or judicial function, as excluding the idea of legislative power. That the County Commissioners are not, in the strict sense of the term, a judicial body, is clear. Notwithstanding that body is created by a Section of the Article relating to the judiciary of the State, the office is characterized by the nature of its powers rather than by the place occupied by the provisions of the Constitution that created it.

This view of the nature of the office in question is fully carried out by the legislation on that subject, (Gen. Stat., Chap. 14,) while the effect of such legislation is to limit the powers of the County Commissioners rather than to enlarge them as affecting the various subjects placed by the Constitution under their jurisdiction.

It is clear, then, that the County Commissioners do not possess any general right to exercise any and all functions of a legislative character that may be vested in or permitted to the Counties, as bodies politic and corporate; then, unless they possess special legislative power in regard to a class of subjects embracing or at least analogous to the one under consideration, they are clearly destitute of the powers that would qualify them to be recognized as the proper authorities of the County in the sense of the Act in question.

*443

*The only power possessed by them at all analogous to the present is that of borrowing money for the purchase of lands, the erection of buildings, &c., (Gen. Stat., 149,) but this power is clogged with the following provision: "Provided, That no such loan shall be created by the County Commissioners until they notify the General Assembly of the necessity thereof and authority be granted to them to create said loan." This not only shows that they were considered by the Legislature as destitute of the powers claimed in this case, in the only analogous case directly placed within their jurisdiction, but that the Legislature deemed it impolitic to leave in their hands the right to create obligations to bind the County in the most necessary cases. If they cannot be trusted by the Legislature to borrow money to the limited extent necessary for the purpose of supplying County buildings, is it to be supposed that the Legislature intends to confer upon them unlimited power to bind the County by a subscription to a railroad in which the County as a corporation has only an indirect and speculative interest? The only possible answer is in the negative. We must then conclude that in employing the expression "proper authorities," the view of the powers of the County Commissioners just presented was in the mind of the Legislature, having the effect to exclude County Commissioners from what was intended to be embraced within the terms of that expression.

Arguments have been pressed by both parties, based upon the order in which certain words and expressions stand in the Act, but they can have little right where the construction of the Act turns upon grave questions arising out of the nature of the powers sought to be conferred. It must generally be assumed that the legislative mind was looking to the consequences and effects to flow from its action rather than to the proper grammatical adjustment of the expression through which that intent is conveyed. The ground upon which the present construction rests involves vital and fundamental considerations, before which questions of literal accuracy and elegance must give way. But even these arguments present a view that strengthens the present conclusion. If the views expressed are sound, then the expression "proper authorities" applies to corporate bodies represented by municipal legislative bodies, and the expression "the people" relates to Counties that have no such legislative bodies. Such a construction gives effect to every part of the statute, while the argu-

*444

ment of the County Commissioners *would leave no case in which the people would have a right to act to the exclusion of the public authorities, and would deprive that provision of the Section of all importance and effect.

It has also been urged that the clause of Section 11 that authorizes the County Commissioners to appoint a person to represent the Counties in the meetings of stockholders when such subscriptions are made evidences an intent to give them like power as it regards the original subscription. The powers exercised in the two cases are in no respect analogous.

The County Commissioners are clearly the proper authority to appoint such representatives, as they are the general custodians of the corporate property and rights, and, as such, proper parties to look after the interests of the County as affected by the action of the stockholders. On the other hand, the fact that the County Commissioners are named as it regards the lesser and clearly admin-

istrative duty, points the omission of their names, as it regards the higher and more important legislative function, as intentional.

The conclusion of the Circuit Court was clearly erroneous. The judgment should be set aside.

6 S. C. 444

STATE v. KILCREASE.

(Columbia. March Term, 1875.)

[*Grand Jury* ⇐36.]

Witnesses examined before a grand jury upon a bill of indictment must be sworn in open Court, and if not so sworn the indictment must be quashed.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. § 76; Dec. Dig. ⇐36.]

Before Carpenter, J., at Edgefield, March Term, 1874.

Indictment against Henry Kilcrease for murder.

The witnesses on the part of the State, who testified before the grand jury which found the bill of indictment against the prisoner, were not sworn in open Court before testifying, but were sworn by the grand jury, and on this ground a motion was made on behalf of the prisoner, before he put in his plea, to quash the indictment. The motion was overruled and the prisoner excepted to the ruling.

The prisoner was then put upon trial and found guilty. After sentence passed, he appealed to this Court.

Gary, for appellant.

Runkle, Solicitor, contra.

*445

*January 17, 1876. The opinion of the Court was delivered by

MOSES, C. J. The motion made in the Court below to quash the indictment should have prevailed. The practice in this State, following the rule of the common law, which required that the witnesses on whose testimony the bill of indictment is to be passed upon by the grand jury must be sworn in open Court, is coeval with its administration of the criminal law. So important has it been considered as one of the securities which of right belong to the accused, that the Legislature has never attempted to deprive him of its enjoyment, or in any way to abridge the safeguards with which the common law surrounds a party charged by a bill with a wrong against the State. A grand jury, it is true, may either on their own information or that derived from other source make a presentment on which a bill may be prepared and submitted by the prosecuting officer. But, even then, the witnesses to sustain it are sworn in open Court, and no other course has ever been pursued in this State. It is true, in some of the States a change has been made by statute, but in South Carolina the rule of the common law has always been followed. In Chitty on Criminal Law, (vol. 1, 322.) it is said "each witness, before he leaves the Court, is sworn that the evidence he shall give to the grand inquest against the defendant shall be the truth, the whole truth, and nothing but the truth."

Mr. Archbold, in his first volume of Criminal Pleadings and Practice, page 98, says: "The witnesses must be sworn in open Court, and during the time the Court is sitting." See also Wharton's America's Criminal Law, § 488. Neither the foreman of the grand jury nor either of his fellows is authorized, by the mere character of their office, to administer an oath, and it is more than questionable if perjury can be assigned on false swearing before them. If the witnesses are not sworn in open Court, what guaranty has the accused that they were sworn before their evidence was taken? In the United States v. Coolidge, (2 Gall, 364 [Fed. Cas. No. 14,858],) it was held that if the grand jury received the testimony of one not under oath, the indictment will be quashed. If the forms and sanctions which have heretofore been recognized as the bulwarks of the trial by jury are not rigidly adhered to, the constitutional requisition that "it shall remain inviolate" will fail to accomplish the great objects it was intended to secure. No matter how strong the edifice may be, if the pillars on which it rests one by one are weakened,

*446

the *great work, consecrated by time, must at last crumble into dust. It is safest to retain it in its pristine form and vigor.

As the motion must prevail on the ground first taken, it is not necessary to consider the other points raised by the appeal.

The motion to quash the indictment is granted.

WRIGHT, A. J., and WILLARD, A. J., concurred.

6 S. C. 446

McKELVAY v. SOUTH CAROLINA RAILROAD COMPANY.

(Columbia. Nov. Term, 1875.)

[*Justices of the Peace* ⇐31.]

Where a Trial Justice has jurisdiction of the case, his decision binds the parties until it is set aside in a mode prescribed by law.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 71; Dec. Dig. ⇐31.]

[*Attachment* ⇐61.]

A debt due a mechanic for wages is the subject of attachment under § 252 of the Code.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 164; Dec. Dig. ⇐61.]

Before Graham, J., at Charleston, March, 1874.

This was an action by Cuffee McKelvay against the South Carolina Railroad Com-

pany to recover $35.37 due the plaintiff for wages as a mechanic.

The defense was that the money had been attached in defendant's hands in an action of Elisha Cannon against plaintiff.

The facts were that Elisha Cannon brought an action against the plaintiff before a Trial Justice, and, under a warrant of attachment issued by him, the debt due by defendant to the plaintiff was attached.

The Trial Justice before whom this action was brought held that the wages of a mechanic could not be attached, and, therefore, that the judgment in the case of Cannon against the plaintiff was void. His decree was for the plaintiff.

The defendant appealed to the Circuit Court, where the judgment of the Trial Justice was affirmed, and the defendant then appealed to this Court, on the ground that, under the law, wages are liable to be attached.

Porter & Conner, for appellant.

Dingle, contra.

*447

*January 17, 1876. The opinion of the Court was delivered by

MOSES, C. J. If, according to the opinion of the Trial Justice, the attachment under which the appellant paid the amount claimed by McKelvay was void, then his conclusion of law was well founded. In our view, however, the process issued against the respondent was by a Court having full jurisdiction of the subject matter and of the parties; and if the Trial Justice who decreed against the defendant in the attachment suit below erred either in an issue of fact or of law, his judgment was only voidable and could have been corrected on appeal.

Under Section 251 of General Statutes a writ of attachment may be obtained from a Trial Justice, and the succeeding Section enumerates the cases in which he may exercise the power thus conferred upon him. While his judgment stands it must be considered binding and effectual for the purposes contemplated by it. It may be reversed in the mode prescribed by law, but until then it must operate so as to subject to it the property and interests which it attached. If, as we are to suppose, the Trial Justice proceeded upon the assumption that wages due are not subject to the process which issued against the appellant for the amount alleged to be due by McKelvay to Cannon, and under which they paid it, he was clearly in error. By Section 252 of the General Statutes, the constable to whom the warrant may be directed is required "to attach the real and personal estate of such debtor, including money and bank notes, except such real and personal estate as is exempt from attachment, levy or sale by the Constitution, and to take into his custody all books and accounts, vouchers and papers relating to the property, debts, credits and effects of such debtor." This plainly implies a liability of demands held by him against third persons to the payment of the creditor in attachment. It is in accordance, too, with the custom of London, by reference to which the attachment laws which have heretofore prevailed in this State have always been construed.

The judgment of the Circuit Court sustaining that of the Trial Justice is set aside and the case remanded.

WILLARD, A. J., and WRIGHT, A. J., concurred.

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6 S. C. *448

*WOLF, MAYER & CO. v. HAMBERG.

(Columbia. Nov. Term, 1875.)

[*Judgment* ⇐122.]

A judgment under the Code, before its recent amendment, could not be taken before the Clerk of the Court where the summons was under the second subdivision of Section 152 of the Code.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 222; Dec. Dig. ⇐122.]

This was an action by Wolf, Mayer & Co., plaintiffs, against C. Hamberg, defendant, wherein the plaintiffs, before the amendment of the Code of the 23d November, 1875, had entered judgment against the defendant before the Clerk of the Court.

The proceeding in the Circuit Court seems to have been a motion to set aside the judgment, on the ground that the summons was under the second subdivision of Section 152 of the Code of Procedure, which was denied, and that the defendant appealed. (*a.*)

January 17, 1876. The opinion of the Court was delivered by

MOSES, C. J. The summons in the case is framed under the second subdivision of Section 152 of the Code of Procedure.

It notifies the defendant that, on failure to answer, "the plaintiffs will apply to the Court for judgment against him." If they regarded their demands as of a character to entitle them to a judgment by the Clerk in default of answer, the summons should have been in conformity with the first subdivision of the Section referred to.

In cases under the Code where (before its amendment) a valid judgment could be entered without an order from the Court, the defendant was admonished, by the language of the summons, that on failure to answer the plaintiff would "take judgment." Under such summons, with the necessary complaint,

(*a.*) The Reporter, not having been furnished with a brief in the case, regrets that he is unable to give a fuller statement of the facts than that contained in the opinion of the Court, and the names of the counsel.

the Clerk was authorized to enter judgment.—Code, § 269. But here the process served upon the defendant notified him that, on default of answer, the plaintiff would "apply to the Court for judgment against him." His failure to answer certainly could confer no right on the Clerk which was not expressly given by the Code, and he could not assume to act in a case where, according to the language of the plaintiffs in their summons, application was to be made "to the Court for judgment."

*449

*Section 152 of our Code corresponds with Section 129 of that of New York.

In relation to the second subdivision of said Section, it is held to express the proper notice to be given in all actions for unliquidated damages on contracts.—Garrison v. Carr, 34 How., 187; Salters v. Ralph, 15 Abb., 273; Brown v. Eaton, 37 How., 325. The plaintiffs, by the selection of their remedy, have recognized their claim as comprehended within the second subdivision of the Section, and it would be a surprise on the defendant to allow them now to question the character which they have given to their demand as one to be passed upon only by the Court by claiming that it is of a different nature and included within the action of which the Clerk may take cognizance. The order for judgment is set aside and the case remanded to the Circuit Court for such action as the respective parties may be advised to take.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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6 S. C. 449

HEYWARD v. WALKER.

(Columbia. Nov. Term, 1875.)

[*Contracts* ⇐54.]

A promise by the creditor to accept payment in Confederate currency if the debtor would make sale of certain real estate which had been mortgaged as security for the debt is on sufficient consideration.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 233–239, 242, 243, 251, 254, 255, 291–315; Dec. Dig. ⇐54.]

[*Payment* ⇐8; *Tender* ⇐19.]

Where a creditor was bound to accept payment in Confederate currency, an offer to pay on satisfaction being entered on the securities for the debt is no discharge of the debtor, nor is he discharged by the debtor's depositing the money in bank and keeping it there to his own credit.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 5, 24; Dec. Dig. ⇐8; Tender, Dec. Dig. ⇐19.]

Before Reed, J., at Charleston, June Term, 1875.

This was an action by Henry Heyward and W. C. Bee as executors of W. C. Heyward, deceased, against Jane Ann Walker, F. Richards and E. W. Edgerton.

The case was referred to H. E. Young, Esq., who submitted a report as follows:

This case was referred to me, by order of 24th February, 1873, to inquire into and report upon the law and facts of the same.

I beg to report the following as the facts of the case:

*450

*On the 11th November, 1856, Mrs. Jane Ann Walker, Frederick Richards, E. W. Edgerton, executed their joint and several bond to T. Grange Simons, conditioned for the payment of $3,000 on or before the 11th November, 1858, with interest payable semi-annually. Mrs. Walker was the principal, and Richards & Edgerton were sureties.

To secure this bond, Mrs. Walker mortgaged a house and lot in Wilson street, Charleston.

This bond and mortgage were on the 8th April, 1859, assigned "to Wm. C. Heyward, executor of Wm. Heyward, in trust for Mrs. Sarah Heyward."

Some time in the early part of 1863—no one fixes the date exactly, but apparently in February or March, 1863,—Mr. Richards, finding that by the depreciation of Confederate money the mortgaged premises would fetch a sufficient price to pay the debt then due to Col. Heyward, (Wm. C.,) applied to him to know if, in case he sold the house and lot, he (Col. Heyward) would accept the Confederate money in payment of this debt. Col. Heyward replied in the affirmative; and, trusting to this promise, Richards put the house and lot in the hands of Whitney, a broker, to sell them.

On 3d April, 1863, a sale was made to John Seigling for $3,500 Confederate money cash.

With the outstanding encumbrance, titles could not be made.

Col. Heyward, being absent in the Confederate army, had signed in blank all the bonds and mortgages held by him, except those in question, so that on payment satisfaction could be entered by Mr. Bee, his general agent; but by some accident these were not so signed.

After the sale of the house and lot, Mr. Richards never sought Col. Heyward to make the payment to him, but meeting Mr. Bee one day in the streets, told him he was ready to pay as soon as the mortgage, properly satisfied, was ready to be delivered. Mr. Bee told him it was not then signed; and this seems the end of Mr. Richards' efforts to obtain the conclusion of the arrangement during Col. Heyward's life.

After Col. Heyward's death, which occurred September 1st, 1863, Mr. Richards saw Mr. Bee and again expressed his readiness to pay; but Mr. Bee then said he, as executor of Col. Heyward, did not feel authorized to

receive the Confederate money—which, of course, had then greatly depreciated.

*451

*On 1st June, 1863, Mr. Richards gave Mr. Seigling an obligation to make good his title, and Mr. Whitney then paid to Mr. Richards "a balance" of $2,064.43 in his hands from the sale of this and other property of Mrs. Walker. The inference from this is, that the other part of the money was paid previously; and as the sale was made on 3d April, I find, as a fair means of the payments, that Mr. Richards received the proceeds of the sale of the house and lot in question on 1st May, 1863. There was then due to Col. Heyward on said bond $3,266.17, which Col. Heyward had agreed to receive in Confederate money. Mr. Richards deposited the funds received from the sale of the house to his general credit, being abundantly able then to meet the claim.

Nothing further was done till the cestui que trust of Col. Heyward instructed his executors to call in this bond, and hence this suit.

As my conclusions of law, I beg to report:

That Col. Heyward, by his promise to Mr. Richards to receive Confederate money for his bond if he sold the lot, was bound so to do; and Mr. Richards, on the faith of this promise, parted with his security and is thus much injured. Consequently neither Col. Heyward nor his executors could recede from the engagement to receive Confederate money, despite of its rapid depreciation, without due notice to Mr. Richards, and this notice was never given.

Mr. Richards' duty as debtor was to seek his creditor and tender him the money, unless relieved therefrom by some act of Col. Heyward.

He never did make the tender, but when Mr. Bee, as executor, told him, in reply to his declaration that he (Mr. Richards) was ready to pay, that he (Mr. Bee) did not feel authorized to receive it if tendered, this relieved him of the obligation to make a formal tender.

But on 1st May, 1863, Mr. Richards received, to be applied to the payment of Col. Heyward, $3,266.17 in Confederate money, and worth then, according to the Act of the Legislature, in good money, $859.51, and deposited it to his own general credit,—that is, to the credit of Edgerton & Richards. This made it their debt, and, as they acted for Mrs. Walker, also her debt. They cannot have both the mortgage satisfied and retain this money, which, as they made no special deposit of it, was at their risk.

*452

*I therefore respectfully recommend, that on payment by Mrs. Walker or Messrs. Edgerton & Richards of the sum of $859.50, with seven per cent. interest to day of payment, to Messrs. Bee and Heyward, executors, they may be required to surrender the bond of defendants held by them, and also the mortgage, after having entered satisfaction on the mortgage.

E. W. Edgerton and Frederick Richards, defendants, excepted to the report on the grounds, and because;

1. That it appears from the testimony, as well as from the facts found by the referee, that Richards was ready to pay, and so informed Bee, the agent of Heyward, in the latter's lifetime, and as early as June, 1863, and that Bee told Richards the bond and mortgage were not signed by Heyward. Therefore, as notice to the agent is notice to the principal, it was incumbent on Bee to perform, or have performed, that which Heyward had agreed and undertaken to do, namely, satisfy the bond and mortgage; for Heyward knew a sale and conveyance of the mortgaged premises could not be properly effected without a removal of the mortgage thereon.

2. That in confirmation of the above, it also appears by the report that Whitney, the auctioneer who made the sale, applied to Heyward prior to the sale with respect to his bond and mortgage, and was informed that Bee would receive the sales money whenever it was ready to be paid.

3. That this is not a strict case of debtor and creditor, but one in which the creditor had made a new contract with the debtor founded on a new and valid consideration, and one which, by the report itself, entitled him to its specific performance, and on the strength of which the debtor was induced to enter into an obligation with a third person touching the property in controversy.

4. That this is a clear case of dependent covenants or mutual conditions, to be performed concurrently, for it appears by the testimony that the fair intent and good sense of the contract was that the money was not to be paid until the satisfaction and surrender of the bond and mortgage.

5. That the report is in other respects contrary to law and the evidence.

Reed, J. After hearing arguments of counsel for both plaintiffs and defendants, it is ordered, adjudged and decreed that the

*453

report *of Henry E. Young, Esq., Special Referee, to whom this cause was referred by order of the Court on the 24th February, 1873, to inquire and report upon the facts and law of the same, filed on the 29th November, 1873, be confirmed and the exceptions thereto overruled. And it is further ordered that the plaintiffs do have leave to enter judgment upon the said report, for the amount therein found to be due, principal and interest, together with the costs of the said action. And it is further ordered, that upon payment of the amount so found due, principal and interest and costs, by the defendants, the plaintiffs shall surrender the bond and mortgage held by them, after hav-

ing entered satisfaction upon the said mortgage.

Campbell & Whaley, for appellant:

The appeal in this case is based on the exceptions to the report. They were overruled.

William Heyward, deceased, the testator of the respondents, held the bond of the appellants executed before the war. It was secured by a mortgage of real estate. Some time in the early part of 1863, the appellant, Richards, finding an opportunity of paying the debt by sale of the mortgaged premises, applied to Heyward, the holder of the bond, to learn of him whether he would take Confederate money in payment thereof. He agreed to do so; whereupon the matter was placed in the hands of a broker (Whitney) for sale. On 3d April, 1863, a sale was made to Seigling for cash, in Confederate money. Whitney was the agent of both parties, and he applied to Heyward to know what he should do with the money. He replied that Mr. Bee would receive the money, and he (Heyward) would send the papers to Bee. Whitney called on Bee, who informed him that Heyward had not sent the bond to him, and that he would write to Heyward about it. Bee has no recollection of this interview. But he did testify that, by accident, Heyward did not "sign the bond and mortgage due by Mrs. Walker." Mr. Bee also testified: "When Mr. Richards offered me the money for the bond, I told him that the mortgage was not signed, and, consequently, he could not get satisfaction. Mr. Heyward came down afterwards, but did not sign the mortgage satisfaction."

I. This is not the case of debtor and creditor merely. The first contract was modified by the obligee of the bond agreeing to take something else than the money in satisfaction of his bond.

*454

*That Confederate treasury notes are not money appears from the case of Planters' Bank v. Union Bank.—16 Wall., 483. At page 501 the Court declare as follows: "We do not controvert the position that, generally, a bank becomes a debtor to its depositors by its receipt of money deposited by him, and that money paid into a bank ceases to be the money of the depositor, and becomes the money of the bank, which it may use, returning an equivalent, when demanded, by paying a similar sum to that depositor. Such is undoubtedly the nature of the contract between a depositor and his banker. So, also, a collector of bank orders only becomes the owner of money collected by it for its correspondent, and, consequently, a debtor for the amount collected, under obligation to pay on demand, not the identical money received, but a sum equal in value."

"But, it is to be observed, this is the rule where money has been deposited or collected, and when there has been no contract or understanding that a different rule should prevail. The circumstances of the present case are peculiar. It seems to have been admitted in the Court below that the deposits had been made in Confederate currency, and that the collections were made in like currency with the assent of the plaintiffs. * * * The Union Bank then became the agent of the plaintiffs to receive and collect, not money, but Confederate notes or promises, and the obligation it assumed was to pay Confederate notes when they would be demanded. The subject of the contract was a commodity, and there was no default in the Union Bank until demand was made and refused. And, from the nature of the transaction, it is to be inferred that the intent of the parties was that one should impose and the other assume only a liability to return to the plaintiffs notes of the Confederate government like those received or collected—notes promising to pay a like sum. And it is not perceived that the effect of the assumption is changed by the fact that the defendants used the notes received in their personal business, if they did use them prior to any demand for the fulfillment of the undertaking."

The law of tender applicable to ponderous articles other than money is not the same as that applicable to money, as further appears from the case of Slingerford v. Morse.—8 John., 474. The effect of a tender of a commodity is a complete bar to the suit upon the contract. The Court, at page 478, say: "The delivery of the goods was a thing collateral to the obligation, as the books term it,

*455

*and by tender and refusal the plaintiff shall never be entitled to the money. Here was no precedent debt or duty. He must resort to the specific articles tendered, and the person in whose possession they are holds them as his bailee and at his risk."

II. The tender of the money or commodity was waived.

There was no actual tender or check. This Richards himself says. But when he spoke to Bee he had the Confederate notes in bank. That no actual tender was expected by Bee appears from his own testimony, when he speaks of Richards having "offered the money for the bond." This he afterwards corrected; but it shows the nature of the transaction between the parties. To take advantage of the non-production of the Confederate notes without putting Richards on his guard would be a surprise, and in its effect operate a fraud on him, which is not to be imputed to any party to the transaction. Bee knew that Heyward had not signed the satisfaction, so as to enable Richards to complete the sale and transfer a valid title. This it was incumbent upon Heyward to do, and this Bee knew; yet he took no steps to have the paper signed. Bee testifies that Heyward came down after this interview between Richards and himself. Here was the

opportunity neglected which has caused the loss. Now, where one of two innocent persons must suffer, he who is the occasion of the loss must bear it.

The contract was to pay Confederate States notes, and the appellants had them; there was no dispute about his readiness or ability to pay, and, if a tender were necessary, the facts of this case show a waiver on the part of the respondent.

In Ashburn v. Poulter, (35 Conn., 553,) the defendant said: "I am now ready to pay you the $17.85 which I owe you," and he had money with him sufficient to pay the debt. The plaintiff replied: "There have been costs made, and you have got to settle with my attorney." It was held that the right of the plaintiff to have the money actually produced and presented to him was waived by the reply he made to the defendant. Here, Richards is ready to pay; it is Bee who prevented the payment by remarking that the bond and mortgage are not signed.

Again: When Whitney calls to pay, Bee again says the bond is not signed yet; Mr. Heyward, who had been absent from the city when his agent was applied to, had, according to the agent's testimony, come to the city, yet he does not, and had not to the time of his death, from April, 1863, to September,

*456

1863, signed and per*formed his part of the contract. If the object was to defeat the performance of the contract between Richards and Heyward, it could not have been more successfully performed than by the failure of the plaintiffs to sign the satisfaction or to assign the mortgage security.

If liability is to be enforced against appellants, they are remediless against the purchaser from them, who holds their obligation for title predicated upon the performance by Mr. Heyward of his contract with Richards.

In Thorne v. Mosker, (20 N. J. Eq., 257,) A offered to pay money to B, holding her purse in her hand in sight of B, who saw the purse but not the bills. A opened the purse, and was in the act of taking out the bills, but she stopped on account of the refusal of B to receive the same money. It was held that the offer was neither payment nor tender, but the refusal was an excuse for not making the tender.

The acts to be performed by Richards and Heyward respectively were mutual and dependent, the one upon the other. Richards could not give title without Heyward's removing the encumbrance. Richards at least was ready and able, and the consummation of the contract was defeated by Heyward, who was not ready, and upon him the loss must fall.

McCrady & Son, contra, submitted the following points and authorities:

1. That W. C. Heyward was not bound by his assent to the sale for Confederate money, as it was virtually an agreement to take less for his debt than was due.

2. That, at all events, where Confederate money was depreciating daily, good faith required an immediate sale and immediate payment; whereas the sale was not prompt and the payment never made.

3. That it is plain that Edgerton & Richards continued to hold and use the money during the rest of the lifetime of W. C. Heyward, and it perished in their hands, and must be their loss.—Williamson v. Bacot, 1 Bay, 62.

4. That no tender was ever made either to Heyward in his lifetime or to his executors after his death.

A tender is not good unless the person making it declares upon what account it is made.

*457

*2. It is not enough for the person who intends to make a tender to say I am ready to pay the debt, or to perform the duty, but he must make an actual offer to pay the one or to perform the other.

3. The mortgagor said to the mortgagee, I am here ready to pay you the money due upon the mortgage, but at the same time kept the money, which was in a bag, under his arm. This was holden not to be a good tender.—Bacon's Abgmt. "Tender," §§ 1, 2 and 3.

5. That the debtor, if he wishes to pay, even to stop interest, must seek his creditor, and not leave his creditor to hunt him.—Story on Bills of Ex., § 325, note 1 to p. 401; rule recognized in Blake v. Quash, executor, 3 McC., 344.

January 25, 1876. The opinion of the Court was delivered by

MOSES, C. J. A sufficient consideration to sustain the agreement between Mr. Richards and Colonel Heyward is found in the fact and circumstances which induced it. The one was led, on the faith of the promise of the other, to part with the security which he could have subjected to the payment of the debt of his principal, on which he was surety, the effect of which was a prejudice to his own interest. The inquiry whether notes of the Confederate government are to be treated as money and subject to the rules which apply to a tender of it, is not pertinent to the case before us. No matter in what light such currency is to be regarded, the parties by their contract stipulated that through the sale of the mortgaged premises it would be accepted in payment of the debt due to Colonel Heyward, and they are bound by their agreement.

If the bond or mortgage could only have been discharged by an entry of satisfaction on their face, the appellants might possibly claim that the omission of the payment was not the fault of Mr. Richards. A simple receipt, however, for the amount due would have as fully protected the obligors of the

bond and the purchaser of the premises as the most formal entry of satisfaction which could have been rendered on both instruments. Mr. Bee, the agent of Colonel Heyward, held all his bonds and mortgages, signed in blank, so that on payment satisfaction could at once be entered. By some accident this bond and mortgage had not been so signed. The agreement of Colonel Heyward and the willingness both of himself and agent to accept Confederate notes are not denied; but it appears by the report of the Referee

*458

that Mr. Richards said to *the latter, on a casual meeting, "that he was ready to pay as soon as the mortgage properly satisfied was ready to be delivered." He thus made the entry of satisfaction on the mortgage a condition precedent to the payment, and when informed that it had not been signed, so that satisfaction could be acknowledged, he does not appear to have made any further exertion, either by offering payment or taking any step in the lifetime of Colonel Heyward to have the business concluded, though after his death he did express to his executor his readiness to pay in Confederate money, which the executor did not feel authorized then to accept.

Mr. Richards, to the filing of the complaint by the respondents on the 27th of March, 1872, resorted to no proceeding to have the contract between himself and Colonel Heyward executed according to its terms. Both parties are entirely innocent of any intentional wrong, and in this condition the loss should fall upon the one who has caused it by his want of activity in executing an agreement in the result of which he had so large an interest. His laches is not to operate to his own benefit and to the prejudice of the other party, who was not bound to deliver the bond and mortgage satisfied until the currency which he had agreed to accept was actually paid. If the questions were to be determined only by the effect of the notice of the executor that Confederate notes would not be received by him in payment, the principles applicable might be different; but the money which, according to the report, Mr. Richards received from the purchaser, Mr. Seigling, in May, 1863, should have been offered in payment to Colonel Heyward, or some cause shown which would have excused Mr. Richards from the duty which, in our judgment, the agreement imposed upon him. Not a single step was taken to that end. So far from Mr. Richards regarding it as the money of Colonel Heyward, he deposited it in the bank to his own general credit, subject to his own contract, and from the day he received it neither Colonel Heyward nor his executors were at liberty in any way to interfere with it by reason of any act on the part of Mr. Richards showing a devotion of it to the agreement on which he now refuses to discharge him from the payment of the bond.

The motion is dismissed.

WILLARD, A. J., and WRIGHT, A. J., concurred.

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6 S. C. *459

*WALKER v. VENO.

(Columbia, Nov. Term, 1875.)

[*Infants* ⟸89.]

Where an infant defendant eight years of age appears by guardian ad litem, appointed by the Court, it is not necessary to the validity of the judgment that he should have been served with process; and this rule applies to a proceeding for partition, under the Act of 1839, before the late Courts of Ordinary.

[Ed. Note.—Cited in Brown v. Coney, 12 S. C. 152; Tederall v. Bouknight, 25 S. C. 283; Rollins v. Brown, 37 S. C. 347, 16 S. E. 44; Morgan v. Morgan, 45 S. C. 334, 23 S. E. 64; Robertson v. Blair & Co., 56 S. C. 106, 34 S. E. 11, 76 Am. St. Rep. 543.

For other cases, see Infants, Cent. Dig. § 259; Dec. Dig. ⟸89.]

[This case is also cited in Robertson v. Blair & Co., 56 S. C. 96, 34 S. E. 11, 76 Am. St. Rep. 543, and distinguished therefrom.]

Before Maher, J., at Aiken, May, 1875.

Action by N. G. W. Walker and Charles Peckman against Frank Veno and Peter James to recover the possession of a tract of land.

The facts were as follows: John Veno was seized in fee simple at the time of his death of the tract of land the subject matter of action. He died intestate in October, 1848, leaving as his heirs at law his widow and four infant children. The defendant, Frank Veno, the youngest of the children, was born in the February after the death of his father. In October, 1857, the widow commenced proceedings, by petition in the Court of Ordinary for Barnwell District, against the children, all of whom were still minors, for partition of the said tract of land. The usual affidavits as to what real estate the intestate owned, and as to its value, were made, a summons issued, and a return thereon made by the Sheriff, stating that he had served the defendants with the summons by leaving a copy thereof at their residence. Henry T. Johnson was appointed by the Ordinary guardian ad litem of the children. He accepted the appointment in writing, and also by writing signed by him acknowledged legal service of the summons, and, as guardian ad litem, consented to a sale of the land.

The Ordinary made a decree, bearing date the 4th December, 1857, directing the land to be sold by the Sheriff for partition. The sale was made in January, 1858, at the price of $235, and Henry Wessels was the purchaser. He complied with the terms of sale and obtained a conveyance of the land. The plaintiffs proved title under him.

The defendants were in possession, Frank Veno as landlord, and Peter James as his tenant.

At the close of the plaintiffs' case, the defendants moved for a nonsuit, on the ground that the Ordinary had no jurisdiction to make the decree for sale, as the defendants in the proceedings before him had not been legally served with the summons.

*460

*The motion was denied, and a verdict having been rendered for the plaintiffs and judgment entered thereon, the defendants appealed to this Court.

Croft, for appellants:

Upon the facts, it is to be determined whether the Ordinary's Court at Barnwell had acquired jurisdiction of the infant defendant, Frank Veno, so that he is bound by the proceedings of said Court, instituted for the partition of the lands of John Veno, deceased.

If Frank Veno was properly before the Court, then he is bound by its proceedings; but if he was not legally made a party to these proceedings, then the Court had never acquired jurisdiction as to him, and he is not bound by its proceedings.

Section 26 of the "Act concerning the office and duties of Ordinaries" (11 Stat., 44,) empowered the Ordinary to divide or sell the real estate of deceased persons' estates, when said real estate shall not exceed one thousand dollars in value.

Section 27 of the same Act, after prescribing the form of the summons in such cases, says: "Which summons shall be served upon those interested, and they shall be made parties, in like manner as is hereinbefore prescribed respecting the method of making parties to the proceedings of proving a will in solemn form." And Section 11 of said Act prescribes that when a will is to be proved in due form of law, all persons interested, etc., * * * shall be cited "by personal notice to such as are within the State."

The Court of Ordinary is a Court of limited jurisdiction. "It must show upon the face of its proceedings that it has jurisdiction or its proceedings will be void."—State v. Fillebrown, 2 S. C., 407.

If the proceedings of the Court are in any other manner than are authorized in the Act conferring the jurisdiction, it is without authority and null and void.

"When the summons in an action is not legally served, the Court has no jurisdiction of the defendant, and all proceedings based upon the pretended service are void."—Voorhies' Code, 133, note 6.

Infants are not bound unless parties to the action.—Sollee v. Croft, 7 Rich. Eq., 43; Bailey v. Boyce, 5 Rich. Eq., 197; Howe v. Falconer, 4 DeS. Eq., 86; Moore v. Hood, 11 Rich. Eq., 324; Story, Eq., 208.

*461

*The case of Bulow v. Witte (3 S. C., 308,) is not against the position of the appellants. At page 820, the Court say: "If the Court had jurisdiction over the subject matter, and the parties and all who were to be affected by its judgment were before it as parties, then its order is legal, binding and final." The only question then decided was that from the circumstances of the case the infants were parties. How or by what means they were to be made parties generally, was not determined.—322.

The titles of the purchaser at judicial sales are good only so far as they operate on the title of parties to the proceedings.—323. But, at most, Bulow v. Witte is confined to the practice of the old Courts of Equity, which Court had a general jurisdiction over infants and their rights, and what is said there has no applicability to the proceedings in the Ordinary's Court, where the jurisdiction, proceedings and practice is defined by a special statute.

Finley & Henderson, contra:

The requirements of the Act entitled "An Act concerning the office and duty of Ordinary" (A. A. 1839, 39,) were fully carried out.

Section 27 of said Act gives the Ordinary power in proceedings like this to appoint a guardian ad litem in the case of minors.

According to the adjudicated cases, the proceedings transferred the title of the minor.

His mother, his guardian by nature, was the petitioner. The Court itself, of its own motion, would look to his rights, and, having appointed a guardian ad litem for him, he became the ward of the Court. The Ordinary was exercising an equitable jurisdiction given him by statute, and his action can be tested by the adjudicated cases as to the action of Commissioners in Equity in similar proceedings.

"The jurisdiction of the Court of Equity to dispose of the real estate of infants and other persons under disability has been too long exercised to be now questioned; and a conveyance or mortgage executed by the Master in pursuance of the order of the Court, which was intended to operate on the title of infants, is binding on them if they are parties to or represented in the proceeding in which the order was made."—Bank v. Spencer, Bail. Eq., 468.

*462

*We rest our position especially upon the case of Bulow v. Witte, (3 S. C., 308.) The facts of that case are very similar to this. Chief Justice Moses, speaking for the Court, on pages 321 and 322, says: "What is the object to be secured by assigning a guardian ad litem to infants interested in a matter before the Court? It is identical with that to be accomplished by the service of a subpœna on an infant in the nurse's arms. It is to attract the attention of its friends, that a due regard may be had to its rights,

and that the mind of the Court may be directed to them." "Is this end in any way more effectually attained by the filing of a formal answer on the part of the guardian ad litem than by bringing to the notice of the Court the facts upon which its judgment is to be exercised in disposing of the rights and interests of the infants involved in the matter before it?" Again: "Whenever the rights of others are sought to be enforced against an infant by a judicial proceeding, the Court first attempts to secure him full means of defense by the appointment of a guardian ad litem, who occupies the same relation (if not a more immediate and direct one) to the infant as the prochien ami does who is appointed to protect the interests of a minor seeking redress against others for a violation of his rights."

January 25, 1876. The opinion of the Court was delivered by

MOSES, C. J. That no one is bound by a judgment in a proceeding to which he has not been made party in due form of law cannot be disputed. It may be conceded, too, that when a new jurisdiction is conferred by statute on an inferior Court, its action under it will be void unless it appears to be in conformity with the conditions prescribed for the exercise of such jurisdiction.

By section 27 of the Act of 1839, (11 Stat., 44,) the Ordinary was authorized to make sale or division of the real estate of a deceased leaving a last will or dying intestate, providing it did not exceed in value the sum of $1,000, except in the case of a will otherwise directing. The form of the summons is given, and it is "to be served on those interested and they shall be made parties as hereinbefore prescribed respecting the method of making parties to the proceedings of proving a will in solemn form," which, by Section 11 of the same Act, was "by personal notice to those within the State." The said Section 37 provides "that in case there are minors interested, the Ordinaries respective-

*463

ly shall have full power *and authority to appoint a guardian or guardians ad litem in each case."

The purpose of the summons is to bring the parties into Court,—in the case of the minor that his rights may be guarded and protected by the officer who is to pass upon them, and in the case of the adult that he should have notice of the proceedings in which his interests are involved, so that he may appear or allow judgment by default to be entered against him, as he might determine for himself.

In the proceeding now under review, not only was a guardian ad litem appointed for the infants interested, including Frank Veno, but the record shows that he accepted; and although his written acceptance of legal services and consent to the sale of themselves could not bind the infant, they are confirmatory of the fact, not only that he was recognized by the Ordinary as before the Court, but that a head was provided to think for him and a tongue to speak in his behalf. If there were any talismanic effects to be produced on a child of eight years (that being the age of Frank Veno at the time) by the personal service of a paper, the purport of which was beyond his comprehension, we might possibly be inclined to hold that, in the absence of proof of such a ceremony, no judgment could avail against him. The mere service of a summons, not followed by the appointment of a guardian ad litem, could not have bound the infant. The summons, then, is not the efficient medium through which he is made a party in the case in which his name appears as a defendant. His security is in the appointment and acceptance of a guardian ad litem, whose duty it is to bring his interests to the view of the Court, that, being known, they may be protected. Nor should the Court act until the rights of the infant are so submitted.

The provision made in the same Section of the Act in regard to the course to be pursued where "minors are interested" would seem to qualify the character of the required service, so far as related to them. The petition itself brought to the notice of the Ordinary the fact that the distributees entitled with the mother were all infants, and he resorted to the only order within his competency for the security of their rights in the matter on which he was to pass judgment. The reasons upon which we based our conclusion in Bulow v. Witte, (3 S. C. R., 308,) apply in full force to the case in hand.

The motion is dismissed.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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6 S. C. *464

*STATE v. HARPER.

(Columbia. Nov. Term, 1875.)

[*Criminal Law* ⇐93.]

The Court of General Sessions has no jurisdiction in cases of petit larceny, the jurisdiction being exclusively in Courts of Trial Justices.

[Ed. Note.—Cited in State v. Williams, 13 S. C. 546, 554, 555, 559; State v. Glenn, 14 S. C. 134; State v. McKettrick, 14 S. C. 352; State v. Jenkins, 26 S. C. 123, 1 S. E. 437; State v. Cooler, 30 S. C. 169, 8 S. E. 692, 3 L. R. A. 181; State v. Pickett, 47 S. C. 105, 25 S. E. 46.

For other cases, see Criminal Law, Cent. Dig. § 161; Dec. Dig. ⇐93.]

[This case is also cited in State v. Williams, 13 S. C. 558, as to the construction of statutes in pari materia.]

Before Shaw, J., at Williamsburg, March term, 1875.

Indictment in the Circuit Court of General Sessions against Thomas Harper for petit larceny in stealing a watch alleged to be of the value of ten dollars.

The defendant was convicted, and when called up for sentence, Mr. Maurice, his attorney, moved in arrest of judgment on the ground that the Court of General Sessions had no jurisdiction in cases of petit larceny, the jurisdiction being exclusively in the Courts of Trial Justices.

His Honor overruled the motion, and after sentence the defendant appealed to this Court.

Maurice, for appellant:

1. The different Courts provided for by the Constitution will be found in Article IV, Section 1.

2. The Court of General Sessions has no jurisdiction, where jurisdiction is given to another Court—in other words, wherever jurisdiction in any case or class of cases is "otherwise provided for by law," the Court of General Sessions has no jurisdiction.—See Article IV, Section 18; and in McIver v. State, (2 S. C., 3.) see the following pertinent and decisive language of Chief Justice Moses, directly in point, giving construction to this clause of the Constitution. He says: "It cannot be contended that, although the Constitution has conferred the power (to issue writs of mandamus) on the Circuit Court of Common Pleas, it has not deprived the Court of General Sessions of the rights which attached to it by reason of its succession to all the jurisdictional powers of the King's Bench, on the criminal side. The argument might have carried force with it but for the fact that the Constitution takes from the Court of Sessions jurisdiction in all criminal cases, wherever it gives it to another Court. The words "which shall not be otherwise provided for by law" negatives the idea that a concurrent power was to be exercised by the two tribunals. There appears to have been a purpose to place beyond question the idea of concurrent jurisdiction by the very terms employed."—See also Dud., 167.

*465

*3. For the jurisdiction of Justices of the Peace, see Article IV, Section 22.

4. That not only jurisdiction but exclusive jurisdiction of all offenses less than felony, and in which the punishment does not exceed a fine of $100 or imprisonment for thirty days, is given to Justices of the Peace or "other officers authorized by law."—See Article I, Section 19.

5. That a Trial Justice, as now known in this State, is such "other officer," and that the General Assembly may confer upon such officer the powers and jurisdiction intended for Justices of the Peace.—See State v. Fillebrown, 2 S. C., 404.

6. That the General Assembly has conferred upon Trial Justices the power and jurisdiction in criminal cases intended for Justices of the Peace, will appear in comparing Sections 21, 22 and 23 of Article IV, and Section 19, Article I, of the Constitution with Chapter XXV of the General Statutes, p. 196, relating to Trial Justices, and particularly that portion at p. 196, headed "Criminal Jurisdiction."

7. By the statute last mentioned, Trial Justices have two classes of criminal jurisdiction, (consistent with and agreeable to Article I, Section 19, of the Constitution.) One is of any and all offenses which are subject to the penalties of either fine or forfeiture, not exceeding $100 or imprisonment in the jail or workhouse not exceeding thirty days. The other is of all offenses (less than felonies) of which they are expressly given jurisdiction, though the particular Section conferring jurisdiction is silent as to the punishment to be imposed. In other words, one Section gives jurisdiction on account of the character of the offense, (being less than felony,) while the other gives jurisdiction by the character and limitation of the punishment, (fine not exceeding $100 or imprisonment not exceeding thirty days.) These Sections must be taken in pari materia, and read together as a whole.—Gen. Stat., 196, §§ 8, 9, 12.

8. Petit larceny is the stealing of any article of property below the value of $20, and is a misdemeanor.—Gen. Stat., 716, § 12.

9. That jurisdiction of petit larceny is expressly given to Trial Justices, and is, therefore, otherwise provided for by law than by giving it to the Courts of General Sessions.—See Gen. Stat., 196, § 12. That no punishment is fixed in this particular Section makes no difference, as this is controlled by the joint

*466

effect of Sections 8, *12 and 9, the last of which fixes the punishment, consistently with the Constitution, in all cases of which jurisdiction is given to Trial Justices.

10. That the Court of General Sessions has no power to punish for petit larceny, and has not a concurrent jurisdiction of such an offense, will negatively appear by the absence from our statutes of any provision conferring such power or jurisdiction. The nearest approach to such authority may be found in Section 1, p. 749, of the General Statutes. But this does not apply to a case of petit larceny, for, as we have already seen, the punishment of that offense is provided for by statute.

11. For the power to punish after conviction, the Court cannot fall back upon the common law, for petit larceny is exclusively a statutory offense since the Act of 1866. The indictment must be under the statute. (State v. Gray, 14 Rich., 174,) and so must the punishment. The Act of 1866 is re-enacted in the General Statutes, 616, Section 12, and Sections 8, 9 and 12, p. 196, fix the questions of jurisdiction and punishment beyond all doubt. It follows, therefore, that

the Court of General Sessions has no jurisdiction either to try or to punish a case of petit larceny.

Melton, Attorney General, with whom was Atkinson, Solicitor, contra:

First. The argument of appellant depends upon the decision of this Court in McIver v. State, (2 S. C. 1.) This case is not in point, because—

1. The writ of mandamus is not "a criminal case" in the sense intended by Section 18 of Article IV of the Constitution. On the contrary, "it is reasonable to suppose," says the Chief Justice, "that, by vesting in the Court of Common Pleas the right to issue it, the Convention regarded the writ, contrary to what had been the received and accepted opinion in South Carolina, and intended, in the language of Tappan, 7, to assimilate it, both in its direct and incidental process, to an action." Upon this, rather than upon the dictum relied upon by the appellant, the case turns.

2. The case involved the construction of two Sections of the same Article of the Constitution—the fifteenth, which gave to the Courts of Common Pleas "power to issue writs of mandamus," and the eighteenth, which gave to the Court of General Sessions "exclusive jurisdiction over all criminal

*467

cases," in such juxtaposition *that plainly the one could not have been intended to include the other; whereas the case now before the Court involves the construction of the eighteenth Section, with reference to an Act of the General Assembly, itself of doubtful meaning.

3. This proposition is enforced by reference to the decision of this Court in State v. Fillebrown, (2 S. C.,) in which (page 408) the Chief Justice declares that "the Court rested its refusal in McIver v. The State on the fact that the Constitution took from the Sessions jurisdiction in all criminal cases whenever it gave it to another Court, and, therefore, the former jurisdiction of the Court of Sessions was gone."

4. For the purposes of the argument, it may be admitted that exclusive jurisdiction is given to Trial Justices by Section 19, Article I, of the Constitution over "all offenses less than felony and in which the punishment does not exceed a fine of $100 or imprisonment for thirty days;" but it is not, therefore, to be inferred that the jurisdiction is exclusive in other cases where it is conferred upon Trial Justices by the General Assembly. The power of the General Assembly to confer such jurisdiction need not here be questioned; only the power to make it exclusive is denied.

The language of Section 18, Article IV, of the Constitution is: "The Court of General Sessions shall have exclusive jurisdiction over all criminal cases which shall not be otherwise provided for by law." The decisions under consideration go to the point that this Section does not include or refer to "cases otherwise provided for" by the Constitution, and they decide nothing in reference to criminal cases, which are otherwise provided for by law—that is, by statute. In reference to the latter cases, where the Constitution is silent and the statute makes provision, the construction is plain that the jurisdiction of the Court of General Sessions, if not exclusive, is at least concurrent.

5. On this point, however, the manuscript decision in Burge v. Willis, heard before this Court at November Term, 1873, is conclusive, and establishes the proposition that in the case now before the Court the Court of General Sessions has at least concurrent jurisdiction. The words of Section 15 of Article IV, conferring jurisdiction upon the Court of Common Pleas, are almost identical with, and clearly have the same effect as, those of Section 18, conferring jurisdiction upon the General Sessions. In relation to the former, the Court say: "The Court of Common

*468

Pleas, being a *Court of general original jurisdiction in civil cases, and having exclusive original jurisdiction in certain other cases mentioned, it has concurrent jurisdiction in other cases which are cognizable before Justices of the Peace."—See also State v. Simmons, 4 S. C., 72.

Second. The Court of General Sessions is not a new creation. The name itself imports a reference to a jurisdiction well-defined, as ancient as the jurisprudence in which it had its origin—a jurisdiction which this Court will not lightly call in question.

In State v. Walker, (14 Rich., 37,) it is said: "The Circuit Courts of law are successors of the General Court which formerly subsisted in Charleston, and, when not restrained by our legal or constitutional regulations, have the power and jurisdiction which pertain to the King's Bench and Common Pleas in England. They are Courts of general jurisdiction, of the highest dignity known to our laws. Within their jurisdiction fall all actions and prosecutions in behalf of the State, even when jurisdiction is given to another tribunal by words not plainly exclusive. The general rule is that an Act of the Legislature shall not be construed to oust them of jurisdiction, except by express provision or necessary implication."—Com. Dig. Courts.

In State v. Sullivan, (14 Rich., 282,) the Court of Errors say: "The Court of General Sessions in South Carolina is a superior Court of general jurisdiction, possessing all the powers exercised by the Court of Queen's Bench in England, where it has been held, without question, that nothing shall be intended to be without the jurisdiction of a superior Court but that which specially appears to be so; and nothing shall be intended to be within the jurisdiction of an inferior Court

but that which is expressly alleged.—Peacock. v. Bell, 1 Saun. Rep., 74; Winford v. Powell, 2 Lord Raym., 1310.

"The Court of King's Bench hath so sovereign a jurisdiction in all criminal matters that an Act of Parliament appointing that all crimes of a certain denomination shall be tried before certain Judges doth not exclude the jurisdiction of this Court without express negative words; and, therefore, it hath been resolved that 33 Henry VIII, Chapter 12, which enacts that all treasons, &c., within the King's house, &c., shall be determined before the Lord Steward of the King's house, &c., doth not restrain this Court from proceeding against such offenses."—2 Bac. Abr., 690, Court of K. B., A. 1.

*469

*Third. The offense of petit larceny is not included in Section 19 of Article I of the Constitution, because—

1. When the Constitution was adopted, petit larceny was not in the category of "offenses less than felony." It has since been made a misdemeanor by statute; but in this, as in all other questions of constitutional construction, reference must be had to the law and the meaning of words at the time of the adoption of the Constitution. Else, it is within the power of the General Assembly, by diminishing the grade of all criminal offenses, to oust the Court of General Sessions of its entire jurisdiction and utterly destroy that which the Constitution has distinctly perpetuated.

2. To include petit larceny, it must not only be determined to be an offense "less than felony," but "one in which the punishment does not exceed a fine of one hundred dollars or imprisonment for thirty days." But whilst the statute has declared the offense to be a misdemeanor, it has not altered the measure of punishment either as to fine or imprisonment; and the offender now, as when the Constitution was adopted, and at common law, may be punished by a fine exceeding one hundred dollars, and imprisonment exceeding thirty days, or either, in the discretion of the Court.—Gen. Stat., Chap. 142, § 1. To contend that Sections 8, 9, 12, Chapter 25, General Statutes, establish the measure of punishment in all cases of petit larceny is to beg the question.

January 26, 1876. The opinion of the Court was delivered by

MOSES, C. J. At the adoption of the Constitution of 1868 there was no offense for the commission of which the punishment was restricted to a "fine of one hundred dollars or imprisonment for thirty days." Neither was there any statute which limited the punishment "for assault and battery, and other penal offenses, less than felony, to fines only." Section 19, Article I, of the Constitution, which established a Court with exclusive jurisdiction over offenses to be punished by "a fine of one hundred dollars, or imprisonment for thirty days," and so much of Section 22, Article IV, as provided a Court for the trial of offenses punishable by fine only, would, therefore, be without purpose or meaning, unless construed in connection with the whole scope of that portion of the Constitution to which the judicial department of the State owes its present existence and organization. As with a statute, so with a Consti-

*470

tution; *the Court must give effect, if possible, to its every provision, and render such a construction as will preserve the intention of the framer if it can be collected from the words he has employed, and thus prevent, if it can, the entire defeat of the purpose which the several Sections were intended to accomplish. Mr. Dwarris, in his Treatise on Statutes, says at page 658: "Indeed a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word should be superfluous, void or insignificant."

Section 19, Article I, of the Constitution confers, in the strongest language it could employ, on "a Justice of the Peace, or other officer authorized by law," exclusive jurisdiction of all offenses less than felony for which the punishment does not exceed a fine of one hundred dollars or imprisonment for thirty days. Section 18, Article IV, confers on the Court of General Sessions exclusive jurisdiction over all criminal cases "which shall not be otherwise provided for by law." In the State v. Fillebrown, (2 S. C., 404) it was held that the General Assembly under the Constitution, might confer on an inferior Court, created by itself, the same powers which the Constitution intended for Justices of the Peace. The powers, therefore, devolving on a Justice of the Peace, under Section 19, Article I, may be properly exercised by a Trial Justice, whose office was established by the Act of 1870, General Statutes, 194, and whose jurisdiction is therein defined.

The provision thus made by the Constitution for the trial of all offenses by a Trial Justice for which the penalty does not exceed a fine of one hundred dollars or imprisonment for thirty days cannot be held without meaning because, at the time of its adoption, the punishment, as therein prescribed, did not attach to any offense in this State. The office is established by Section 22, Article IV, of the Constitution as a branch of the judicial department, while his jurisdiction in matters criminal extended to offenses punishable by fine only, although none of such character were then known to our law. Whatever exclusive jurisdiction is conferred by Section 19, Article I, on Justices of the Peace is conferred also on whatever "other officer" is "authorized by law" to try the offenses therein designated.

It would be a narrow construction of the Constitution, and one which could not be sus-

tained, where effect, if possible, should be given to the mandatory significance of such

*471

an instrument, to say *that as, by the law then of force, no alternative punishment of the nature of those referred to in the said Section was inflicted for the commission of any offense, the Sections themselves are to be considered without force. It would be an assumption ill becoming a branch of the government created by the Constitution to say that its framers were ignorant of the law then existing in the State for which they were providing a new organic and fundamental system as a substitute for the one then prevailing. Their purpose, it may well be supposed, was to create by Section 19, Article I, an exclusive jurisdiction of such offenses less than felony, in regard to which the General Assembly might, from time to time, annex as a punishment a fine not exceeding one hundred dollars or imprisonment not exceeding thirty days.

It now remains to be considered whether a Trial Justice has jurisdiction in a case of petit larceny, which, at the adoption of the Constitution, comprehended any simple larceny of goods, choses in action, &c., below the value of $20, and was made a misdemeanor by the Act of 1866, (13 Stat., 378,) and so declared to be by General Statutes, 716. It is expressly conferred by the twelfth, and recognized in the thirteenth and fourteenth Sections of the twenty-fifth Chapter of the General Statutes. The offenses of which they have jurisdiction are subject to the fine or imprisonment fixed and limited by the nineteenth Section of the first Article of the Constitution, and by the ninth Section of the twenty-fifth Chapter of the General Statutes. The offenses within the range of the prescribed punishment are exclusively in the jurisdiction of a Justice of the Peace, "or other officer authorized by law," and such must the Trial Justice be held.

If the Court of General Sessions has concurrent jurisdiction in cases of petit larceny with a Trial Justice, then this anomaly would follow: There would exist two different punishments for the same offense. That of the Trial Justice is limited to a certain amount of fine or term of imprisonment; that of the General Sessions by common law unlimited as to amount, and time dependent on the discretion of the Court, which may impose both fine and imprisonment. A construction which would lead to such a result should be avoided, unless forced either from the express words used or an implication from them so inevitable that it cannot be avoided.

The case of Burge v. Willis, (5 S. C., 212,) cited in the argument for the respondent, has

*472

no application to the point now pre*sented for our consideration, because the jurisdiction conferred on Justices of the Peace in matters of contract where the amount claimed does not exceed $100 is not made exclusive.

The motion to arrest the judgment is granted.

WILLARD, A. J., and WRIGHT, A. J., concurred.

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6 S. C. 472

Ex parte PARKER.

(Columbia. Nov. Term, 1875.)

[*Judges* ⇐30.]

A Circuit Judge has no authority, without the sanction of the Chief Justice, to enter the territorial limits of a Circuit not his own, hear an application for a writ of habeas corpus by a prisoner there confined, issue the writ and discharge the prisoner.

[Ed. Note.—Cited in State v. Satterwhite, 20 S. C. 538.

For other cases, see Judges, Cent. Dig. § 143; Dec. Dig. ⇐30.]

[*Judges* ⇐30.]

The provisions of the Constitution and Acts of the Assembly relative to the cases in which a Circuit Judge may exercise judicial powers outside the territorial limits of his own Circuit, stated and commented on.

[Ed. Note.—Cited in State v. Parker, 7 S. C. 235, 239; State v. Black, 34 S. C. 201, 13 S. E. 361; La Motte v. Smith, 50 S. C. 562, 27 S. E. 933.

For other cases, see Judges, Cent. Dig. § 143; Dec. Dig. ⇐30.]

[This case is also cited in Bank of Manning v. Mellett, 44 S. C. 386, 22 S. E. 444, without specific application, and in State v. Satterwhite, 20 S. C. 536, and distinguished therefrom.]

Before Mackey, J., at Richland, August, 1875.

This was a petition by N. G. Parker to the Hon. Thomas J. Mackey, Judge of the Fifth Circuit, stating that the petitioner was illegally detained in custody by the Sheriff of Richland County, and praying for a writ of habeas corpus. The writ was issued at Columbia on the 13th of August, 1875, and on the 16th of the same month, at the same place, the return was made and the petitioner discharged from custody.

The facts of the case, so far as they relate to the only question considered by this Court, are so fully stated in the opinion of the Court as to render any further statement unnecessary.

Rion, for appellant.
Youmans, contra.

February 1, 1876. The opinion of the Court was delivered by

WILLARD, A. J. This is an appeal brought by the Attorney General in behalf

of the State from an order made by the Hon. T. J. Mackey, Circuit Judge of the Sixth Circuit, upon a writ of habeas corpus issued by him in the Fifth Circuit to inquire into the cause of the detention of N. G. Parker,

*473

held in confinement in the *city of Columbia, within the Fifth Circuit, by which the detention of Parker was held to be illegal, and he was released from confinement.

It appeared by the return of the Sheriff of Richland County to the writ that Parker was held by him under two several orders of arrest signed by D. B. Miller, Esq., Clerk of the Court of Common Pleas and General Sessions for the County of Richland. The first of these orders of arrest was made in an action in which D. H. Chamberlain and others, Commissioners of the Sinking Fund, were plaintiffs, and N. G. Parker was defendant, bearing date April 21, 1875. The other order of arrest was made in an action in which the State was plaintiff and N. G. Parker defendant, and was dated April 22, 1875.

The brief sets forth this history of the two cases referred to as appearing by the records in the office of the Clerk of the Court; but it will not be necessary to refer particularly to the various proceedings in these cases, as an objection has been interposed, going to the authority of the Circuit Judge to issue the writ of habeas corpus, which, under the view taken of it by this Court, disposes of all questions properly before us under the present appeal. It is proper, however, to notice that the action brought by the Commissioners of the Sinking Fund was discontinued, on motion of the Attorney General, July 21, 1875, prior to the issuing of the writ of habeas corpus. It follows, therefore, that at the time of the issuing of the writ the order of arrest made in the action of the State v. N. G. Parker was the only authority for detention then in operation.

It is contended that the Circuit Judge of the Sixth Circuit could not issue a writ of habeas corpus within the Fifth Circuit. On the other hand, it is contended that the authority of the Circuit Judges to issue writs of habeas corpus is not limited to writs issued within their Circuits, but that such writs may be issued by any Circuit Judge in any part of the State where he may chance to be present. It is also argued that, inasmuch as the Circuit Judge of the Fifth Circuit was at the time absent from his Circuit, the Circuit Judge of the Sixth Circuit, that being an adjoining Circuit, had authority, and was bound by law, to issue a writ within the last named Circuit, if application was made to him for such writ on proper grounds, while temporarily present within the territorial limits of the last named Circuit.

We will proceed to consider the force of this objection and the arguments directed against it.

*474

*The provisions of the Constitution directly bearing on this question are contained in Sections 13 and 14 of Article IV, and are as follows:

"Section 13. The State shall be divided into convenient Circuits, and for each Circuit a Judge shall be elected by joint ballot of the General Assembly, who shall hold his office for a term of four years, and during his continuance in office he shall reside in the Circuit of which he is Judge.

"Sec. 14. Judges of the Circuit Court shall interchange Circuits with each other, in such manner as may be determined by law."

Under Section 13 the State was divided by the Legislature into eight Circuits, and Judges were elected for each Circuit, as prescribed by the Constitution.

Opposite views have been entertained of the force of Section 14. On the one hand it has been contended that, independent of this Section, the Circuit Judges possess authority to exercise their powers as Judges beyond their Circuits to any extent that might be permitted by acts of legislation. On the other hand, it has been contended that, independent of Section 14, they could exercise no authority whatever beyond the territorial limits of their respective Circuits. It will not be necessary to determine which of these opinions has the soundest basis in order to place a construction on Section 14 that will be sufficient to dispose of all the questions arising in the present case. It will be sufficient if it be found that the true intent of Section 14 was to restrain the authority of the Circuit Judges to action taken within the territorial limits of their respective Circuits, except where authorized by statute to perform duties beyond those limits. The question is one exclusively relating to the place where judicial duties ought to be performed, and not of any territorial limitation of the force of such acts when rightfully performed.

The fourteenth Section contains a positive mandate enforcing a general duty of interchange, under the words "shall interchange Circuits with each other," and a direction by which that duty may be made specific and determinate, under the words "as may be determined by law." The mandate, whether intended to call into existence, as original, the duty of interchange, or to enforce that which, independently of it, might be inferred from the nature of the office and other provisions of the Constitution establishing it, clearly gives expression to the whole duty of the Circuit Judges as it regards interchange of Circuits, and subjects that duty to

*475

such *provisions of law as should thereafter be enacted to render it specific and determinate. The word "shall," to the same extent that it confers or recognizes a general duty of the Judges, confers on the Legislature the right to prescribe the mode and man-

ner of its exercise, and this implies the right to say when and under what circumstances it shall not be binding. Inasmuch as, from the nature of the judicial office, the right to exercise judicial powers is always commensurate with the duty governing their exercise, it follows that the entire right and duty of interchange as between the Circuit Judges is subjected by the Constitution to the control of the Legislature. It also follows that if the Legislature undertakes to exercise the power and prescribes certain cases and modes in which such interchange may take place, it must be regarded as withholding its sanction from interchange in other cases and under other modes than those prescribed.

It is necessary to ascertain, at this point, what is embraced under the term interchange, and whether every right or duty to exercise judicial functions in a Circuit other than the proper Circuit of a Judge is to be regarded as an interchange within the meaning of the Constitution. If such should be found to be the case, then it would follow that no judicial functions can rightfully be exercised by a Circuit Judge beyond the territorial limits of his Circuit, except when authority of law has been conferred for that purpose. The words "shall interchange Circuits with each other," considered in the narrowest view that can be taken of them, would cover the case of an arrangement by which A should take B's Circuit for a limited time and B should take A's Circuit for the same time. This would be a case of exchange or of mutual interchange. It is clear that such a limited construction would not satisfy the purpose of the Constitution. It would leave unprovided for and unconsidered the more important case of a vacancy in any Circuit, or the inability of its Judge, temporary or permanent, to perform his duties, which would occasion a cessation of the functions of the Circuit Court for an inconvenient period, unless a Judge could be supplied from the other Circuits. It is not to be assumed as the intention of the Constitution to regulate the minor details of judicial interchange, overlooking provisions vital for keeping in action the judicial machinery. If the words "shall interchange Circuits with each other" can, without doing violence to their proper sense, receive an interpretation

*476

large enough to include all the contin*gencies that many render the interchange of judicial duties necessary, that construction is the one that is conformable to the true spirit of constitutional construction.

The terms employed do not confine themselves to cases of mutual interchange. Interchange, based on the principle of equality, as fully satisfies that language as that based on mutuality or reciprocity. Interchange between two may be considered as properly mutual or reciprocal interchange; but between a larger number naturally resolves itself into the idea of a system of interchange covering all cases where interchange may either be necessary or desirable, adjusted on the principle of equalizing the duties and labors all are called upon to perform under it. There is clearly no difficulty in placing this enlarged construction upon the words employed by the Constitution.

We must conclude, then, that it was the intent of the Constitution to confine the Circuit Judges in the performance of judicial duties to the Circuits to which they are respectively elected, except when authority to go beyond that limit is conferred by some statute.

It is now in order to see to what extent the statute permits the Circuit Judges to act beyond the limits of their Circuits.

It is provided by a statute passed under and in pursuance of Section 14, Article IV, of the Constitution, as follows:

"The Judges elected and commissioned for the several Circuits shall hold the Courts of Common Pleas and General Sessions for the several Counties in their respective Circuits: Provided, Said Judges shall interchange Circuits upon their request to, and order of the Chief Justice, or upon the order of the Chief Justice without such request, whenever in his judgment it shall be deemed advisable."

By the foregoing provision, the right of a Circuit Judge to hold the Circuit Court in another than his own Circuit depends upon the sanction and order of the Chief Justice. —General Statutes, 570, § 26.

The only other provisions of law bearing upon this question are contained in Sections 417 and 419 of the Code of Procedure. Subdivision 3 of Section 417 is as follows: "Orders made out of Court without notice may be made by the Judge of the Court in any part of the State." If by "Judge of the Court" is meant the Judge of the Circuit in which the cause is pending, then it is certainly sufficient to enable a Circuit Judge to make ex parte orders in causes pending in his own Circuit in any part of the State

*477

where he may *chance to be. Whether it is authority for any Circuit Judge in the State to make ex parte orders in any cause pending in any of the Circuits need not be considered here, that question not being involved in the present case. But if that should be the true construction of the words "in any part of the State," it could not be construed as authority for a Judge to go into another Circuit and there make ex parte orders, but to make such orders within his own Circuit although acting upon cases pending elsewhere. It would, under that construction, appear to be a provision affecting the place where orders of that class might be made, and not one relating to the performance of judicial acts by a Judge beyond the territorial limits of his Circuit.

Subdivision 4 is as follows: "Motions upon

notice must be made within the Circuit in which the action is triable, or, in the absence or inability of the Judge of the Circuit, may be made before the Judge of a Circuit adjoining that in which it is triable." This provision primarily relates to a contingent jurisdiction in the Circuit Judges to hear contested motions in causes triable in other Circuits than their own. It does not, by any necessity of its language or purpose, confer on a Circuit Judge power to perform judicial duties within the limits of a Circuit other than his own, although it authorizes the performance of acts that may in themselves have authority beyond his Circuit. If such a construction were otherwise admissible, it is precluded by the word "adjoining." The obvious purpose of limiting this contingent authority to the Judges of an adjoining Circuit was to prevent unreasonable travel on the part of parties and their counsel in order to reach a place where such motions could be made. If it had been in the contemplation of the Legislature that such motions should be heard in their proper Circuits by some Judge of another Circuit temporarily present there, they, doubtless, would have extended such authority to any Judge in the State temporarily present. It is evident that the Legislature had in mind the case of parties compelled to go beyond the limits of their Circuits in order to make motions of that class, and the language must be restrained to its primary sense under the influence of the object they must be deemed to have had in view.

Section 419 is as follows: "Where notice of a motion is given or an order to show cause is returnable before a Judge out of Court, and at the time fixed for the motion he

*478

is absent or unable to hear *it, the same may be transferred by his order to some other Judge before whom the motion, in case of his absence or inability, might have been made." This Section extends the provisions of subdivision 4, already referred to, to the case of a motion already noticed or ordered to be heard in its proper Circuit; but where the hearing cannot take place according to such notice or order by reason of the absence or inability of the Judge of that Circuit, in that case such Circuit Judge may select from among the Judges of the adjoining Circuits the Judge who should hear the case in his place. It has no application in enlarging the authority of the Judges to take judicial action at places beyond the limits of their Circuits. This Section is not happily phrased, but it is not difficult to see how cases may arise under its provisions.

It has, therefore, been seen that no provision of law exists authorizing a Circuit Judge to enter another Circuit and perform judicial functions there without the sanction and consent of the Chief Justice. No such sanction or order was given in the present case. There is no reason why authority to issue the writ of habeas corpus should form an exception to this rule. If the issuing of this writ is not always to be regarded as a duty performed by the Circuit Court, it is still a duty incident to Circuit jurisdiction and one that follows the limits of that jurisdiction. The reason for circumscribing by territorial limits the jurisdiction of the respective Circuit Judges, so that their duties and responsibilities may be separate and clearly distinguished, applies with equal force to that important class of judicial proceedings that grow out of the use of that writ. If that writ is useful in keeping Judges within the limits of their jurisdictions, it would lose much of its usefulness if it merely resulted in opposing the judgment of one Judge to that of another of co-ordinate powers.

Our conclusion is that the Circuit Judge of the Sixth Circuit had no authority, so far as appears by the case before us, to entertain the application for the writ of habeas corpus within the limits of the Fifth Circuit, and that the writ was improperly issued and must be set aside, with all proceedings based upon it.

It would manifestly be improper in the present state of the case to pass upon the validity of the order of arrest. That question should be heard and passed upon by the Circuit Court in which the action is pending before it is reviewed in this Court;

*479

and, for *that reason, this Court deems it premature to consider the other important questions discussed at the bar.

The writ and all proceedings based upon it must be set aside.

MOSES, C. J., and WRIGHT, A. J., concurred.

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6 S. C. 479

SANDERS v. HARTZOG.

(Columbia. Nov. Term, 1875.)

[*Deeds* ⇨40.]

A writing, endorsed upon a deed of conveyance to S., in these words; "In consideration of the sum of $500, to me in hand paid by E. G., I hereby assign, transfer and set over to E. G. all my right, title and interest in and to the premises covered by the within deed, to have and to hold the said land described within unto the said E. G., her heirs and assigns forever," signed by S. opposite an L. S. and attested by two witnesses: *Held*, to be a good bargain and sale of the land described in the deed of conveyance.

[Ed. Note.—Cited in Lorick & Lowrance v. McCreery, 20 S. C. 428.

For other cases, see Deeds, Cent. Dig. §§ 81–83; Dec. Dig. ⇨40.]

Before Maher, J., at Barnwell, September Term, 1874.

This was an action by Eliza G. Sanders, plaintiff, against Henry Hartzog, defendant, to recover the possession of a lot of land in the town of Bamberg.

The case was as follows: Thomas J. Counts, by his deed of release bearing date the 17th September and recorded the 21st November, 1867, conveyed the lot in question, fully describing the same therein by metes and bounds, to Burrell Sanders. On the 27th June, 1871, Burrell Sanders endorsed upon the said deed of release an instrument over his hand and seal in the following words and figures:

"The State of South Carolina,
"Colleton County.

"In consideration of the sum of five hundred dollars, ($500,) to me in hand paid by E. G. Sanders, I hereby assign, transfer and set over to Miss Eliza G. Sanders all my right, title and interest in and to the premises covered by the within deed, to have and to hold the said land described within unto the said Eliza G. Sanders, her heirs and assigns, forever. Burrell Sanders. [L. S.]"

This instrument was attested by two witnesses and recorded on the 31st August, 1871.

*480

*Burrell Sanders was afterwards adjudicated a bankrupt and the defendant was in possession of the lot claiming as purchaser from his assignee.

At the close of the plaintiff's case, the defendant moved for a nonsuit, on the ground that the instrument endorsed upon the deed of release was insufficient in law as a conveyance of land.

His Honor granted the motion, and the plaintiff appealed.

Skinner, for appellant.

1. There is no intrinsic force in a deed to transfer an estate. The deed is simply the legally-constituted witness that the estate has been transferred; and this not by the common law, (by which a parol transfer was valid,) but the Statute of Frauds, requiring the transfer to be evidenced by writing.—2 Bl. Com., 294, 297, 313; 4 K., 555.

2. The Act of 1795 (1 Brev. Dig., 177,) allows such operation to the words "grant, bargain, sell and release," &c., and will the Court allow less force and effect to the words "assign, transfer and set over," (used in the plaintiff's deed,) when the purpose of the Act (ibid, § 39,) was to render the transfer of land "free and unrestrained" according to the policy of the law?

2 Bl., 289: And the words of the deed are of more apt and ample signification than those of the Act.

See the meanings and uses of these words in 2 Bl., 294, 310, 17, 24, 27, 39.

3. But no form of words is necessary to the validity of a deed.—2 Bl., 298; 4 K., §§ 511-12; and the deed to the plaintiff is doubly sufficient in that the statutory form of the deed from Counts to Sanders is incorporated and made a part of it by reference. —Br. L. M., 482; 2 Bl., 108, and note to page 110, by Judge Sharswood; Dawson v. Dawson, Rice Eq., 266.

4. But upon a contract to convey land, made upon a valuable consideration, (and the plaintiff's deed expresses one,) the bargainor is seized to the use of the bargainee, and the Statute of Uses executes the estate, and the plaintiff's deed is therefore good and effectual as a bargain and sale.—2 Bl., 338; 4 K., 544; Rugge v. Ellis, 1 Bay, 104; Craig v. Pinson, Chev., 272; Chancellor v. Windham & Law, 1 Rich., 164; and see argument of counsel and note by reporter in same case.

*481

*5. The plaintiff's deed is sufficiently certain, and unaffected by the ruling in Turner v. Moore, 1 Brev., 236; Brm. L. M., 485; Kirkland v. Way, 3 Rich., 5; Evans v. Corley, 8 Rich., 318; and third persons can only raise the question of the "meaning" of the deed.—McCullough v. Wall, 4 Rich., 80.

6. But in the present case the allegation of possession in the plaintiff and ouster by defendant is uncontroverted and taken as true. —Code, § 191. And in the absence of any opposing evidence, the plaintiff was entitled to recover.—Brewster v. Stirkie, 1 E. D. Smith, 321; Hill v. Draper, 10 Barb., 454.

Gantt, for defendant:

The assignment in this case is not sufficient as a title by which to transfer real estate.

1. Because the Act of 1795 (5 Stat., 256, which is also incorporated in the Revised Statutes, page 423, § 4,) prescribes the form or purport of a release, which is declared valid and effectual to pass the title of real estate, but provides that the Section shall be so construed as not to invalidate the "forms heretofore in use in this State."

In Craig v. Pinson, (Chev. R., 272,) the form prescribed by the Act of 1795 was held to be the form for a bargain and sale, and a deed not pursuing that form and having only one subscribing witness was adjudged invalid. Judge Butler, delivering the opinion of the Court, said (on page 277): "The Act of the Legislature does say that the form prescribed should not invalidate the forms heretofore in use in this State; that is, all common law modes of conveyance, which were attended with notoriety and transmutation of possession from one to another. All other forms are excluded by the one presented." This language, however, was too general or broad, for it has been adjudged that the covenant to stand seized, when founded on consideration of blood or marriage, is still effectual to pass title to land under the operation of the Statute of Uses, and that such covenant avails under that statute to convey a freehold to commence in

future.—Chancellor v. Windham & Law, 1 Rich., 161; Kinsler et al. v. Clark, 1 Rich., 170; Dinkins v. Samuels, 10 Rich., 66.

But Craig v. Pinson seems to have settled the point that a deed of bargain and sale to be valid and effectual must pursue the Act of 1795; and such deed operates in this

*482

State, not by virtue of the *Statute of Uses, but as a direct conveyance passing the estate with transmutation of possession as effectually as a feoffment with livery of seizin.

The writing here in question, if valid at all, must be supported as a deed of bargain and sale. But it lacks the operative words of conveyance expressed in our statutory form, and contains none equivalent thereto; "assign, transfer and set over" are not equivalent to "bargain and sell." "Alien or grant," "demise and grant," have been held sufficient.—Sheppard's Touchstone, 219. Chancellor Kent (in 4 Com., 496,) says: "Nothing can be more liberal than the rules of law as to the words requisite to create a bargain and sale. There must be a valuable consideration, and then any words that will raise a use will amount to a bargain and sale." But our statutory form of a bargain and sale excludes the operation of the Statute of Uses, and the statute has converted the bargain and sale, as a conveyance to uses, into a conveyance working transmutation of possession ex vi facti, without help from the Statute of Uses.—4 Kent, 461. Therefore words that formerly might have been sufficient to raise an use or trust which the Statute of Uses would execute, do not, since the Act of 1795, necessarily constitute a bargain and sale effectual under that Act. The rule is fully recognized that when a deed cannot operate in the mode contemplated by the parties, it should be construed in such a manner as to operate, if possible, in some other way.—Chancellor v. Windham, 1 Rich., 167.

It is, however, submitted that this instrument, if not valid as a bargain and sale, can avail in no other way than as an agreement to convey, enforcible in equity.

It would hardly be contended that this instrument is a covenant to stand seized to uses, since it professes to be founded on a pecuniary consideration alone.—1 Rich., 161, 170. Moreover, Sanders reserved no estate to himself, so the question of freehold to commence in futuro is not involved, and hence no necessity to construe as a covenant to stand seized. Submitted that where, as in this instance, the manifest intention is to pass a present estate, to hold that the instrument is effectual as a covenant to stand seized, and that the use raised is forthwith executed by the Statute of Uses, would be to set at naught our statute which prescribes the form of a deed, when the object is to convey a present and not merely a future intent.

In the case of Clark v. O'Margery, (2 Brev. Rep., 134,) a similar assignment of a grant was held by this Court to be not sufficient to

*483

*pass any estate therein, as upon no principle of legal construction could it be considered equivalent to any of the legal conveyances hitherto in use for effecting the transfer of real estate, as the endorsement in question does not even import a bargain and sale of the land, but imports only an assignment of the same.

In 4 Kent's Com., 579, the distinction between bargain and sale and covenant to stand seized to uses is, that while the former requires a valuable consideration, the latter requires a consideration of blood or marriage, which latter consideration is not embraced in the language of the assignment in question, nor was it given in evidence at the trial. And as it is said in the same volume and page that 'the instrument, to operate, must partake of the qualities of the deed assumed, this assignment cannot operate as a bargain and sale for the numerous reasons above stated, or as a covenant to stand seized to uses, for want of the required consideration of blood or marriage.

In Ingram v. Porter, (4 McC., 201,) Judge Colcock, in delivering the opinion of the Court, says: "When it is said the deed must operate if it can, it is meant if it can consistently with the meaning of the parties, as regulated by the rules of law. It is not intended that the plain and obvious meaning of words are to be entirely changed, and that those words which are entirely applicable to one subject are to be applied to another, for this would in effect be making a deed and not construing one."

February 2, 1876. The opinion of the Court was delivered by

MOSES, C. J. The Act of 1795, (General Statutes, 423,) while it prescribes the form of a release which shall be effectual for the transfer of real estate, provides "that it shall be so construed as not to invalidate the forms heretofore in use in this State." Among those in use at its passage were not only lease and release, but bargain and sale, and a covenant to stand seized to uses.—Lessee of Rugge v. Ellis, 1 Bay., 109; Craig v. Pinson, 1 Chev., 272; Chancellor v. Windham, 1 Rich., 161 [42 Am. Dec. 411]. The statutory form created by the Act may be said to embrace both a lease and release, and a bargain and sale, by the introduction of modes usually employed in both. The instrument by which the land conveyed by Counts to Burrill Sanders was transferred to Eliza G. Sanders, the appellant, while it cannot take effect as a conveyance at common law, nor as a covenant to stand seized, because it failed in the consideration of mar-

*484

riage or consanguinity, *may, nevertheless,

be effectual as a bargain and sale, which, alike with the covenant to stand seized, owes its creation to the Statute of Uses, if the words employed are sufficient to sustain the instrument as a contract for the sale of the land, in consideration of money or its equivalent paid. The Statute of Uses, which, immediately on its enactment, converted what had been equitable into legal estates, gave rise to new modes by which the title to land could be as securely transferred as by any form of conveyance at common law then recognized and in use. Among these was a title derived through a bargain and sale; for the use being given by the deed, the statute conveys the legal estate, and thereby confirms in the purchaser the title as well as the use.

Can the deed to Eliza G. Sanders take effect as a bargain and sale? It recites a money consideration paid, and an intention beyond dispute to vest in her the land covered by the conveyance to her grantor from Counts. While it may not employ technical words, its language is sufficient to express the purpose which the party paying the money and the party executing the deed had in view. It was evidently the design of Burrell Sanders that his grantee should "have and hold" the land in fee simple; for if any estate is conveyed it is one of inheritance. He makes no reservation, and clearly manifests his purpose to part with all "his right, title and interest" in the land.

But to maintain an instrument as a valid bargain and sale, it is not necessary that technical words should be employed. Chancellor Kent, in the fourth volume of his Commentaries, 496, says: "Nothing can be more liberal than the rules of law as to the words requisite to create a bargain and sale. There must be a valuable consideration, and then any words that will raise a use will amount to a bargain and sale."

Mr. Washburne, in his work on Real Property, (3 vol., 620,) quoting from 2 Wood Com., says: "The elementary writers insist upon the importance of the words of grant being suitable to the nature of the deed, and it is accordingly stated that for a feoffment the proper words are 'give,' 'grant,' 'en feoff,' &c., and for bargain and sale, 'grant,' 'bargain' and 'sell,' &c. But the words 'bargain and sell' are not essential to such a conveyance, and any words of equivalent signification, which would at common law raise a use, will be sufficient, if they show the intent of the parties."

*485

*In Roe v. Tranmarr, (Willes, 682,) the judgment of the Court, resting, as it says, on the general rules of law in respect to the exposition of deeds laid down in many of the books, and which are collected out of them by Shephard on Common Assurances, gives effect to the maxim that verba intentioni et non e contra debent inservire, and that, "therefore, deeds which are intended and made to operate one way, may operate another way, if the intention of the parties cannot take place, unless they operate a different way from what they were intended."

Parke, B., in ex dem Lewis v. Davies, 2 M. & W., 516, referring to Roe v. Tranmarr, cites with approbation what is there said by the Lord Chief Justice, quoting from the opinion in Osman v. Sheafe, 3 Lev., 370, "that the Judges in these latter times (and he thinks very rightly) have gone further than formerly, and have had more consideration for the substance, to wit, the passing of the estate according to the intent of the parties, than the shadow, to wit, the manner of passing it."

In Jackson and others v. Fish and others, 10 John., 457, it was said by the Court, of which Mr. Kent was then the Chief Justice: "There are no precise technical words required to raise a use. If the words amount to a present contract of sale or bargain, a trust is instantly raised on which the statute operates."

We think that the words in the deed before us amount to such a contract, and the motion to set aside the nonsuit is granted, and the case is remanded to the Circuit Court for a new trial.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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6 S. C. 485

HUTTON v. EDGERTON & RICHARDS.

(Columbia. Nov. Term, 1875.)

[*Contracts*, ⇐93.]

Ignorance of a party's legal right at the time he makes a contract is no ground for avoiding it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 418; Dec. Dig. ⇐93.]

[*Contracts* ⇐71.]

Time given is a sufficient consideration for a promise in writing to pay back interest on a non-bearing interest debt.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 318; Dec. Dig. ⇐71.]

Before Reed, J., at Charleston, March Term, 1875.

Action by B. H. Hutton, surviving partner of the late firm of Benkard & Hutton, of the

*486

city of New York, against Edgerton & *Richards, of Charleston, on a promissory note for $527.48, dated 1st January, 1868, and payable, with interest, at six months.

Defense that the note was without consideration except as to $171 admitted to be due with interest.

The defendants gave evidence tending to show that on the 25th February, 1861, they became indebted to Benkard & Hutton in the

sum of $824.24 for merchandise; that in September, 1866, they gave their note for the debt, payable September 24, 1867, and included therein the interest which had accrued during the war; that at that time the defendants did not know that they were not liable for interest during the war; that payments were made which reduced the amount due according to the face of the note on the 1st January, 1868, to $527.48, at which time the note sued on was given for that balance; and that, deducting the interest which had accrued during the war, the balance due at that date would have been $171.

His Honor instructed the jury as follows: I charge you to ascertain the amount due after giving credit for the interest from February 25th, 1861, to December 24th, 1866. If the promises of defendants to pay were made under a misapprehension of their right, and, thus misapprehending, they gave their note, it is a mistake that should be corrected. Suppose the note had been given for a horse which turned out worthless, or for a piece of land to which the seller had no title, or that it was for any other reason without consideration, would it not be void in law, notwithstanding the promise to pay? If the defendants made promises, it was to pay what was legally due, and no more. It is for you to ascertain what is due, and I charge you, as matter of law, that interest did not run between the belligerents during the war: and if it was computed and included in the note between the 25th February, 1861, and the 24th December, 1866, it was an error that your verdict should correct.

The attorney for plaintiff excepted to the charge, and asked for the following instructions:

That time was a good consideration; that it was a new contract founded on a good consideration. If a new contract was executed under ignorance of the law, that the maxim ignorantia juris non excusat would apply; but if it was executed under a mistake of the

*487

*law, that the other fact that a mistake of the law was made shows that they did have an idea that they were not bound; and, with that idea in their heads, the fact that the note was executed showed that the note was a compromise of a doubtful right.

By the Court: I submit that proposition to you, and say that if the defendants at the time they gave this note, and at the time they made the subsequent promises relied on, knew that they were not liable for interest during the war, and yet gave the note and made the promise to procure indulgence of what was actually due, then they are liable. But if the promises were made and the note given in ignorance of their rights as established by law, then they are not liable for the interest which accrued during the war; and, deducting that sum, you will find your verdict for plaintiffs for the amount actually due. This I conceive to be the law; but if not the law, it is unquestionably the justice of the case.

The jury returned a verdict in conformity with the instructions, and judgment was entered for plaintiffs for $382.

The plaintiff appealed on the following grounds:

1. Because the verdict of the jury was contrary to the evidence.

2. Because His Honor erred in instructing the jury that they must deduct the interest which had accrued between the 25th February, 1861, and the 24th December, 1866.

3. Because His Honor ought to have instructed the jury, when asked, that time given and suit forborne was good consideration for a new contract.

4. Because His Honor erred in instructing the jury that if they found that Edgerton & Richards were ignorant of their rights when they executed the note, that they would not be bound by their contract.

5. Because His Honor ought to have instructed the jury, when asked, that if the note was executed under a mistake of law, the fact that a mistake had been committed showed that the defendants had some knowledge of their rights, and the note was the result of a compromise, which compromise could not be relieved against.

6. Because His Honor ought to have instructed the jury, when asked, that if they found that time had been given at the request of the defendants, and that the note had been executed in consideration of such time, that they must find for the plaintiff.

*488

*7. Because His Honor ought to have instructed the jury, when asked, that the interest which had accrued between the 27th April, 1861, and the 2d April, 1866, was a good moral consideration to support a new promise.

McCrady, for appellants, submitted the following points:

1. Forbearance to sue and time given is a good consideration to support a new promise.

2. That if respondents acted on their own knowledge alone in executing the note, it was not a mistake of law but ignorance. The fact of making a mistake implying an act of judgment, ignorance implying the absence of the elements necessary to an act of judgment, and ignorantia juris neminem excusat.

3. That, at most, the giving the note was but a compromise of a doubtful right, it being alleged that the note was executed under a mistake of law, and a mistake as above implying an act of judgment, and showing that the defendants had some knowledge of their rights, and that such a compromise cannot be relieved against.

He cited and commented on the following authorities: Miles v. McClellan, 1 N. & McC., 133; Barnsture v. Eggart, 3 McC., 162;

Mapes v. Sedney, Cro. Jac., 683; Bainbridge v. Moss, 31 Eng. L. & Eq., 565; Lawrence v. Beaubien, 2 Bail., 649; 1 Story Eq., 125; Shotwell v. Murray, 1 Jones Ch., 512; Hunt v. Roumanier, 8 Wheat., 174; Mayer v. Reed, 37 Ga., 482; Griffith v. Lewell, 26 Iowa, 226; 4 Amer. L. R., 743; Broom Leg. Max., 154; Brown v. Hiatt, 15 Wall., 177; Earle v. Oliver, 2 Exch., 71.

Campbells & Whaley, contra.

February 15, 1876. The opinion of the Court was delivered by

MOSES, C. J. It would be difficult to take any view of the case, which, testing the verdict by the principles of law applicable to the facts proved, could allow it to stand.

The charge of the presiding Judge that "if the promises were made and the note given by the defendants in ignorance of their rights as established by law, then they are not liable for the interest which accrued during the war, and, deducting that sum, the jury will find for the plaintiffs the amount actually due," was error, nor was its force abated or qualified by his additional remark

*489

in the follow*ing language: "This I conceive to be the law: but if not the law, it is certainly the justice of the case." While, under the issues presented, the jury were to find the facts, it was the duty of the Court to instruct them as to the law by which their effect was to be determined. They were not at liberty to substitute their sense of the abstract justice which should regulate the verdict in the place of their obligation to consider and pass upon the relative rights of the parties by the standard supplied by the law. It is not necessary to dwell upon the results which would ensue if such a license were allowed to juries, who are bound to decide by the law laid down by the bench, and not by conclusions drawn from their own ideas of naked justice. The appellants could not exonerate themselves from the payment of the note by ignorance of their legal rights when they executed it. Such a plea cannot be interposed to defeat the full effect of the instrument. It was enough on this part of the case to refer to the well-considered decision in Lawrence v. Beaubien, 2 Bail., 624 [23 Am. Dec. 155]. There, in an elaborate opinion, the proper distinction between ignorance and mistake is fully considered and discussed. The terms, in legal contemplation, do not import the same significance and should not be confounded. Ignorance implies a total want of knowledge in reference to the subject matter. Mistake admits a knowledge, but implies a wrong conclusion. Where one is misled by the advice of another, he may refer his mistake to the suggestions which prompted his action, as is said in the case referred to: "it is capable of proof," but ignorance concedes the want of all knowledge, and action under it proceeds from one's own will not influenced by the counsel of another. Richards here, so far as is developed by the testimony, when he gave the note, does not seem to have considered whether the plaintiff was legally entitled to interest on the debt for which it was given. But even where one can claim relief from a contract on the ground of mistake of law, it is held in Lawrence v. Beaubien, that the rule can only apply to contracts "where one party acquired nothing, and the other neither parted with any right nor suffered any loss, which ex æquo et bono, ought not to be binding." If Richards had not given a note, the appellants at least as early as 1866 could have sued and obtained judgment on the open account, and thus converted it into an interest-bearing demand. He cannot consistently ask to be relieved from the effect of his own mistake without first repairing the loss which it has caused to the other.

*490

*The language of Ch. Kent, in Lyon v. Richmond, (2 John. Ch.,) may be well adopted in this case. At page 59 he says: "The Courts do not undertake to relieve parties from their acts and deeds fairly done on a full knowledge of facts, though under a mistake of the law. There is no other principle which is safe and practicable in the common intercourse of mankind. And to permit a subsequent judicial decision in any one given case, on a point of law, to open or annul everything that has been done in other cases of the like kind for years before, under a different understanding of the law, would lead to the most mischievous consequences. Fortunately for the peace and happiness of society, there is no such pernicious precedent to be found."

There was error, too, in the omission on the part of the Court to charge as requested —that, if the jury concluded from the facts in evidence that the note in suit was given in consideration of further time extended on the debt, originally contracted in 1861, it must be sustained as a binding agreement on both the parties, subject to all the legal consequences it involved. The extension in itself was a benefit to the one party and the interest promised of profit to the other. There was mutuality in the consideration which led to the execution of the note, and the defendants, after availing themselves of the advantage which it conferred upon them, cannot be allowed to convert it to the prejudice of the plaintiff.

The motion for a new trial is granted, and the case remitted to the Circuit Court.

WRIGHT, A. J., and WILLARD, A. J., concurred.

6 S. C. 490

JACOBS v. WOODSIDE.

(Columbia. Nov. Term, 1875.)

[*Executors and Administrators* ⟸50.]

Where a debtor becomes administrator of his creditor, the debt is extinguished at law, and becomes assets in his hands.

[Ed. Note.—Cited in Twitty v. Houser, 7 S. C. 164; Charles v. Jacobs, 9 S. C. 299; Coleman v. Smith, 14 S. C. 514; Ashley v. Holman, 15 S. C. 106; Todd v. Davenport, 22 S. C. 150; Donnan v. Watts, 22 S. C. 432; Chick v. Farr, 31 S. C. 471, 475, 10 S. E. 176, 390.

For other cases, see Executors and Administrators, Cent. Dig. § 302; Dec. Dig. ⟸50.]

Before Cooke, J., at , March Term, 1874.

Action by R. H. Jacobs, as administrator de bonis non, with the will annexed, of E. O. Jacobs, deceased, against John L. Woodside and Thomas Goldsmith.

*491

*The case is as follows:

The action was on a sealed note for $4,408.-50, dated October 20, 1860, payable twelve months after date to E. O. Jacobs, executor, and signed by John Charles, John L. Woodside and Thomas Goldsmith. E. O. Jacobs was executor of the last will and testament of his father, William Jacobs, deceased, and in that capacity took the note in question. Before the maturity of the note, E. O. Jacobs died, and letters of administration, with the will annexed, upon his estate were granted to John Charles, the principal on the note. John Charles continued as administrator of the estate from 1861 to April 1, 1872, when his letters were revoked and administration de bonis non, with the will annexed, was granted to the plaintiff. The note was turned over to the new administrator and this suit soon after instituted.

It was contended on the trial, by the defendant's attorneys, that the note in question became cash in the hands of John Charles as soon as he became administrator of the estate of the payee, and that he could be made liable therefor only upon his administration bond, and that the sureties upon said note had been discharged by operation of law and were not liable. It was also shown upon the trial that John Charles was perfectly solvent at the time of the grant of letters of administration, but that he and his sureties were hopelessly insolvent at the time his letters were revoked. The presiding Judge was requested by the defendant's counsel to charge as follows, to wit:

1. That if the jury found from the testimony that John Charles was principal, and that John L. Woodside and Thomas Goldsmith were sureties only, and that John Charles was appointed administrator of the estate of the payee, E. O. Jacobs, deceased, and was solvent at the time, then the debt is extinguished and this action cannot be maintained.

2. That if they find the facts as above stated, then the appointment of John Charles as administrator operated as a discharge of the sureties.

The request was denied, and His Honor instructed the jury as follows:

The law in this case is in a nutshell. It is embraced in this: take the note sued on and calculate the interest for one year and

*492

*add it to the principal, and calculate the interest on this for twelve years four months and twenty days, it will make $8,806.99. This should be your verdict. Take the record and find it.

The verdict was for $8,806.99.

The defendants appealed.

Wells, with whom was Cothran, for appellants:

It is a principle of the common law, as old as the year books, that when an obligee makes an obligor his executor, the same hand being to receive and pay out, the debt is discharged.—Note to Cheetham v. Ward, 1 B. & P., 630; Wankford v. Wankford, 1 Salk., 299; Freakley v. Fox, 9 B. & C., 130.

This common law principle, however, has been held to apply only to cases when the obligor becomes the executor, and not to those when he becomes the administrator of the obligee; the reason given being that in the one case the suspension is the voluntary act of the creditor, and therefore the action is forever gone; but in the other case the suspension is by act of law and only temporary in its nature—a distinction seemingly without any difference in principle, since in both cases the same hand is to receive and ought to pay out. Equity, however, avoids the absurdity of requiring a man to sue himself, by holding, with more justice, not that the debt is discharged, but that it is assets in the hands of the executor; or, as the old books quaintly express it, that the debt due by the debtor executor hath been paid to him by himself.—Berry v. Usher, 11 Ves., 90; Simmons v. Guteridge, 13 Ves., 264.

This principle of equity would seem to apply as broadly to administrators as to executors. In our own decided cases there is no distinction made between the two classes. In Schnell v. Schrœder, (Bail. Eq., 335,) it is said:

"But all the authorities concur that a debt due by an administrator to his intestate's estate is assets in his hands."

And again, in Griffin v. Bonham, (9 Rich. Eq., 71,) Chancellor Dargan says for the entire Court:

"It may be laid down as a rule of universal application that whenever the character of payor and payee of any debt or obligation is blended in the same individual, by operation of law the debt is paid, and the amount is cash in hand on the accounts of the payee to the credit of the party entitled

*493

to the fund. Eo instanti *it is due by the payee, and will be so considered in every transaction relative to the matter."

Language cannot be broader and more general; and, taken in its broad, clear sense, unrestricted and just as it stands, it would be far more in accordance with the principles of equity and good conscience, especially when there are creditors, to apply it to administrators than to executors. For in the case of an executor, the creditors would have only the debtor-executor to look to, at least so far as his own indebtedness to his testator was concerned, while in the case of an administrator they would have the additional security of the administration bond; and if that was insufficient, through any dereliction of the officer taking the same, they would have that officer's own bond to fall back upon. Nay, in the appointment of an executor, neither creditors nor legatees could possibly have a voice pro or con, while in the appointment of an administrator the distributees would certainly have, and the creditors might have, a voice in the matter, and all would have it in their power to secure a bond good beyond peradventure. So far, then, as reason and justice are concerned, the language used by the Chancellor is even more applicable to administrators than to executors. But to put the matter beyond all doubt, the Chancellor goes on to say:

"As a consequence of this principle, whenever an executor or administrator is indebted to his testator or intestate, the amount for which he is indebted and then due will be considered cash in hand at the moment when he assumes upon himself the administration. If the debt be not due at the commencement of the administration, it will be cash on account, to the credit of the estate, whenever it falls due in the course of the administration."

So far, then, as these authorities go, administrators and executors are placed upon precisely the same footing. Let us, then, go a step further and consider these two cases in the light of the construction placed upon them by this Court in the late case of Clowney v. Cathcart, 2 S. C., 395. There it is held that the debt may or may not be considered assets, at the option of the creditors and distributees. The decision in that case was eminently just and proper. The indebtedness was incurred after the death of the intestate, and at a sale of the intestate's property, made under order of Court, one of the administrators was the purchaser; the other was his surety, and the debt was secured by mortgage. It came into the hands of the principal and under his control, not by operation of law, but by express order of the Court of Equity.

*494

*Furthermore, it was by him transferred as a bond and mortgage to one of the creditors of his intestate. This was the turning point in the case, and the Court observes that "the principal question in the case depends upon the fact that, after the bond and mortgage passed into the hands of James Cathcart, as administrator, he transferred them to a creditor of his intestate." It was no hardship to the defendant, Richard Cathcart, because he was a coadministrator and knew of the transfer of the bond and mortgage and had it in his power to protect himself.

But to apply the principle to every case would work great hardship, as in the case before us. This is no proceeding on the part of creditors or distributees against a debtor-administrator simply, but a proceeding by an administrator de bonis non against the sureties of that debtor-administrator to recover a debt accrued in the lifetime of the intestate. Here was no transfer of the note to a creditor of the estate, or even to a distributee. And while the creditors or distributees might, had they been so disposed, have considered this a subsisting debt by sealed note as against the debtor-administrator, instead of assets realized at the maturity of the note, yet we submit that the sureties stand on higher ground. The debtor-administrator, by turning the note over to the administrator de bonis non, after quietly holding it and treating it as paid for eleven years, during which time he becomes insolvent, might revive the note as against himself; but we submit that he could not do so as against his sureties thereon. These sureties were powerless to protect themselves, even had they known that the debt was not paid. They could not do otherwise than stand by and see the administrator and his sureties become hopelessly insolvent, without the ability to compel the payment of this note; and even had they possessed power to compel payment, they might well have deemed themselves secure under the broad general expressions used in the cases of Schnell v. Schroeder and Griffin v. Bonham, supra. On the other hand, those interested in the estate have been guilty of great laches. They had it in their power to secure this debt by calling the administrator to account whilst he and his bondsmen were solvent. They did not do so, and, according to the well-established principle of equity, that when one of two innocent parties must suffer loss, and one of them might have protected himself and did not, whilst the other could not, the loss must fall upon the one who might have and did not

*495

protect himself. Indeed, this note *appears to have been taken by E. O. Jacobs in a fiduciary capacity, and, properly speaking, should have been turned over to his testator's administrator de bonis non with the will annexed. It would then, no doubt, have been collected from the principal. That it was not so turned over is strong evidence that

John Charles, the administrator, with the will annexed, of E. O. Jacobs' estate, regarded and treated it as so much cash, and that the parties interested in the two estates of father and son so regarded it.

But, again, the effect of appointing John Charles, the principal on the note, to be administrator of the payee's estate, was precisely that which occurs when an administrator who has a fund in his hands belonging to his intestate's estate becomes guardian to a minor to whom that fund is going. In that case, the sureties on the guardianship bond become liable for the fund and the sureties on the administration bond are released.—Johnson v. Johnson, 2 Hill Ch., 277; Simpkins v. Cobb, 2 Bail., 60; O'Neal v. Herbert, Dud. Eq., 30; O'Neal v. Herbert, McMul. Eq., 495.

So here the sureties on the administration bond became liable and the sureties on the note were released. The administration bond goes to the entire personal estate. It is for the faithful administration of the whole, not a part, and John Charles, the administrator, could administer this note only by regarding it as cash or by paying it. He could no more sue the sureties than he could sue himself. It is unnecessary to discuss the question whether he might not have discharged himself by turning it over to a creditor or legatee of the estate in discharge of their claims against the estate, for there is not even a pretense that he did either.

There is, then, no escaping the proposition that the sureties on the administration bond are liable and not the sureties on the note. The note was either administered as so much cash or it was unadministered, and in either event necessarily went into the decree against the administrator and the sureties on his bond in his accounting before the Judge of Probate. The liability fell first upon the administrator, and he failing to make it good, it fell upon the sureties on his bond.

Sullivan & Stokes, contra:

1. The bond of Charles and his securities to E. O. Jacobs, deceased, on whose estate the said John Charles administered, with will annexed, was never paid by Charles or

*496

his securities, all of *whom were insolvent, and the respondent, as administrator de bonis non of E. O. Jacobs, deceased, was entitled to recover the amount of the principal and interest of said bond and costs of suit, as the Court ruled and the jury found. See the facts of the case at large and the verdict.

2. On the 1st day of April, 1872, the letters of administration on the estate of E. O. Jacobs, previously granted to John Charles, were revoked, and on the same day administration de bonis non was granted to Richard H. Jacobs, respondent, upon the same estate, and the bond in question turned over to him by the Probate Court, when said bond was first embraced in the inventory of E. O. Jacobs' estate, which was done by respondent. And the principal and sureties to the first administration bond all being insolvent, this suit was instituted by respondent to recover said debt of Charles and his two sureties therefor, which was his individual debt to his testator, E. O. Jacobs; and the mere fact that John Charles became administrator of E. O. Jacobs, his deceased creditor, did not, under the circumstances and law of the case, extinguish the debt or discharge him or his sureties from the payment thereof.

Authorities in support of this proposition:

"Where the debtor is appointed executor, the suspension of the remedy is the voluntary act of the creditor, and therefore the action is forever gone; but the effect is different where the remedy is suspended by act of law. Thus, if administration of the effects of a creditor be committed to the debtor, this being by act of law, is only a temporary privation of the remedy. Therefore, if the obligor of a bond takes out administration to the obligee and dies, the administrator de bonis non of the obligee may maintain an action for such debt against the executor of the obligor. Again, if the executrix of the obligee marry the obligor, such marriage is no release of the debt, for the testator has done no act to discharge it. Consequently the remedy is merely suspended by the legal effect of the coverture, and on her death the administrator de bonis non will be equally entitled to that debt as to any others outstanding."—Williams on Ex., 1183.

In Wankford v. Wankford, (1 Salk., 303,) Powell, J., said: "That if administration of the goods, &c., of the obligee was committed to the obligor, that was but a suspension of the action and no extinguishment of the debt; but the reason of that is, because the commission of administration is not the act of the obligee; and so is 8 Co., 136, Sir John Needham's case."

*497

*In Wankford v. Wankford, Holt, C. J., uses the following language on page 306: "Suppose the obligor takes administration to the obligee; in that case the same person has a right to receive the money and is to pay it, and yet that will be no extinguishment; and so is 8 Co., 136, Sir John Needham's case; but the reason of the diversity is, because the administration is made such by act of law, but the executor by the act of the testator, and for that reason it is no extinguishment."

"The obligor of a bond administered to the obligee, and died. A creditor of the obligee having obtained administration de bonis non, brought an action for such debt against the executors of the obligee. It was successfully

maintained."—Peters. Abridg., Title Ex., 288.

And the same author, in note on page 287, says: "But the case of an administrator is different, for he is not appointed by the deceased; and, therefore, it would be very hard if it were in the power of the Ordinary to release any debt due to the estate by committing administration to the debtor."

February 15, 1876. The opinion of the Court was delivered by

MOSES, C. J. The action was a sealed note, dated October 20, 1860, payable at twelve months to E. O. Jacobs, executor, and signed by John Charles, J. L. Woodside and Thomas Goldsmith. Jacobs was the executor of the last will and testament of his father, William Jacobs, and in that capacity took the note. Before its maturing, Jacobs died, and letters of administration, with the will annexed, on his estate were granted to Charles, the principal of the note, who continued as such administrator from 1861 to April 1, 1872, when his letters were revoked, and administration de bonis non, with the will annexed, was granted to the respondent, (the plaintiff below,) to whom the note was turned over, and this action soon after instituted.

On the trial, it was contended by the defense that the note in question became cash in the hands of John Charles as soon as he was made administrator of the estate of the payee, E. O. Jacobs, and that he could be made liable therefor only through his administration bond; that the sureties on the note had been discharged by operation of law and were not liable. It was shown upon the trial that John Charles was solvent at the

*498

time of administration *granted; but both he and his sureties were insolvent when it was revoked.

His Honor the presiding Judge was requested by the appellants to charge in conformity with the views thus submitted, and his refusal to do so is the error here assigned.

It is not to be denied that at common law, where the testator appointed his debtor executor, the debt was considered discharged to the same extent as if a gift of it had been made by the will.—Wankford v. Wankford, 1 Salk., 307; Freakley v. Fox, 9 B. and C., 130. The rule rested on the assumption that by the act a gift was intended, and if there was a deficiency of assets to satisfy the debts of the testator, the debt of the executor was considered as assets in his hands, subject to the discharge of debts.—See Will. on Ex., 1126.

To what extent the principle may now prevail in England, modified as it has been in its application by decisions both of the Courts of equity and law, from time to time, it is not necessary to inquire, for since 1789 the rule has had no force in this State. An Act passed in that year, (5 Stat., 111,) and embodied in the General Statutes, (Section 2, Chapter 87,) declared that the appointment of a debtor to the testator as his executor "shall not be construed in law or equity to be a release or extinguishment of the debt, unless the testator shall in his will expressly declare his intention to release the same." The rule which obtained in the English Courts as to executors was never applied to an administrator debtor to the intestate, for his appointment is by operation of law, and cannot be referred to the act of the creditor.—Needham's case, 8 Coke, 138; Wankford v. Wankford, sup.

The executor or administrator, thus combining in himself the character both of debtor and creditor, thereby preventing all remedy for the recovery of his debt to the estate, which in law he alone represents, so far from being discharged or released by the mere act of his appointment, or the grant of letters testamentary or of administration, is regarded as holding the amount as cash in his hand, as the other effects of the decedent, subject to a due course of administration. His relation to the debt is changed by the very nature of his office. He cannot occupy a position which, on the one hand, would impose upon him the obligations of a debtor, while on the other it would entitle him to the rights of a creditor. To prevent the loss which might otherwise follow from the com-

*499

plete *suspension of the remedy, the debt must be regarded as assets either in the hands of the administrator or the executor, and the bond of the former, in his case, will stand as its security. It is not necessary to multiply authorities on the point. A reference to Schnell v. Schroeder, (Bail. Eq., 335,) Griffin v. Bonham, (9 Rich. Eq., 71,) Winship v. Bass et al., (12 Mass., 198,) is enough.

The reason of the rule finds sanction in the principle which holds that where an administrator has in his hands a fund belonging to a distributee, of whom he is afterwards appointed guardian, it is at once transferred to him in his right as guardian, and the sureties on his administration bond are discharged.—Johnson v. Johnson, 2 Hill Eq. 277 [29 Am. Dec. 72]; Simkins v. Cobb, 2 Bail., 60; O'Neall v. Herbert, Dud. Eq., 30; O'Neall v. Herbert, McMull. Eq., 495.

There is nothing in the case to permit the inquiry as to what might have been the effect of a transfer of the note by the administrator to a creditor of the estate, or into any act on his part or that of the creditors or distributees, recognizing the note as an existing demand, and a direct appropriation of it to the debts of the intestate, which might bring it within the exceptions referred to in Clowney v. Cathcart, (2 S. C., 395.)

On the contrary, here it is not denied that the note was retained by the administrator, John Charles, for eleven years, when his letters were revoked, and administration de bonis non of the estate of E. O. Jacobs, with the will annexed, granted to the respondent. Richard H. Jacobs, to whose hands the note in some way came.

The motion for a new trial is granted.

WRIGHT, A. J., and WILLARD, A. J., concurred.

227

[End of Volume 6 S. Car.]

REPORTS OF CASES

HEARD AND DETERMINED BY

THE SUPREME COURT

OF

SOUTH CAROLINA

VOLUME VII

FROM NOVEMBER, 1875, TO NOVEMBER, 1876, INCLUSIVE

BY J. S. G. RICHARDSON

STATE REPORTER

COLUMBIA, S. C.
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1878

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JUDGES AND OTHER LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS VOLUME

JUSTICES OF THE SUPREME COURT.

HON. F. J. MOSES, CHIEF JUSTICE.
HON. J. J. WRIGHT, ASSOCIATE JUSTICE.
HON. A. J. WILLARD, ASSOCIATE JUSTICE.

JUDGES OF THE CIRCUIT COURTS.

First Circuit.
HONS. R. F. GRAHAM and J. P. REED.

Second Circuit.
HONS. JOHN J. MAHER and P. L. WIGGIN.

Third Circuit.
HONS. JOHN T. GREEN and A. J. SHAW.

Fourth Circuit.
HON. C. P. TOWNSEND.

Fifth Circuit.
HON. R. B. CARPENTER.

Sixth Circuit.
HON. T. J. MACKEY.

Seventh Circuit.
HONS. M. MOSES and L. C. NORTHROP.

Eighth Circuit.
HON. T. H. COOKE.

ATTORNEY GENERALS.

S. W. MELTON and WILLIAM STONE, ESQS.

CLERK OF SUPREME COURT.

A. M. BOOZER, ESQ.

TABLE OF CASES REPORTED

	Page
Abrams v. Moseley	150
Adams v. Kibler	47
Bass v. Lucas	106
Blackwell v. Tucker	387
Bolling v. Stokes	364
Buckner v. Savannah & C. R. Co.	325
Campbell v. Charleston County	71
Cherry v. McCants	224
Choice v. Charles	171
Cooke v. Pennington	385
County Com'rs of Fairfield County v. Winnsboro Nat. Bank	78
Davis v. Vaughan	342
De Saussure v. Bollmann	329
Edwards v. King's Creditors	370
Fairfield County Com'rs v. Winnsboro Nat. Bank	78
Featherston v. Norris	472
Garvin v. State Bank	266
Gibson v. Gibson	356
Gillison v. Savannah & C. R. Co.	173
Grier v. Wallace	182
Holley v. Walker	142
Homestead Building & Loan Ass'n v. Enslow	1
Jones v. Massey	134
Levy v. Barrett	25
Lilly, Ex parte	372
Loyns v. Tedder	69
McCelvey v. Thomson	185
McElwee v. Jeffreys	228
McGee v. Piedmont Mfg. Co.	263
McLaughlin v. Charleston County Com'rs	375
Massey v. Duren	310
Moore v. Johnson	303
Orr v. Orr	381
Powers v. McEachern	290
Prince v. Nance	351
Pringle v. Sizer	131
Reynolds v. Timmons	486
Roach v. Ivey	434
Rose v. Izard	442
Rosenberg v. Lewi	344
Rowe v. Greenville & C. R. Co.	167
Ryan v. Pettigrew	146
Sanders v. Colleton County Com'rs	359
Seigler v. Seigler	317
Smith v. Moore	209
South Carolina R. Co. v. Wilmington, C. & A. R. Co.	410
State v. Jackson	283
State v. McJunkin	21
State v. Nerland	241
State v. Parker	235
State v. Watson	63
State v. Watson	67
State ex rel. Scott v. Smith	275
Tillman v. Walkup	60
Twitty v. Houser	153
Williams, Ex parte	71
Witsell v. City of Charleston	88
Wylie v. Lyle	202
Zeigler v. Northeastern R. Co.	402

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF SOUTH CAROLINA

JUSTICES PRESENT.

HON. F. J. MOSES, CHIEF JUSTICE.
HON. J. J. WRIGHT, ASSOCIATE JUSTICE.
HON. A. J. WILLARD, ASSOCIATE JUSTICE.

*HOMESTEAD ASSOCIATION v. ENSLOW.

(Columbia. Nov. Term, 1875.)

[*Homestead* ⟸95.]

The homestead exemption allowed by the Constitution and Acts of Assembly cannot be taken against a mortgage given since the adoption of the Constitution and before a homestead exemption had been claimed and set off in the mortgaged premises.

[Ed. Note.—Cited in Rosenberg v. Lewi, 7 S. C. 350; Calmes v. McCracken & Koon, 8 S. C. 100; Hornesby v. Burdell, 9 S. C. 306; State v. Mallone, 10 S. C. 40; City Council of Charleston v. Caulfield, 19 S. C. 205; Elliott v. Mackorell, Id. 243; Youngblood v. Lathen, 20 S. C. 375; Hendrix v. Seaborn, 25 S. C. 484, 60 Am. Rep. 520; Ketchin v. McCarley, 26 S. C. 14, 11 S. E. 1099, 4 Am. St. Rep. 674.

For other cases, see Homestead, Cent. Dig. § 146; Dec. Dig. ⟸95.]

[This case is also cited in Duncan v. Barnett, 11 S. C. 333, 336, 32 Am. Rep. 476, on the question whether the legislature could not under section 20, art. 1, of the Constitution extend its authority beyond Const. art. 2, § 20.]

Before Reed, J., at Charleston, April term, 1875.

Action by the Homestead Building and Loan Association against Joseph A. Enslow, the Citizens' Building and Loan Association of Charleston, and others.

The case was referred to Thomas Y. Simons, Esq., as Referee, in whose report the facts are fully stated.

The report is as follows:

Joseph A. Enslow, of the city of Charleston, being the head of a family, on the 4th day of February, 1871, became seized in fee, by purchase, of the lot of land, with the

dwelling house and out*buildings thereon, situate on the North side of Society street, the subject of this action.

Mr. Enslow being thus seized, continued to occupy the premises as a residence for his family and himself until the 18th day of March, 1875, when the premises were sold under the judgment and decree of this Court.

In February and April, 1872, and April, 1873, Mr. Enslow, being thus in possession as owner of the property, executed and delivered to the Homestead Building and Loan Association his three several bonds, secured by his three several mortgages of the lot and buildings in Society street.

In February, 1874, Mr. Enslow executed and delivered his bond to the Citizens' Building and Loan Association, secured by a fourth mortgage of the said premises, and in June, 1874, executed and delivered his bond to Egisto P. Fabbri, in trust, secured by a fifth mortgage of the said premises.

Proceedings in foreclosure were instituted in this action, and Mr. Enslow, one of the defendants, in his answer, sets up a claim to a homestead exemption of one thousand dollars in the said real estate.

This Court, on the 24th of February, 1875, ordered, among other things, a foreclosure of the mortgages, a sale of the property, and a reservation from the net proceeds of sale of the sum of twelve hundred dollars, subject to the further order of this Court, to abide the claim of the defendant, Joseph A. Enslow, for a homestead in said premises and costs and expenses that may be incurred in the determination thereof.

The question, therefore, submitted for my judgment, is, whether, under the Constitution

and laws of this State, Mr. Enslow is entitled to a homestead exemption in the premises thus mortgaged.

The homestead is entirely a matter of statute regulation. It was unknown at the common law. Nor can there be much light derived from the decisions in other commonwealths, because these depend upon the language and provisions of their respective Acts of Assembly. We must look, therefore, to the enactments in the State for a solution.

While it may be conceded that a statute creating a homestead cannot have a retroactive effect, it is clear that it operates upon all contracts entered into after it becomes of force upon the statute book. It there forms part of the law of the land, having relation

*3

*to and regulating all rights and duties which spring out of its existence.

Section 32, Article XI, of the Constitution of this State, adopted by the people in Convention assembled, in 1868, declares:

"The family homestead of the head of each family residing in this State, such homestead consisting of dwelling house, outbuildings, and lands appurtenant, not to exceed the value of one thousand dollars, and yearly product thereof, shall be exempt from attachment, levy or sale, on any mesne or final process issued from any Court"—"Provided, That no property shall be exempt from attachment, levy or sale for taxes, or for payment of obligations contracted for the purchase of said homestead or the erection of improvements thereon."

The words of the Constitution are imperative—"shall be exempt from attachment, levy or sale." The exceptions against which the homestead shall not prevail are few and explicit—(1) taxes, (2) payment of obligations contracted for the purchase of said homestead, (3) the erection of improvements thereon. Expressio unius, exclusio alterius.

In this action there is a sale prayed for, and obtained, under the judgment and decree of Court. The bonds or obligations to secure the payment of which the mortgages were executed are neither for taxes, purchase money or improvements.

The action is, by the foreclosure and sale of the premises mortgaged, to enforce the payment of the contracts or obligations, of which the bonds are the representatives.

Whether it was wise for the people in convention to declare that there shall be a homestead exemption, except in the few instances so expressly and implicitly asserted, is not the question. The simple issue is, what does the Constitution provide?

I am of opinion, therefore, as a matter of law, that even against the plaintiff's bonds and mortgages, the defendant, Joseph A. Enslow, is, as the head of a family, entitled to the exemption claimed.

The proceeds of sale, however, after allowing the homestead, is sufficient for the payment of the plaintiff's claim. The parties, therefore, more especially interested are the defendants, the Citizens' Building and Loan Association, and Egisto P. Fabbri, in trust, who are subsequent mortgagees.

The case of the homestead exemption is much stronger in reference to their obligations. The Constitution, (Section 32, Article

*4

XI,) hav*ing laid down the fundamental and general principles which should be applicable, made it the duty of the General Assembly to enforce the provisions of the homestead by suitable legislation.

The General Assembly, by "An Act to revise and amend an Act entitled 'An Act to reduce all Acts and parts of Acts to determine and perpetuate the homestead into one Act, and to amend the same,'" approved February 22, 1873, after re-declaring in substance the provisions of the Constitution and providing for a money value of one thousand dollars, where it was impracticable to set out the homestead in land in kind, enacts:

"Sec. 5. No waiver of the right of homestead, however solemnly executed, shall be binding upon the head of the family, or, in case of his or her death, his or her heirs, so as to defeat the homestead herein provided for."

The bonds and mortgages to the Citizens' Building and Loan Association, and to Egisto P. Fabbri, in trust, were created and executed respectively in February and June, 1874, more than a year after the passage and approval of this Act of the Legislature. Their execution and delivery surely, therefore, in view of the express and unequivocal terms of the Act, can scarcely be held to be a waiver of the homestead. I find, therefore, as a matter of law, that the defendant, Joseph A. Enslow, is entitled to one thousand dollars out of the proceeds of the sale of the premises in Society street, made under the process of this Court, and recommend that out of the twelve hundred dollars reserved for this issue, the payment of this amount with interest from the day of sale, and the costs and expenses attending the litigation of this question, and that the residue be applied to the mortgages unpaid, according to the priority of their claims, as heretofore reported.

The defendants, the Citizens' Building and Loan Association and Egisto P. Fabbri, excepted to the conclusions of the Referee, as to the homestead in this case, because the defendant, Joseph A. Enslow, is not entitled to homestead out of real estate mortgaged by him.

The decree of the Circuit Judge is as follows:

Reed, J. The report being read, and counsel being present and waiving argument, it is ordered that the above exception be overruled, and the report of the Referee in this cause be confirmed and made the decree of this Court.

*5

*The defendants, the Citizens' Building and Loan Association, appealed on the following grounds:

1. Because, under the Constitution and laws of South Carolina, no homestead exemption is given in property mortgaged until the mortgages are satisfied.

2. Because, unless property has been specially set apart as a homestead in the manner provided for by law, the right to sell is indisputable, and the right to mortgage follows the right which the owner of the fee has to dispose of the property.

Tobias, with whom was Cohen, for appellant:

There is but one question in this case, and that is, whether Joseph A. Enslow, a bankrupt, who had mortgaged a certain piece of property twice in 1872, once in 1873, and twice in 1874, is entitled to claim homestead in that property as against the first of the two mortgages given in 1874, in a suit for foreclosure of mortgage in which he and his assignee in bankruptcy were parties, and in which the decree was filed after he had been adjudicated a bankrupt.

While this question narrowed down to these limits is of very little consequence, except to the parties immediately in interest, being, as it is, confined to a very small number of cases, still the establishment of principles on which this and kindred questions are to be determined is of the greatest importance, as it is necessary to enable all who are interested in making investments in real estate to act with certainty. What society requires is, that rights and liabilities should be accurately defined. Once fixed, men can regulate their actions accordingly; but when they are uncertain, business is impeded, the everyday relations of life are obstructed, and society is thrown into confusion.

Homestead laws are of very recent origin, and are very different in the several States in which they have been enacted. Hence it is, that in the discussion of the various questions arising under them, there is no body of precedents by which we can be guided, and we are of necessity compelled to fall back upon general principles of law to interpret the constitutional and statutory provisions on which they are founded.

The Constitution of South Carolina, in Article XI, Section 32, provides as follows: "The family homestead of the head of each family residing in this State, such homestead

*6

consisting of dwelling *house, outbuildings and lands appurtenant, not to exceed the value of one thousand dollars, and yearly product thereof, shall be exempt from attachment, levy or sale, on any mesne or final process issued from any Court: Provided, That no property shall be exempt from attachment, levy or sale for taxes, or for payment of obligations contracted for the purchase of said homestead or the erection of improvements thereon."

It requires no complicated rules of interpretation to understand this provision of the Constitution. It means simply that when homestead is once established, it is exempt from attachment, levy or sale on any mesne or final process, subject only to certain exceptions enumerated in the Article, but such exemption clearly does not attach until homestead is fixed.

Under the statute laws of the State homestead is only fixed when one of two conditions happens:

1. When any real estate of any head of a family is seized upon, on any mesne or final process, the Sheriff is directed to cause a homestead to be then set aside, not to exceed in value the sum of one thousand dollars.

2. When the head of a family dies, his widow or children are entitled to have a homestead to be set aside in the manner provided by law.

The rules of interpretation, both of constitutions and of statutes, are the same.—Potter's Dwarris on Statutes and Constitutions, 654. And one of the established canons of interpretation is that "statutes are to be construed in reference to the principles of the common law. For it is not to be presumed that the Legislature meant to make any innovation upon the common law further than the case absolutely required. The law rather infers that the Act did not intend to make any alteration other than what is specified, and, besides, what has been plainly pronounced; for, if the Parliament [read legislative body] had had that design, it would have expressed it." This is the rule both in England and America.—Potter's Dwarris, 185, and note.

Under the common law, the right of the owner of the fee simple to alienate is perfect, subject only to the right of dower in the wife, or the rights of a husband in the lands of the wife. It has not been claimed, nor can it be claimed, that either the constitutional or statutory provisions of this State have taken away the right of alienation, in fee, of any property of which a man is ab-

*7

solutely *seized, until homestead attaches by operation of law,—that is to say, until levy on mesne or final process is made on the property of a head of a family, or until he dies. When either of these events takes place, the homestead is fixed; and when once fixed, it cannot be waived, nor can any one, at any time previously, waive his right to it if he has the kind of property to which it attaches by operation of law the moment the right arises.

This is the plain meaning of the clause of the Act of 1873, forbidding waiver of the right of homestead, as is evident from the words of that Section, which provides that "when thirty days shall have elapsed after

the filing the return of said appraisers, setting off a homestead to any debtor, according to the provisions of Section 1 of this Act, and no good cause has been shown or exceptions filed against such return, such debtor may have such return recorded in the office of the Register of Mesne Conveyance of the County in which the same is located; and upon such return being so recorded in thirty-three days after the proceedings have become final, the title to the homestead so set off and assigned shall be forever discharged from all debts of said debtor then existing, or thereafter contracted." And also from the words of the other Section, which provides that no waiver "shall be binding upon the head of a family" when homestead is fixed by levy of mesne or final process, "or, in case of his or her death, his or her heirs," when homestead is fixed by the death of the head of the family,—or, in other words, no man can waive the right of homestead generally, so that it shall not attach in case he should have property at the time that homestead is fixed which he has not disposed of prior to the time at which it is fixed in some method sanctioned by law. This interpretation is made the more certain by the closing words of the waiver clause, which are: "So as to defeat the homestead herein provided for."—15 Stat., 369, §§ 3, 5.

If the common law right to sell is not taken away by the Constitution or statutes, (and there is nothing in either which takes away that right,) then the right to convey carries with it the lesser right to mortgage.

A mortgage at common law vested the legal estate in the mortgagee, and Cruise lays down the rule in the following words: "It has been stated that upon the execution of a mortgage deed, the mortgagee becomes seized of the legal estate, and may enter into possession unless prevented by the express

*8

terms of the contract; *but in equity the lands mortgaged are considered as a pledge only in his hands for securing the repayment of the money borrowed."—Cruise Dig., Tit. XV, Chap. 2, § 11.

Chancellor Kent defines a mortgage as follows: "A mortgage is the conveyance of an estate by way of pledge for the security of a debt, and to become void on the payment of it. The legal ownership is vested in the creditor, but in equity the mortgagor remains the actual owner until he is debarred by his own default or by judicial decree."—4 Kent, 134.

Our statutes of 1791 and 1797, which are re-enacted in the Revised Statutes, provide that the mortgagee shall be entitled to recover satisfaction for the money lent or due out of the land, and they further recognize that the property remaining in the mortgagor is only an equity of redemption. The words of the statutes are: "Provided, That, notwithstanding the foregoing provision, all releases of the equity of redemption shall be binding and effectual in law;" and in another part they provide that on judicial sale the mortgagor shall be forever barred and foreclosed of his equity of redemption.—Rev. Stat., 536.

The preamble of the Act of 1791 sets out, among other things, that it is enacted because the right of the mortgagor to his equity of redemption is, in the present mode of exercising that right, attended with inconvenience, and for ascertaining when the equity of redemption of the mortgagor shall be barred.—6 Stat., 169.

These Acts have been too often settled by judicial decision in our Courts to admit of any doubt as to their meaning. In Ex parte City Sheriff, (1 McC., 399,) Judge Huger, in delivering the opinion of the Court, says, with regard to the Act of 1791: "This Act prevents the mortgagee from proceeding against the land by ejectment, which could be done at common law. * * * Should another judgment creditor proceed to sell the property mortgaged to satisfy his own demand, he could only sell what really belonged to the defendant, that is the land subjected to the lien of the mortgage, and the purchaser, having notice of the mortgage and recording his notice, could only purchase subject to the mortgage,—in other words, all that the mortgagor possesses, and therefore all that could be sold, is the equity of redemption."

In McClure v. Mounce, (2 McC., 423,) Judge Colcock, in delivering the opinion of the Court, says: "The abstract question is, when mortgaged land is sold without a reg-

*9

ular foreclosure, either at law or in *equity, what interest passes to the purchaser? and the case above mentioned (Ex parte City Sheriff) furnishes a direct answer. The equity of redemption only is sold." In Schnell v. Schroder, (Bailey Eq., 332,) the Court, through Judge David Johnston, says: "In regard to Schroder's bond, I am very clear that if, as it is stated, the lot was sold under execution, subject to the mortgage, and purchased by Boyer, the bond is extinguished. The equity of redemption was all that Schroder had in the lot upon which an execution could operate, and that having been sold and vested in Boyer, (the mortgagee,) his right to redeem was gone. The mortgage vested the lot in Boyer subject only to this right to redeem. * * * Boyer had unquestionably the right to buy, and Schroder to sell and release his equity of redemption, and whether he sells, or it is sold under legal authority, the legal consequences are precisely the same." In McLure v. Wheeler, (6 Rich. Eq., 343,) Chancellor Dunkin, in his decree, subsequently confirmed by the whole Court, consisting of Chancellors Job Johnston, Dunkin, Wardlaw and Dargan, says: "The thing sold, that on which alone the

Sheriff had any authority to levy the execution, was the mortgagor's equity of redemption." "It was ruled in Schnell v. Schroder," continues the learned Chancellor, "(and the doctrine has since been repeatedly recognized,) that a purchase of the equity of redemption by the mortgagee extinguishes the mortgage debt, and that the effect was the same whether the purchase was directly from the mortgagor or from the Sheriff, under an execution against him."

Under these cases it is plain that the only property which the mortgagor has in the estate mortgaged is an equity of redemption. While it is true that so long as the estate remains unchanged in his hands it is equivalent to the fee in the mortgagor, and the mortgage is only a lien on the land, still the moment an attempt is made in any way to change the status of the estate, whether by himself or by another, all that the mortgagor has is an equity of redemption. What the mortgagor can sell is an equity of redemption: what the Sheriff can levy upon is an equity of redemption—nothing more and nothing less.

There is another class of cases in our books on this subject, which, beginning with Durand v. Isaacs, (4 McC., 54,) and followed by Stoney v. Shulz, (1 Hill Ch., 465,) Mitchell v. Bogan, (11 Rich., 686,) and Williams v. Beard, (1 S. C., 308.) declare that when the mortgagor is out of possession the common law applies, and at common law the legal estate is in the mortgagee.

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*If, under the first class of cases cited, the law of this State is that a mortgagor has nothing either to dispose of or to be taken from him, other than an equity of redemption, and if, when out of possession, the rule of the common law applies and the mortgagee is the owner of the legal estate, then it follows that the only property to which the mortgagor can at any time lay claim in case his possession is either threatened by legal process or taken is an equity, and neither the Constitution nor the statutes of South Carolina gives a homestead in an equity.

From another standpoint, it would seem clear that the exemption laws do not apply to mortgages. The policy of the law is opposed to preventing property from changing hands. For centuries the constant tendency both in England and in America has been to remove all trammels from the free transfer of real estate. The right to transfer real property is recognized even by the most earnest advocates of such a construction of the homestead laws as would give the right to claim homestead in mortgaged premises at the expense of the mortgagee. The right to sell, of course, carries with it the right to execute a power irrevocable to sell. In Mitchell v. Bogan, (11 Rich., 690,) the Court declared that if the mortgage contained in it a power of sale in the mortgagee, he would be enabled to sell on condition broken; and though that question was not directly before the Court, still it has been long settled in England. And in this State such mortgages are not unfrequently made, and their validity is unquestioned. If a mortgage contained such a power and the mortgagee, on condition broken, proceeded to sell, the mortgagor could not claim homestead, because neither of the contingencies required by our law to enable him to do so would have happened. The mortgagee could execute the conveyance, and the purchaser would take a good and marketable title.

That which the mortgagee could do, if the power of sale were given by deed, he surely could have done by the intervention of the Court if the mortgage were valid at the time that it was given. It would be a mere mockery of the law to say that at the moment of sale, if a Court should order it, the mortgagor could defeat the right of the mortgagee. Such a construction of the law would be to declare that an important right is entirely without a remedy. Under such a construction, no man could safely invest in mortgages to any large amount, because, however rich a man might be at the time that he executed a mortgage, how many pieces of real

*11

estate *he might then have, he might, before condition broken, become ruined in fortune: he might have parted with all of his real estate other than the piece mortgaged, and could then claim his homestead exemption out of the property mortgaged and defraud the mortgagee of his just rights. Mortgages would then become the most unsafe, instead of being, as they are now considered, among the most desirable investments. The Supreme Court, in the case of Shelor v. Mason, (2 S. C., 233,) seems clearly to have recognized that homestead cannot be claimed in mortgaged property until the mortgage is satisfied. It seemed to recognize that public policy as well as common honesty and common sense went hand and hand with the law. In this case the only question before the Court, and the only question decided, was that of a mortgage given before the Constitution of 1868; but in the opinion, Judge Willard, speaking for the Court, uses this language: "The interest created by the mortgage is specific, while from its nature such exemption" (homestead exemption) "can only be brought into discussion when the remedy goes against the whole property of the debtor."

If these positions are correct, then it follows that homestead cannot be claimed in mortgaged property until the mortgage is satisfied by payment. The case is, however, much stronger when property has been mortgaged more than once. Our statute declares that a second mortgage deprives the mortgagor of his equity of redemption.—Rev. Stat., Chap. 82, § 8, p. 424. When the first mortgage is executed, all that the mortgagor has to dispose of is his equity of redemption; and,

as the statute says that on the execution of a second mortgage he loses even that, it is evident that he has nothing remaining in him out of which a homestead can be claimed, even if homestead could be claimed in an equity of redemption so long as the mortgages remain unpaid.

The case becomes still stronger when a person goes into bankruptcy. There the mortgagor is out of possession, and the mortgage becomes by that fact a mortgage at common law. The assignee gets into his possession nothing but an equity of redemption, which only entitles him to redeem by payment of the mortgage. This position as to the possession of the assignee is sustained by Chief Justice Waite, who, in the case In re Bennett, a bankrupt, recently decided in the Circuit Court of the United States for the District of South Carolina, said: "The assignment in this case, under the operation of the Bank-

*12

rupt Act, transferred *the fee to the assignees. Bennett had no longer any estate in the mortgaged property. Whatever right he had was then absolutely conveyed, and his grantees went into possession not as his tenants, but as owners. It is true that this conveyance may not have been voluntary, and that in one sense it was by operation of law, but it is equally true that its effect was to divest the mortgagor of his title and possession and place them both in the assignees. This is the legal effect of the adjudication of bankruptcy, the appointment and qualification of the assignees, and the official assignment by the Register or Judge. It is a conveyance by the bankrupt in the same sense that the deed of a Sheriff, after judgment, execution, levy and sale by him, is a conveyance by the judgment debtor. In the one case the Register or Judge and in the other the Sheriff is made by law the agent of the owner to convey. When, therefore, the assignment was made, the bankrupt mortgagor was 'out of possession,' and Mrs. Bennett became invested with all the rights and powers of a mortgagee at common law. As such she could obtain the possession of the mortgaged property by an appropriate possessory action at law, or subject the accruing rents and profits of the land to the payment of her mortgage by a proceeding in equity. She could, also, upon proper demand and notice, require tenants in possession to pay rent to her."

Enslow had mortgaged several times. His assignee was in possession. When the assignee and Enslow answered the complaint for foreclosure, there was nothing out of which a homestead could be claimed.

Porter & Brawley, contra:

The homestead exemption is not to the debtor as such, but is intended for the benefit of the family, and therefore no act of the head of the family, however intended or expressed, not even an express waiver, however solemnly executed, can defeat the right which attaches as an incident to the ownership of the estate without any previous act of appropriation, binds the estate and becomes a lien or claim upon it from the instant of its accrual, may be set off and assigned either before process issues or after, and all persons dealing with the head of the family must be held to deal with reference to this encumbrance, and whatever interest they take is taken subject to it.

*13

*It is an exceptionally favored estate, unknown to the common law, more favored even than dower, for while that right may be forfeited by misconduct or relinquished either for or without consideration, no misconduct of the head of the family, nothing that he can do or suffer, can deprive his family of that shelter of the homestead roof provided by the fundamental law and hedged about and protected by all the safeguards which the ingenuity of the law-makers could devise, so that nothing short of absolute removal from the State can operate to work a forfeiture, the object of the law evidently being to prevent emigration from the State at a critical period of her history and to foster domestic relations.

As the homestead right is entirely a creature of the Constitution and of statutory law, the Court is referred to the Constitution, Art. I, §§ 20, 32; XV Stat. at Large, 369, 374, §§ 1, 3, 5, 8, 10.

In the case before the Court, the dwelling house of Enslow was sold under a judgment of the Circuit Court, obtained in proceedings to foreclose a mortgage given by him to secure a bond to the appellant for money loaned in February, 1874, and the first question which arises is, whether this proceeding is "mesne or final process" within the purview of the Constitution and the statutes, which declare "that the family homestead of the head of each family residing in this State, such homestead consisting of dwelling house, * * * shall be exempt from attachment, levy or sale on any mesne or final process issued from any Court upon any judgment obtained upon any right of action," * * * provided, "that no property shall be exempt from attachment, levy or sale for taxes or for payment of obligations contracted for the purchase of said homestead or the erection of improvements thereon."

"Process a procedendo ab initio usque ad finem hath two definitions. 1st. It is largely taken for all the proceedings in any action from the beginning to the end, and is divided into, first, original process to compelling appearance; second, mesne process, which issues pending the suit upon some collateral interlocutory matter; third, final process to enforce the judgment."

Process is any means adopted by the sovereign power to begin or carry on an action—mesne process being that interlocutory or intermediate proceeding which is adopted in

order more thoroughly and effectually to accomplish that result which is obtained through the final process by which the object of the action is attained or carried into effect.

*14

*Any judicial proceeding, then, that operates upon person or property is process, mesne or final; an order of Court which directs the sale of property for the payment of a debt is certainly a process which is final as to that property, if there is any meaning in language; and unless the appellant can show that this case comes within some of the exceptions, it is difficult to deprive the family of the debtor of this exemption.

Three classes of obligations are excepted from the operation of this homestead exemption: 1st, taxes; 2d, obligations contracted for the purchase of the homestead; 3d, obligations contracted for the erection of improvements thereon.

It cannot be pretended that the obligation upon which this action is brought is covered by any of these exceptions. No other class of obligations is in terms exempted from the operation of the law and, expressio unius, exclusio alterius.

Under the old system of pleadings, a judgment in foreclosure was technically called a decree of foreclosure, but under the Code all decrees are not only really, but technically, judgments.

This Court held (In re Kennedy, 2 S. C., 216,) that the homestead exemption was valid even as against the liens of judgments on contracts entered into before the adoption of the Constitution. And although since the decision of the Supreme Court of the United States, in the case of Gunn v. Barry, the Courts modified the rule established, in so far as the same related to debts contracted prior to the adoption of the Constitution, yet there is no question but that the exemption is valid as against all judgments obtained upon debts contracted subsequent to that period.

Even were decrees essentially different from judgments, in what way is this case distinguished from the ordinary one of a creditor seeking satisfaction of his debt out of the property of his debtor, and how is it taken out of the operation of the principle upon which all exemption laws rest? Mr. Justice Willard, in the case referred to, states this principle to be "that the State will not lend its aid to the creditor by way of seizing and appropriating the property of the debtor to the discharge of his obligation to such creditor, to the extent of stripping the debtor of all the means upon which his power of future acquisitions depends. This principle is deeply rooted in a sentiment of humanity, having the force of moral obligations, binding the creditor to a merciful exercise of his power over his debtor, and in the conviction

*15

of the public conscience that *it is neither the duty nor the policy of government to enforce the rights of the creditor beyond the limits of a reasonable and humane exercise, nor to the extent of destroying the power of the debtor to obtain usefulness in his civil and domestic relations."

If this language was thought appropriate in the case of a creditor having a lien by way of judgment upon all the property of the debtor upon a cause of action accruing long before the adoption of the Constitution, upon a contract presumably entered into in view of the law then existing, which subjected the property of the debtor, to the uttermost farthing, to the payment of his debts, upon what principle of natural justice is it to be held inapplicable to the case of a creditor who has a lien only upon one piece of his debtor's property to secure a debt contracted after the adoption of the Constitution, in full view of that instrument, which declared that that specific piece of property should be exempt from sale for the payment of debts, and of that other provision which declared that no waiver of the right of homestead, however solemnly executed, should be binding upon the head of a family so as to defeat the same?

But it is claimed that that which the law forbids to be done directly has been accomplished indirectly by operation of law,—that is, that the mortgage to the appellant has operated to defeat the right of homestead. This view is based upon a misconception both of the character of the homestead right and of the nature of a mortgage. We have already cited these statutory provisions, which go to establish our proposition that the right of homestead is incident to the ownership of the land; that it is a paramount lien upon it; that whenever the head of a family is possessed of a homestead, the right to the homestead exemption attaches, and whoever deals with him must do so in view of such right, which exists in his family, and which he cannot of his own will defeat. We will now consider the nature of a mortgage, and here, too, we find statutory enactments which define it in terms not to be misunderstood.

The preamble to the Act of 1791 (5 Stat. at Large, 169,) recites that "mortgages are generally meant as securities for debts, and no actual estate is intended to be conveyed by the mortgagor to the mortgagee," and enacts that "no mortgagee shall be entitled to maintain any possessory action for the real estate mortgaged, even after the time allotted for the payment of the money secured by the mortgage is elapsed; but the mortgagor shall

*16

be still deemed *owner of the land and the mortgagee as the owner of the money lent or due."

That Act changed the common law in this State in relation to mortgages; and whereas

before that date and at common law the legal estate was in the mortgagee, and only an equity of redemption remained in the mortgagor, since that time a mortgage has not been held to convey any interest in the land, but to be merely, in the words of the Act, a "security for a debt." So much so that even if it be expressly stipulated that if the money be not paid at a given day the title shall be absolute and the estate irredeemable, this stipulation operates nothing. "It is a well-known rule," says Chancellor Harper, in Walling v. Aiken, (McM. Eq., 13.) "that that which was intended as a security shall never be turned into an absolute conveyance. The mortgagee is considered only as a creditor, and all that he is entitled to is his money, coming within what time (within the known limits) or from what source it may."

The reasoning of the appellant takes no sufficient account of the change wrought by the Act of 1791 in the nature of mortgages. Before that Act and at common law the legal title passed to the mortgagee upon the execution of a mortgage, and in some of the States that is still the rule. But in this State a mortgage is not a conveyance of the land either under the ancient law or the Statute of Uses, for it transfers no estate in the land whatever. It is not even the acknowledgment of a condition subsequent by which the estate of a mortgagor may be defeated, nor the stipulation by the owner of land of a covenant which runs with the land and imposes a burden on it, for such a condition or such a covenant can be created only when an estate in land is transferred. The term "equity of redemption," which is claimed by the appellants to be the only interest left in the mortgagor after the execution of the mortgage, is borrowed from the common law mortgage, but does not appropriately apply to mortgages under our Act of 1791, and is calculated to mislead. There can be no "redemption" when no estate has passed to be redeemed, and what is called the "equity of redemption" means nothing more and is nothing more than a legal right in the owner of the land to disencumber it. The mortgagor is so far the legal owner of the land that a judgment against him is a legal lien upon the land, subject to the mortgage, and the land so subject may be sold under execution against the mortgagor, and it is in like manner liable to lien and sale under judgments

*17

against *every subsequent owner of it, who has in like manner a legal right to disencumber it. So the mortgagor has the right to execute a second mortgage, or a third and fourth, as was done in the very case before the Court, which he could not do if all the interest that remained to him in the land after the first mortgage was a mere "equity of redemption," strictly so called.

The case of Shelor v. Mason, (2 S. C., 233,) may be supposed to be of authority for the appellant. That case differs from this in two important particulars: 1st. The mortgage there was executed prior to the adoption of the Constitution, while here it was subsequent—subsequent, too, to the Act of February 22d, 1873. 2d. In that case it did not appear that the person claiming the homestead was insolvent, and that there was no other property out of which the exemption could be claimed, and the Court says that, "from its nature, such exemption can only be brought into discussion when the remedy goes against the whole property of the debtor." Here the defendant, Enslow, is in bankruptcy, and the remedy of plaintiff goes against his whole property, for if his debt is not paid out of the mortgaged premises, he can go against the estate generally.

In that case reference is made to Bronson v. Kinzie, (1 How., 311, 318.) No authority can be derived from that case, because in the United States Courts the common law doctrine as to mortgages prevails, and the legal title is held to be in the mortgagee, who, upon condition broken, has the right to sue for and recover the land itself.

In what material respect does a mortgage differ from a judgment? The one is a lien upon the specific property mortgaged; the other is a lien upon a debtor's whole estate. All that the creditor can ask in either case is his money; in neither has he the right to the specific thing, the subject of the encumbrance, and in both he requires the aid of the process of the Court to enforce his claim. The creditor thus asking the aid of the State to secure payment of his debt is bound by those exemption laws which, out of considerations of humanity and public policy, have been adopted by the State. And if it be said that the rule for which we contend will entail inconvenience in the alienation of property, the answer is, that although it be the settled policy of the State to preserve the homestead roof for families, it cannot interfere in all cases with the exercise of individual rights; yet if, in the course of men's

*18

dealings, it be found necessary *to invoke the aid of the State, the process through which such aid is extended can only be called into existence and will only operate in accordance with the well-settled principles which exempt a certain amount of the debtor's property from sale for the payment of his debts.

The fifth Section of the Act of February 22d, 1873, provides that "no waiver of the right of homestead, however solemnly executed, shall be binding upon the head of the family, or, in case of his or her death, his or her heirs, so as to defeat the homestead herein provided for." This Section would seem to be especially intended for cases of mortgage of the homestead premises, for those are the only cases in which it is

likely that a waiver of the right would be asked or considered necessary. It certainly would not be necessary for the vendor of the homestead to ask for such waiver, for it is expressly provided that the homestead cannot be claimed as against debts for the purchase money, and we can conceive of no state of facts which would seem to require a waiver of this right except where a head of a family was endeavoring to raise money on the pledge of his homestead, and would agree, in consideration of such advance of money, or other benefit to be derived, to waive his claim of homestead, and the law expressly declares that no such act shall be operative to defeat it.

No Court will permit that to be done indirectly which the law expressly forbids to be done, and that certainly would be the result if the position of the appellant is sustained. The law would be completely nullified, if, by the execution of a simple mortgage to secure the payment of money borrowed, the right of homestead could be defeated.

Lastly, it is contended that, by the assignment of his property in bankruptcy, the mortgagor is put out of possession, and, being "out of possession," the parties are left under the rule of the common law, which makes the mortgagee owner of the land in such cases, upon condition broken, and reference is made to our cases of Durand v. Isaacs and Mitchell v. Bogan to sustain this view. Those were cases where the mortgagor subsequent to the mortgage had alienated the land, and was, both in law and in fact, "out of possession," and they can have no application here, where both the legal and actual possession is in the mortgagor, for the very Act which, according to the appellants, vests the possession of the mortgagor's estate in the assignee, expressly excepts from the op-

*19

eration of the assignment such *property "as is exempted from levy and sale upon execution or other process or order of any Court by laws of the State of the bankrupt's domicile;" and there is a further proviso that the foregoing exceptions shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignee; and by the words of the Act, "in no case shall the property hereby excepted pass to the assignee, or the title of the bankrupt thereto be impaired or affected."—Section 14 Bankrupt Act, U. S. Revised Statutes, page 981, § 5045.

The decision of Chief Justice Waite in re Bennett, cited by the appellant, throws no light upon this question, inasmuch as the facts and points in issue in that case were entirely different from those in the case before the Court, no question of homestead rights arising therein. Nor is the statement, in appellant's belief, that Enslow's "assignee was in possession," true in point of fact.

February 15, 1876. The opinion of the Court was delivered by

WILLARD, A. J. The defendant, Enslow, the head of a family residing within this State, mortgaged, in 1871, the premises on which he resided with his family. The premises appear to be such as might be considered a family homestead within the sense of the Constitution allowing exemption from certain process as against premises so held and occupied. These premises have been sold under a decree foreclosing such mortgage, and a portion of the purchase money arising from such sale is held under a decree of the Circuit Court asserting that the defendant, Enslow, is entitled to the same in right of his claim to homestead exemption as against his mortgage of said premises.

The appeal is from that decree and alleges that the homestead right cannot be asserted as against the mortgage made by Enslow.

There is no doubt but that Enslow could make a valid mortgage. A homestead had never been actually set apart. The homestead provisions do not in terms prevent the owner of lands from mortgaging them. Such an intent cannot be enforced as against the common law right of dominion unless it is found to be essential to the operation of the homestead provisions as it regards the specific effect of those provisions. All that the Constitution seeks to accomplish is to prevent premises so held and occupied from being subjected to process for the purpose of enforcing obligations of a certain character —Article II, Section 32. The right of dominion of the owner of lands, including the pow-

*20

er to alien or encumber, is not *either directly or indirectly the subject of this provision. The whole force of the constitutional provision is expended in preventing interference in certain cases with that dominion. The statutes in pursuance of this clause of the Constitution do not enlarge the nature or operation of the homestead provision of the Constitution. Whether the Legislature had not the right to extend the measure of relief afforded to the heads of families by the Section above cited under a more general grant of legislative authority conferred by Section 20, Article I, of the Constitution, need not be considered at this time, for no such exercise of authority beyond the terms of Section 32, Article II, has been attempted. The statutes (General Statutes, 474,) merely provide specific means for accomplishing that which constituted the end and purpose of the Constitution as contained in Section 32, Article II. Had the mortgagee obtained possession of the mortgaged premises otherwise than by proceedings for their sale, either under authority conferred by law, or the contract of the parties, on the mortgagee, no question under the Constitution affecting the rightfulness of that provision could have arisen.

It remains, then, only to consider whether a judicial sale for the foreclosure of the mortgage is embraced under the description "attachment, levy or sale on any mesne or final process issued from any Court," contained in Section 32, Article II.

The portion of that Section involved in the present construction is as follows: "The family homestead of the head of each family residing in this State, such homestead consisting of dwelling house, outbuildings and lands appurtenant, not to exceed the value of one thousand dollars, and yearly product thereof, shall be exempt from attachment, levy or sale on any mesne or final process issued from any Court." It is obvious that process issued to enforce a judgment or decree for the payment of money, and which may be enforced against the whole estate of the judgment debtor, is here intended. To extend the sense of the Constitution, as demanded by the respondent, Enslow, would be equivalent to holding that no judgment nor order of any Court could bind such a homestead so as to disturb the possession of the occupant. This is manifestly beyond the intention of the Constitution.

It is noticeable that the exemption conferred by the Constitution is not limited in terms to the head of a family holding premises occupied as a family homestead by rightful title. Nor can this be regarded as an unintentional omission, if the object of the Con-

*21

stitu*tion was merely to shield the possession of the family homestead against creditors having only a general right to subject the lands of their debtors to their judgments; for as against judgment creditors at large there is as much reason for protecting a homestead held by a defective title as one held by a good title. But the whole sense of the Constitution would have to be changed if we are to suppose that no judgment or order of any Court could become the means of ousting the possession of the head of a family, for that construction would necessarily include a judgment recovered by one having good title to the premises against one having a defective title. If we attempt to meet this difficulty by interpolating words in the Constitution, confining the right of exemption to cases where the person claiming such exemption holds by rightful title, then we disturb the provisions and deprive them of their obvious fitness, as they stand, to provide protection against judgment creditors having no other right to the land than that arising from the operation of process issued to enforce a money judgment or decree.

The view just presented is conformable to what was said by the Court in Shelor v. Mason.—2 S. C., 233.

The sale for foreclosure was not forbidden by the Constitution as it regards the homestead in question, and the mortgagor has no right to claim any part of the proceeds of sale by reason of the alleged occupation of the mortgaged premises as a family homestead.

The judgment below must be modified accordingly.

MOSES, C. J., and WRIGHT, A. J., concurred.

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7 S. C. 21

STATE v. McJUNKIN.

(Columbia. Nov. Term, 1875.)

[*Jury* ⇐59.]

It is no ground of challenge, to the array of the jury, that the jury lists were prepared by a Jury Commissioner whose term of office had expired, but whose successor had not been appointed.

[Ed. Note.—Cited in State v. Lee, 35 S. C. 196, 14 S. E. 395.

For other cases, see Jury, Cent. Dig. § 271; Dec. Dig. ⇐59.]

[*Officers* ⇐44.]

Where an officer continues in the exercise of the duties of the office after his term of office has expired, he is an officer de facto, and the validity of his official acts cannot be questioned collaterally.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 66; Dec. Dig. ⇐44.]

*22

*Before Cooke, J., at Pickens, March Term, 1875.

Indictment against Dyer McJunkin for murder, committed in November, 1874.

It was shown, on behalf of the prisoner, that the jury lists from which the jurors for the present term of the Court were drawn were prepared on the 26th January, 1875, by W. A. Lesley, acting as Jury Commissioner for the County of Pickens, assisted by the County Auditor and the Chairman of the Board of County Commissioners; that Mr. Lesley was first appointed to the office of Jury Commissioner, and qualified on the 10th January, 1873; that his term of office expired on the 10th January, 1875; that he was reappointed and recommissioned Jury Commissioner on the 13th February, 1875, and that the venire for drawing the jurors was issued before, and the jurors drawn after, his reappointment. A challenge to the array was then submitted by the prisoner on the ground that the jury lists were illegal because Mr. Lesley was not the Jury Commissioner of the County at the time they were prepared; and it was also objected, on his behalf, that the venire issued to the Jury Commissioner by the Clerk was also illegal and void on the same ground. The challenge to the array was overruled, and the venire held to be valid.

The prisoner was put upon trial and found guilty. He then moved in arrest of judgment on the same grounds above mentioned, and he also moved for a new trial. His motions

were denied, and, after sentence passed, he appealed to this Court.

Keith, for appellant.
Blythe, Solicitor, contra.

February 18, 1876. The opinion of the Court was delivered by

MOSES, C. J. We have accorded to this case full and deliberate consideration, not because of the difficulty of the legal proposition on which the appellant relies, but of the serious consequences which its decision involves.

While it is not to be disputed that all the features which give to the jury system its symmetry and beauty must be preserved, and that its value as a protecting shield to the citizen shall not be impaired by weakening any of the elements which have contributed to its effect as an institution prized by the

*23

people as their best *medium of security against personal and political wrongs, yet Courts are not at liberty to disregard the principles which are applicable to its practical administration.

The single question made involves the validity of the acts of the Jury Commissioner who participated in drawing the juries. It is claimed that Mr. Lesley, who acted with the County Auditor and the Chairman of the County Commissioners for Pickens County, was not at the time Jury Commissioner for the said County; that, therefore, the Board of Jury Commissioners, which, by the first Section of Chapter 141 of the General Statutes, is to consist of the said three officers, was not properly constituted at the time of the drawing both of the grand and petit jurors summoned to the term of the Court at which the bill was found and the prisoner tried, and that, consequently, the challenge to the array should have prevailed. By the Chapter and Section already referred to, the Jury Commissioner is to be appointed by the Governor and confirmed by the Senate. Lesley had been such Commissioner for two years previous to the drawing of the said juries. His first term expired on 10th January, 1875, and he was not recommissioned until 11th February of the same year. When he was reappointed did not appear, though he continued to act during the intervening space of thirty-one days within which the juries were drawn.

The duties of the Jury Commissioner are entirely of a ministerial character. They are defined and prescribed by statutory regulations, and involve no exercise of right beyond that which is comprehended within the specific powers conferred. The title to the office is not brought into question by any direct proceeding to that end, but it is sought to affect it in a collateral way, and not through an issue by the only process under which his right to hold and enjoy it could be determined. Neither is his original appointment to and induction into the office denied, or his continuance in the exercise of its duties. He was recognized as such Commissioner by the Sheriff of the County, who, by virtue of the eleventh Section of the forty-first Chapter of the General Statutes, is to deliver the venire issued by the Clerk, and also by the Board of Commissioners, on the members of which the Sheriff is required to serve it. He was acknowledged and accepted by the Board as one of its duly-constituted and acting members, and, to all intents and purposes, occupied the position, if not of an offer de jure, certainly of one de facto. The acts of such an officer during his continuance

*24

of their *exercise have all the validity and binding efficacy of one holding his place by evidence of title above question or examination in a collateral way. This principle has been frequently recognized in our Courts, as may be seen by reference to Taylor v. Skrine, (2 Tread. Cons. Rep., 696,) State v. Hill, (2 Speers, 160,) Kottman v. Ayer, (3 Strob., 93,) State v. Maberry, (3 Strob., 146,) McBee v. Hoke, (2 Speers, 145.) In the last case, O'Neall, J., delivering the opinion of the Court, said: "But I take the broad ground that, being found in an office of which he had been the incumbent for many years, the plaintiffs had the right to regard him as the Coroner, and his acts for them are good. * * * One in office and transacting its duties is supposed to be rightfully there, and, so far as third persons are concerned, that presumption legalized his acts. Such a position is necessary to prevent the interminable difficulties in which we should be involved if it were otherwise." The rule, as it prevailed at common law, is laid down in Bacon's Ab., title "Office and Officers," and in 16 Viner's Ab., 114. It proceeds upon the principle "that one entering office under color of election or appointment is an officer de facto, and his acts in relation to the public or third persons are valid until he is removed, although it be conceded that his election or appointment was illegal." The English cases have followed the rule, and it was fully recognized by the Judges in Hopley v. Young, (8 A. and E., 63,) and Bowley v. Barnes, (Ib., 1037.) The authorities in New York, Massachusetts, Connecticut, and, we might also say, in the most, if not all, of the States of the Union, are to the same effect. This Court, in Palmer v. Railroad, (3 S. C., 591 [16 Am. Rep. 750],) said: "The existence and authority of the office are not questioned, but the title of the incumbent is the only matter in dispute. The validity of the array does not depend on the title of the Jury Commissioner to his office. While actually exercising the power of the office, his official acts must have full force and effect."

A very different question would arise, as was said by Sutherland, J., in Wilcox v. Smith, (5 Wend., 235,) referring to the case of Rex v. Vivelet (3 Comp. 432,) in the fol-

lowing language: "When the act of the officer was made the foundation of a criminal proceeding, instead of being used as a defense or protection, and it may well be that a strict legal title to the office, under such circumstances, may be inquired into."

In the case before us there is no charge of

*25

bias or prejudice on *the part of the Board, or on any member in discharge of the duty imposed by the jury law, and no unfairness charged in its exercise. The ground interposed is not sufficient either to arrest the judgment or for a new trial, and the motion must be dismissed. It is accordingly so ordered.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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7 S. C. 25

LEVY v. BARRETT.

(Columbia. Nov. Term, 1875.)

[*Wills* ⇐527.]

Testator having eight children, of whom his son I, and his daughter L. were two, makes his will and afterwards a codicil thereto, whereby, after various devises and bequests, and a declaration that his son I. would receive no part of his estate, he gives to his daughter L. "the same portion of my estate which my son I. would have received had this exception not been made," and then devises and bequeaths the residue of his estate to his executors in trust for the benefit of his children, and directs that the final distribution of his estate amongst his surviving children and the issue of such as may then be dead shall not be made until ten years after his death. I. died in the lifetime of the testator, after the codicil was made: *Held*, That L. was entitled, in the final distribution of the residue, to two eighth parts.

[Ed. Note.—Cited in De Leon v. Barrett, 22 S. C. 416, 424.

For other cases, see Wills, Cent. Dig. § 1140; Dec. Dig. ⇐527.]

Before Reed, J., at Charleston, April, 1875.

This was an action by Charles F. Levy and Laura L., his wife, and others against the executors of Jacob Barrett, deceased, and others, to obtain, amongst other things, the judgment of the Court as to the construction of the will of the testator upon the claim of the plaintiff, Laura L. Levy, one of the daughters of the testator.

The testator, when his will and codicil were made, had eight children, his daughter, Laura L. Levy, and his son, Isaac Barrett, being two of them. Isaac died in the lifetime of his father. The others survived him, and they and their children, with the husbands of such of the females as were married, were parties to the action either as plaintiffs or defendants.

The will and codicil are as follows:

Will.

"In the name of God, amen. I, Jacob Barrett, of Charleston, State of South Carolina, do make and declare this to be my last

*26

*will and testament. I give, devise and bequeath to my daughter Laura my three (3) houses and lots at corner of Anson and Hasel streets, and on Anson street, all being one lot; also the brick house on State street, corner of Unity alley; also the sum of $5,000 being amount already received by said Laura and her husband for insurance of a building on Broad street, in Charleston, and also the lot on which the said building stood; the property given to my said daughter Laura to be charged against her in the distribution of my estate at the sum of eighteen thousand five hundred dollars ($18,500).

"I give, devise and bequeath to my daughter Sarah the house and lot on East Bay, formerly known as the French Coffee House, to be charged against my daughter Sarah in the distribution of my estate at the sum of twenty-five thousand dollars ($25,000).

"I give, devise and bequeath to my daughter Pauline my brick house and lot in New York, situated on Thirty-sixth street, between Sixth and Seventh avenues, to be charged against my daughter Pauline in the distribution of my estate at the sum of sixteen thousand dollars ($16,000).

"I give, devise and bequeath to my daughter Eugenia Amanda my two houses and lots in Brooklyn, New York, situated in Second Place, to be charged against her in the distribution of my estate at the sum of twenty thousand dollars ($20,000).

"I give, devise and bequeath to my daughter Mary Beatrice my other two houses in Brooklyn, situated in Second Place, also to be charged against my daughter Mary Beatrice in the distribution of my estate at the sum of twenty thousand dollars ($20,000).

"And whereas, from special reasons, my son Isaac will not receive any portion of my estate, and his sister Laura having always extended to him much attention and kindness, I believe that it will be gratifying to him that I should make some extra provision for my daughter Laura. In consideration of such kindness and attentions, I hereby give, devise and bequeath to my daughter Laura the same portion of my estate as would have been bequeathed to my son Isaac, had this exception not been made. And I hereby authorize my executors to this my last will and testament, immediately after my death, to give my brick house and lot on East Bay, and known as one of the Prioleau Range, to my daughter Laura, in consideration of her kindness to her brother Isaac, and to be charged against my daughter Laura in the final distribution of my estate out of the portions which would have been bequeathed to my

*27

son Isaac at the *sum of fifteen thousand dollars ($15,000). And it is my will and desire that, in consideration of this bequest,

my daughter Laura will continue to extend to her brother the same kindness; to give him a comfortable support; pay all his expenses of clothing, boarding and lodging, doctor's bills, etc., while he lives single and with her; but should my son Isaac marry with the consent and approval of his mother, then his wife and children to receive for their support and maintenance the same portion of the income of my estate as my other children, and ten thousand dollars ($10,000) to be appropriated to my daughter Laura for the benefit of herself and her children. Should my son die and leave no child or children, then his wife to receive the interest of $10,000 for her support and maintenance during her widowhood, and the remaining interest of this portion to go to my daughter Laura, for the benefit of herself and her children.

"I give, devise and bequeath to my son Jacob my brick house, Vendue Range; also my house and lot on East Bay corner of Unity alley, and my brick house on East Bay, formerly occupied by Hyams, to be charged against my son in the distribution of my estate at the sum of fourteen thousand dollars ($14,000).

"I give, devise and bequeath to my son Solomon, Star Plantation, in Washington County, Georgia; also my house and lot in the town in Linton, Georgia, and a tract of land in Glynn County, also in the State of Georgia, and known as Carbright, to be charged against my son Solomon in the distribution of my estate at the sum of six thousand dollars ($6,000).

"I give, devise and bequeath to my beloved wife Hetty Barrett the sum of four thousand dollars per annum, to be paid to her by my executors in such monthly or quarterly instalments as may be best suited to her wants, as it is my wish to fully secure to my beloved wife a maintenance in accordance with the manner in which she has lived during my own lifetime. I desire that the amount herein set apart for her maintenance and support be paid to her out of a sum necessary to secure to her that amount. It is my will and desire, that upon the death of my wife, the property devoted to her uses during her lifetime shall revert back to my estate, and be distributable under the provisions of my will respecting the residue of my estate. It is further my will that my executors, hereafter named, in this my will, shall set apart out of my estate the sum of fifty thousand dollars ($50,000) of my best securities, and in like manner invest all the accruing inter-

*28

est on *the same in good, safe securities, and its increases during the life of my wife; and she shall be fully authorized and empowered, by her last will and testament, to dispose of the same fund at her discretion, giving the same and all of its accumulations to one or more of my children or grandchildren, to the exclusion of any or all of the others, and in such shares as she may think proper. It is further my will and desire that the property given to my children under this my will, whether it be property specially devised or a part of the residue, shall be held by them for and during their natural lives respectively; the property devised to each of my daughters to be received by her, and held by her, for her sole and exclusive use and behoof, free from all debts and encumbrances, contracts or engagements of their present or any future husbands; and after the death of any of my children, the income of the payments devised to such child or children shall be applied to such child or children surviving them for their maintenance and support. It is my further will and desire that should any of my children depart this life leaving no child or children surviving him or her, or should the child or children left surviving by any of my children departing this life shall so depart this life before attaining the age of twenty-one (21) years or marriage, the property devised to such child or children shall revert to my estate, and shall become devisable as a part of my estate, and subject to the same conditions as the residue of my estate. It is my will and desire that my executors shall set apart, out of my estate, the sum of ten thousand dollars ($10,000) of the State of Georgia, city of Columbus, bonds of the longest date, for the following purposes, viz.: The sum of five thousand dollars ($5,000) I devise and bequeath to the congregation, Hasel street, to be held by the trustees of that synagogue, and the interest of said five thousand dollars ($5,000) annually to go towards the payment of the minister of said congregation; I devise and bequeath the other five thousand dollars ($5,000) to the Hebrew Orphan Society, Broad street, Court House Square, to be held by the trustees of that institute, and the interest of that amount to be used by said trustees in furthering the objects of that society. All the rest and residue of my estate, both real and personal, of whatsoever character and kind, I leave in trust to my executors, hereafter named in this my last will and testament, for the benefit of my children and grandchildren; the interest of all such property

*29

to be invested in safe securities, and *kept together until twenty (20) years after my death; then, at that time, it is my will and desire that the final division of my estate shall take place, according to the tenor and meaning of this my last will, among my surviving children, the child or children of either of my children who may have departed this life previous to this distribution standing in the place of such deceased parent. I hereby appoint George W. Williams, H. H. DeLeon, Charles T. Lowndes, W. B. Smith, W. C. Bee, executors of this my last will.

"In witness whereof I have hereto set my hand and seal this 21st day of September, 1870."

Codicil.

"I, Jacob Barrett, do hereby declare this to be a codicil to my last will and testament. I do hereby revoke so much of my within contained will as devises and bequeaths to my daughter Laura my brick house and lot on East Bay, and known as one of the Prioleau Range, and direct the same to be held as therein directed, according to the residue of my estate.

"I do further direct that the final division of my estate shall take place among my surviving children at the period of ten years after my death, instead of twenty years, as specified in my said will, and that at such time the amounts devised to my children be first equalized and the residue divided as therein directed. I do further direct that the portions of my estate left to all of my children shall be subject to the following trusts, to wit: In trust to them for life, and after their death to such children as they may leave surviving, the child or children of any deceased child to take such share as his, her or their parent would have taken if alive; and in case there should be no such child or children, grand-child or grand-children, then the same to revert to my estate and become devisable as a part of the residue of my estate, hereby revoking such portions of my will as may be inconsistent with this codicil, but confirming the said will in all other respects.

"Witness my hand and seal this 10th day of January, Anno Domini 1871."

The case was referred to G. Lamb Buist, Esq., who made the following report:

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*This case was referred to me on the 11th day of November, 1873, by the Honorable R. F. Graham, Judge of the First Circuit, by virtue of an order in the words following, to wit: "The decree hitherto made in this cause having been set aside, and the cause remanded for further proceeding, on motion of R. S. Duryea, attorney for the infant defendants, and on hearing J. Barrett Cohen and James B. Campbell, (attorneys of Charles F. Levy and wife, Joseph Cohen and wife, Bushrod F. Rice and wife, Michael W. Larendon and wife, Solomon J. Barrett and wife and Jacob Barrett,) and Porter & Conner, (attorneys of Daniel Dishon and wife,) and R. S. Duryea, (attorney of Mrs. H. J. Barrett,) and Simons & Seigling, (attorneys of the executors of Jacob Barrett,) it is ordered that this case be referred to G. Lamb Buist, Esq., as Special Referee, to take testimony and report the same, and more especially to take testimony as to the situation of the estate and the circumstances affecting the various parties, particularly the infants, entitled under the will; also as to the condition of the families of the children of the late Jacob Barrett, and the necessity or propriety of allowing maintenance; also the propriety of allowing the interest for the nurture, support and education of the families of the said the children of the said Jacob Barrett; also to take testimony on any other matter arising under the pleadings which may be brought before him, with leave to report any special matter."

I have been attended by all the solicitors in the case, and taken at several references the testimony submitted with this report.

* * * * * *

The other question presented for my consideration is as to the construction to be placed on the will of the testator as to the claim of Mrs. Laura Levy, one of the daughters of the testator.

It is contended on her behalf that she is entitled to two-eighths part of the estate of testator, being her own share or portion and that of her brother Isaac.

The will provides as follows: "And whereas, from special reasons, my son Isaac will not receive any portion of my estate, and his sister Laura having always extended to him much attention and kindness I believe that it will be gratifying to him that I should make some extra provision for my daughter Laura; in consideration of such kindness and attention I hereby give, devise and bequeath to my daughter Laura the same portion of my estate as would have been bequeathed to my son Isaac had this exception

*31

*not been made. And I hereby authorize my executors to this my last will and testament, immediately after my death, to give my brick house and lot on East Bay, and known as one of the Prioleau Range, to my daughter Laura in consideration of her kindness to her brother Isaac, and to be charged against my daughter in the final distribution of my estate, out of the portion which would have been bequeathed to my son Isaac, at the sum of $15,000; and it is my will and desire that in consideration of this bequest my daughter Laura will continue to extend to her brother the same kindness, to give him a comfortable support, pay all his expenses of clothing, boarding and lodging, doctors' bills, etc., while he lives single; but should my son Isaac marry, with the consent and approval of his mother, then his wife and children to receive for their support and maintenance the same portion of the income of my estate as my other children, and $10,000 to be appropriated to my daughter Laura, for the benefit of herself and her children. Should my son die and leave no child or children, then his wife to receive the interest of $10,000 for her support and maintenance during her widowhood, and the remaining interest of this portion to go to my daughter Laura, for the benefit of herself and her children."

The testator in his will further directs that the final division of his estate shall take place, according to the tenor and meaning of this his last will, among his surviving children, etc., and in his codicil he provides as follows, to wit: "I do hereby revoke so

much of my within contained will as devises and bequeaths to my daughter Laura my brick house and lot on East Bay, and known as one of the Prioleau Range, and direct the same to be held as therein directed according to the residue of my estate." The will is dated 21st September, 1870; the codicil 10th January, 1871. And Isaac Barrett died prior to testator on September 9th, 1871, unmarried, and without issue.

I have given this question the most careful consideration, with a view to the determination of the proper contruction to be placed on the testator's will; and to arrive at a proper conclusion, it is necessary to consider, first, the interest to which Mrs. Levy would be entitled had Mr. Isaac Barrett survived his father; and, secondly, whether, under the terms of the will, in consequence of his decease, she no longer can lay claim to his share or portion.

And, first, I am of opinion that had Isaac survived his father and remained unmarried,

*32

Mrs. Levy would have received, in the *language of the will, "the same portion of my estate as would have been bequeathed to my son Isaac had this exception not been made," which exception was made in the following words: "And whereas, from special reasons, my son Isaac will not receive any portion of my estate, and his sister Laura having extended to him much attention and kindness," etc. It is a reasonable and natural conclusion that if testator had no special reasons or made no exception to Isaac, his share would have been the same as that of the other children, and this results from the provision that, in the event of the marriage of Isaac, his wife and children should receive for their support and maintenance the same portion of the income of his estate as his other children, and $10,000 to be appropriated to his daughter Laura, for the benefit of herself and children; and should his son die and leave no children, that his wife should receive the interest of $10,000 for her support and maintenance during her widowhood, and the remaining interest of this portion should go to his daughter Laura, for the benefit of herself and her children. In the codicil, the testator only revokes so much of his will as devises and bequeaths to Mrs. Levy his house and lot on East Bay, and the same goes into his residuary estate. He further changes the period of distribution from twenty to ten years, and recites trusts upon which these are to be held.

I cannot perceive in the will wherein Isaac Barrett was named as a legatee of testator; for special reasons he was excluded; and for kindness already extended, the share he would have received but for the special reasons was bequeathed to Mrs. Levy, subject to certain modifications, should the contingency arise of marriage of Isaac, with the consent and approval of his mother.

Having construed the intention of testator in his will on this point to be:

1. That for special reasons Isaac was to receive no share;

2. That to his sister Laura there was devised his share or portion to which the other children were entitled; and,

3. That the contingency of his marriage did not arise to vary the nature of Mrs. Levy's interest;

I am of the opinion that the decease of Isaac prior to testator has no effect upon Mrs. Levy's interest to the one-eighth share, and she is, in my judgment, entitled under the terms of the will to the same.

*33

*Some of the parties excepted to so much of the report as holds that Mrs. Laura L. Levy is entitled to two-eighths under the will of Mr. Jacob Barrett, instead of one-seventh, and that each of the other children is entitled to but one-eighth, instead of one-seventh, on the following grounds:

1. Because, even if the said Referee had power to report on a question of law, his construction of the said will is incorrect, inasmuch as Mr. Barrett made no devise, bequest or gift to his son Isaac except the Prioleau Range property, which gift was revoked by his codicil.

2. Because Isaac having died before his father, and subsequently to the making of the will and codicil, all legacies which might have been given to him lapsed, and if any person was to take what he would have taken,—to use the words of the will, "had this exception not been made,"—it could only be under such condition of things as must have existed had he been in a position to have a portion of the estate bequeathed to him.

3. Because if Isaac had lived and remained unmarried, Laura L. Levy would have taken nothing under the will except the Prioleau Range property, which was revoked by the codicil.

4. Because the words used in the will under which it is claimed that Laura L. Levy is entitled to two shares, except so far as the Prioleau Range property is concerned, would, if Isaac were alive and unmarried, be void for uncertainty.

5. Because after the purchase of the Wentworth street house for Mrs. Levy by Mr. Barrett, which title was placed in evidence by Mrs. Levy, and prior to the death of Isaac, the testator, by his codicil, revoked the gift of the Prioleau Range property, and declared that the property left to all of his children should be divided as directed under his will, to wit, among his surviving children.

6. Because a will speaks from the death of a testator, and at the time of the death of Mr. Jacob Barrett, Isaac was dead and could have taken no portion.

7. Because, under the provisions of the will and codicil, Laura was entitled to no more

than an equal share with the other surviving children of the testator.

The decree of His Honor is as follows:

Reed, J. This case was heard upon the

*34

report of the Referee, *and exceptions to the same on the part of all plaintiffs, except in only Charles F. Levy and Laura L., his wife, and all of the infant defendants, excepting only the children of Mrs. Laura L. Levy.

The questions raised were, first, can any portion of the income of the estate, which is large, be applied to the education and maintenance of the children of the testator and their issue, who are the ultimate devisees, and who are shown to be in extremely destitute circumstances prior to the period fixed for the final distribution of the estate, which, under the codicil, is not to be made until ten years after the death of the testator. The Referee has decided this question in the affirmative, and recommends that five thousand dollars of the income be applied annually to their use.

To this finding there is no exception, and, concurring in the justice and necessity of the application, the report of the Referee on this subject is confirmed.

The other question, and the one on which the report of the Referee is excepted to, is what portion of the estate Mrs. Laura L. Levy is entitled to under the will of her father, the testator?

If the Referee is correct in his conclusions, she is entitled to two-eighths of the estate, and each of her brothers and sisters to one-eighth; that is to say, she would take for life, and her children after her death, double the estate that would be taken by each of her brothers and sisters. If, on the other hand, the Referee is wrong, then Laura (Mrs. Levy) would take the same estate under her father's will as each of her brothers and sisters; that is to say, each would take one-seventh under the limitations of the will.

The testator left surviving him his widow, Mrs. Hetty J. Barrett, and seven children, to wit: Laura (Mrs. Levy,) Sarah (Mrs. Joseph Cohen,) Pauline (Mrs. Dishon,) Eugenia Amanda (Mrs. Rice,) Mary Beatrice (Mrs. Larendon,) and Jacob Barrett and Solomon Barrett.

Isaac Barrett died before his father.

The scheme of the will, aside from the liberal provisions made for the wife, a part of which was in any event to fall into the residue, and the remaining portion also into the residue, if not disposed of by will in her lifetime, seems to have been to equalize his children, beginning by dividing among them so much of the estate as it was intended should be possessed and enjoyed by them immediately after the testator's death, into eight

*35

specific shares, of unequal *value, postponing the possession of the residue, which was much the largest portion, until twenty years after the testator's death, according to the will, which period was altered by the codicil to ten years, which said codicil also revoked the devise of the Prioleau Range property, and directed that the same should be held as a portion of the residuary estate.

In these specific and ultimate divisions does Mrs. Levy take one share in her own right, or is she entitled to two-eighths, one-eighth in her own right, and one-eighth in the right of her brother Isaac?

The language used to express the will of the testator on this subject of Isaac's share is greatly confused, and, if it can be construed at all, is susceptible of several constructions of about equal probability.

The theory adopted by the Referee has been elaborately and ably urged by the counsel representing Mrs. Levy. On the other hand, counsel representing the remaining devisees and legatees insist that such a construction is utterly fallacious, and that the whole tenor of the will necessarily limits Mrs. Levy to her own seventh of the estate, or else its terms in regard to this matter are incomprehensible and must be rejected as void for uncertainty. I concur with the counsel who have reached the last named results, but I have arrived at my conclusions by an entirely different course of reasoning.

According to my view, it was the intention of the testator to make specific allotments of certain property to each of his children, excepting Isaac, to be enjoyed by them immediately after his decease, and to give the remainder of his estate to his executors, in trust, for the use of his children whilst they lived, but to be divided, with its accumulations, among the survivors of them twenty years after his decease.

For reasons that were known to himself, he excepts his son Isaac from this specific division; indeed he did not regard himself as disposing of any other property directly to his children, and gave the specific property that would have been given to him, "had this exception not been made," to his sister Laura, believing it would be gratifying to him, (Isaac,) and in consideration of the kindness and attention rendered and to be rendered to him by his sister. That portion was the brick house and lot on East Bay, known as one of the Prioleau Range, and charged in the final distribution of his estate out of the portion which would have been bequeathed

*36

*to his son Isaac at the sum of fifteen thousand dollars; and this was given, not only in consideration of past kindness and attention, but also in trust, that her good offices should be continued towards her brother whilst he remained single and lived with her; but, if he married, then his family, who would become his protectors, was to receive the same "income" (portion) of the estate as testator's

other children, including, as he supposed and intended, the Prioleau Range property; and, in that event, Laura was to be relieved of her trust, and to receive ten thousand dollars for all services rendered to her brother.

Isaac never married, and died before his father, the testator.

The will was executed on the 21st September, 1870, and, afterwards, in December of the same year, testator purchased for his daughter Laura, at a cash cost of eight thousand five hundred dollars, a house and lot in Wentworth street, the conveyance of which was dated December 1st, and recorded on the 20th December.

On January 10, 1871, but twelve days after the deed was recorded, testator made a codicil to his will, revoking the devise of the Prioleau Range property. The value of the house and lot on Wentworth street was thus taken out of the residuary estate, and the Prioleau Range property added to the residue, for the double purpose, as I take it, of increasing the residue for ultimate division among his surviving children, and for the purpose of fixing and paying to Laura a cash compensation for services rendered and to be rendered to her brother Isaac, or as the testator calls it, "kindness and attention."

If this view be correct, it follows that Mrs. Levy is limited to an equal share with her brothers and sisters in the final settlement of the estate, and cannot take two-eighths, as contended for. Is it correct? Taking these words, "for special reasons, my son Isaac will not receive any portion of my estate," found at the beginning of the clause of the will on this subject, as also some isolated expressions of similar import in the body of the clause, the construction might seem strained; but, upon an examination of the whole instrument, the number and condition of testator's family, his object in disposing of his property by will, as illustrated by his vesting the bulk of it in the hands of certain eminent bankers as trustees, for a long term of years; the reasons, as gathered from the paper itself, which may be supposed to have

*37

actuated him in its execution, *the terms of the codicil, whereby it is directed that a final division of his estate among his "surviving children" shall be made at the end of ten, instead of twenty years, "the amounts devised" to his children, being "first equalized;" the fact that Isaac was one of his children, and, if he had survived to that time, would have taken his share of the residue, either in his own right or as cestui que trust of his sister Laura, render this construction, as I think, not only the most reasonable that can be suggested, but in perfect accord with the intention of the testator.

If I am right, and, whether right or not, it resolves the very grave doubts that exist in favor of the justice and equity of the case; and if wrong, then I think the paper cannot be intelligently construed, so far as any interest, either in or through Isaac, is concerned, and is therefore void for uncertainty.

Either view will accomplish what nature, as well as his declaration, suggests testator must have intended to do for his children—put them on an equality.

It is therefore ordered, adjudged and decreed that so much of the report of the Referee as sets out that Mrs. Laura L. Levy is entitled to two-eighths in the final distribution of the estate of the testator, Jacob Barrett, is overruled; and it is further ordered, adjudged and decreed that the said Laura L. Levy is only entitled on such final settlement to take one child's part of the residue, and no more.

It is further ordered, adjudged and decreed that the executors of Jacob Barrett do pay the children of the said Jacob Barrett, the plaintiffs in this cause, the sum of $5,000 per annum, to be equally divided among them, from the date of the death of the said Jacob Barrett, and that they continue to pay the same amount annually in the manner above directed, until the period of final distribution of the estate, and that said amount be applied to the support and maintenance of the plaintiffs and of their children.

It is further ordered that the costs of these proceedings be paid by the estate.

It is further ordered that any party to these proceedings have leave to apply, at the foot of this decree, for such further order or decree as may be necessary in the premises.

The plaintiffs, Charles F. Levy and Laura

*38

L., his wife, for *themselves and in behalf of their children, appealed from so much of the decree as sustained the exceptions to the report.

Campbell, for appellants.

Cohen, Porter & Brawley, contra.

February 17, 1876. The opinion of the Court was delivered by

WILLARD, A. J. The construction of the present will does not involve the interpretation of obscure or doubtful expressions. The will is carefully and clearly drawn, and the mind of the testator, as expressed, is in harmony with itself, both as it regards the general objects and motives that influenced him and the particular considerations that lead to special provision for his daughter Laura; it is in harmony both as it regards the ends sought to be attained and the means employed for their attainment. The true construction, therefore, should not deny force to any part of the will, but gather the sense equally of all its provisions.

The general plan of the will was to give children equal shares in the ultimate division of the estate. An exception to this is made in the case of two of his children, the one being excluded from direct participation in the estate, and the other receiving an increased

provision on account of the circumstances that led to the exclusion of the former. Out of these exceptional circumstances the present question arises; and these provisions will be hereafter examined in detail. Apart from this case, which must be regarded as standing on exceptional grounds, strict equality, as between his children in the final division of his estate, was manifestly a controlling purpose.

Certain portions of the testator's real estate were specifically devised to each of his children intended to participate in the final division at a valuation fixed by the testator on each parcel. The value of the parcels, thus specifically devised, were to be charged to the respective children taking under such devises.

Provision was made for the wife of testator and certain special objects, and the residue of his estate was left in the hands of his executors to accumulate until twenty years after his death, when a final division was to take place.

The principles on which this division was to be made was to add to the residue remaining in the hands of his executors, after satisfying the other purposes of the will, the valu-

*39

ation of the real estate *specifically devised to children, and to divide the aggregate into as many parts as there were children, or the issue of children living entitled to participate in the final division, and from each part going to a particular child or the issue of a child to deduct the valuation fixed by the will for the specific devise to such child, and the remainder thereof to constitute such child's interest in such final distribution.

The several children taking under the will were to take life estates, with remainders to their issue. In the case of the death of a child without issue to take, the share of such child was to fall into the residue and be distributed among the remaining persons entitled to such residue on final distribution.

The testator, by a codicil, changed the time for final distribution from twenty years after his death to ten years thereafter. The remaining provisions of the will and codicil are not important to the understanding of the general nature of the dispositions intended by the testator, apart from the peculiar circumstances that affected two of his children, and to which attention will next be given.

For some reason not disclosed by the will, the testator did not intend that his son Isaac should directly receive any part of his estate. It will not be necessary to ascertain the precise motive that leads to this exclusion. It is enough that we find that it was not intended as a mark of displeasure, and that it may reasonably be ascribed to want of confidence in the ability of that son to make a judicious use of property intended for his support.

In the place of a direct provision for Isaac, the testator makes the following dispositions: "And whereas, from special reasons, my son Isaac will not receive any portion of my estate, and his sister Laura, having always extended to him much attention and kindness, I believe that it will be gratifying to him that I should make some extra provision for my daughter Laura; in consideration of such kindness and attention, I hereby give, devise and bequeath to my daughter Laura the same portion of my estate as would have been bequeathed to my son Isaac had this exception not been made." The will then goes on to devise specifically to Laura a house and lot "in consideration of her kindness to her brother Isaac, and to be charged against my daughter in the final distribution of my estate out of the portions which would have been bequeathed to my son Issac at the sum of fifteen thousand dollars, ($15,000); and it is my will and desire that, in consideration of the bequest, my daughter Laura will continue to

*40

*extend to her brother the same kindness, to give him a comfortable support, pay all his expenses of clothing, boarding and lodging, doctors' bills, &c., while he lives single." Then follows provisions contingent upon the marriage of Isaac with the consent of his mother and his having children. These provisions have no direct bearing on the present question, as Isaac died during the lifetime of his father without having married. They have, however, an indirect bearing that will be considered hereafter.

Two observations are pertinent to the provisions just cited, namely, that Isaac was not intended to be among those children entitled to participate in the final division of the estate, and that Laura was intended so to participate to an extent greater than the remaining children so entitled to participate.

It is also noticeable that Laura, by the will, was intended to receive a specific devise of real estate, at a fixed valuation, on account of that portion of the provisions made for her on account of her relations to Isaac, to be charged in the final distribution precisely as she had a similar specific devise on account of the provisions made for her individually, in common with the other children, and similar to that which each of the others received, Isaac only excepted. This specific devise was revoked by the codicil.

It is contended by the respondents, who represent the devises other than those to Laura, that all that Laura could take under the devise of that which the testator describes as what would have been taken by Isaac but for the exception made in his case was what Isaac would have taken had the devise been made in terms to him, subject to all the conditions and limitations affecting alike the devises to the several children. In other words, had Isaac been put upon the same footing with the other children, the fact of his death without issue before the final division would have caused the estate devised to him to fall into the residue of the estate, in which case

all entitled to come upon the residue would be equally so entitled.

What the respondents contend for is, in effect, that Laura is not to be regarded as a devisee as it regards that part of the estate coming to her through her relations to Isaac, but that the devise is to be treated as if made to Isaac, so far as it concerns the application of the conditions and limitations imposed by the will in the case of the contingency of a

*41

child dying without issue before final *division of the estate. According to this view, the death of Isaac before that event destroyed an assumed life estate in him, and his failing to leave issue defeated the remainders intended for his children, consequently the life tenancy of Laura was destroyed, and all that part of the estate passed into the residue and must be distributed accordingly. According to this view, Laura would participate in the residue on the footing of equality with the other children.

It is not denied that the will intended that Laura should enjoy the devise thus assumed to be made in effect to Isaac, subject to the injunctions of the will for the maintenance of Isaac. The respondents' proposition that the codicil revokes this intended devise in its whole scope and effect demands notice in a different connection from the present.

The question thus raised is whether these provisions of the will, conferring what the testator regarded as Isaac's natural right on Laura, are to be regarded as constituting a direct devise to Laura, so that the conditions and limitations attached to devises are to operate on contingencies connected with the termination of her life and her leaving issue without encumbering her interest with other contingencies connected with the life of Isaac.

The will in terms makes Laura the devisee of the legal estates, whatever trust may affect it in behalf of Isaac, and whatever may be the nature and extent of that legal interest. The contingencies of dying with or without children, on their face, relate to children taking estates under the will. The like life estate taken is made to depend on the life of the taker, and not on any other person, and issue to take by way of remainder are the issue of the parent taking a life estate in all cases except that of Isaac's children.

The respondent must, in order to establish their construction, make good the propositions that there is matter in the will sufficient to defeat the natural and primary sense of the terms employed and to substitute another in its place.

It will not be necessary to consider whether the sense and construction contended for by the respondents can be made to comport reasonably with the terms employed, unless, on examination we find something in the will making it clear that the testator's intent will be defeated if the expressions employed by him are taken in the natural and ordinary sense.

The respondents point to the rule of equal-

*42

ity among children as *evincing the intention of the testator, and claim that such equality would be destroyed if Laura could take, notwithstanding Isaac's death without issue. It must be conceded that the testator did intend, as a general rule, to deal with his children on terms of equality. It is equally clear that he intended to make the exception to this rule in the case of Isaac and Laura. To account for his departure from what constituted the general idea of his will, he assigns, with sufficient clearness, his motives for so doing. He cannot allow Isaac to participate directly and on the footing of the other children, but gives effect to the assumed, a possibly known, desire of Isaac that Laura should receive special and "extra" provision on account of her kindness and affection for him. It is upon Laura, as Isaac's benefactor, that his bounty is bestowed. All this makes it perfectly clear that the testator intentionally created an exception to the general rule of equality on grounds that he regarded as sufficient. To use the general rule so as to destroy the exception is to violate the intentions of the testator.

But the respondents contend that the exception was only intended to be allowed while Isaac was living, and that his death destroyed the force of the motive that led to the favor bestowed upon Laura.

This is not sustained by the text of the will. In the first place, the motive of kindness in the past is placed in the most conspicuous light in the statement by the testator of the grounds of his extraordinary provisions for Laura.

The injunction that she shall provide for the maintenance of Isaac was not intended to deprive her of a beneficial interest in the devise. In the devise to Laura, on account of Isaac, the death of Isaac is in terms contemplated, and an intention clearly manifested that Laura should enjoy, from and after that event, the entire estate so devised if Isaac should leave neither wife nor child. The devise thus affords the clearest evidence not only that it was not the intention of the testator that his bounty to Laura should cease with Isaac's death, but that if Isaac died without wife or child that Laura should enjoy the devise to her after the death of Isaac. It is clear that the general intention, contemplating equality as among his children, is in harmony with the particular disposition made in behalf of Laura in excess of what equality would confer, so that the logical connection of his mind can be traced through both; there is, therefore, no ground here to disturb the direct sense of the terms which he has employed to indicate the provision intended for Laura.

*43

*Another ground presented by the respondents has less relation to the presumed intention of the testator and more to the force and effect of the terms by which he describes the subject matter of the devise to Laura. They contend that the subject matter of the devise to Laura is what Isaac might have taken had he lived until the time when final division of the estate was to be made.

It must not be forgotten that had Isaac lived until the final division, he would have taken nothing, for nothing was devised for him.

While it may be conceded that Laura should not take more than Isaac would have taken had the devise been to him instead of her, still it is clear that Laura ought not to take less under the devise to her than Isaac would have taken had the devise been made to him. The language of the will to be first considered in this connection is as follows: "I hereby give, devise and bequeath to my daughter Laura the same portion of my estate as would have been bequeathed to my son Isaac had this exception not been made." Considering this clause as furnishing a measure of the subject of this devise to Laura, what is the nature of that measure, and how must it be applied? In the first place, it was a measure according to something existing at the time the testator made his will. There is no evidence of any intention or idea that events thereafter to occur were to constitute the measure of what was to go to Laura under the devise. He gives that which "would have been," but for the special circumstances of the case, "bequeathed" to Isaac—not that which might on certain contingencies be enjoyed by Isaac had the devise been made to him. Suppose, then, that the special circumstances had not existed, what would have been bequeathed to Isaac?

The general rule of equality as among children would then have had no exception, and Isaac would have taken the one-eighth part of the estate, subject to certain contingencies. Laura takes that interest, subject to the same contingencies that would have affected Isaac, namely, an estate for the life of the taker, and a remainder to her issue if any she have. But respondents contend that Laura only takes an interest for her own life in a life estate terminable on the death of Isaac without issue. But such an estate is not what Isaac would have taken had the devise been to him, but something very much inferior in both legal estimation and pecuniary value.

This construction of the respondents be-

*44

comes still more perplex*ing and unsatisfactory if we attempt to state the nature of the remainder intended for the children of Laura surviving her. In a word, that which he gives to Laura is a child's portion in his estate, in addition to her own, that remained undisposed of in consequence of the exception affecting Isaac; but upon the same conditions as that she took on equal terms with her brothers and sisters, namely, a life estate for her own life, remainder to her issue.

It is necessary to refer to the language of the clause relating to final division in order to understand fully the position of the respondents as to the nature and extent of the interest that the testator intended for Laura. The language is as follows: "All the rest and residue of my estate, both real and personal, of whatsoever character and kind, I leave in trust of my executors hereinafter named in this my last will and testament, for the benefit of my children and grand-children, the interest of all such property to be invested in safe securities and kept together until twenty (20) years after my death; then, at that time, it is my will and devise that the final division of my estate shall take place according to the tenor and meaning of this my last will among my surviving children; the child or children of either of my children who may have departed this life previous to this distribution standing in the place of such deceased parent."

This clause certainly declares that those intended to take in the final division are surviving children and the descendants of such as die before that event occurs. Does it go farther and fix, independently of the preceding portions of the will, that all surviving children, with the issue of those heretofore deceased, shall take equally, whether representing individually or collectively a child's portion? The language cited answers this inquiry by referring the question as to who among the class named shall take and what shall be their relative right of participation to the intention expressed in all parts of the will taken together as a whole. The force thus given to all parts of the will confirms rather than destroys the exceptions as established in the case of Laura and Isaac.

The direction is two-fold: distribution must take place "among" surviving children and the issue of such as are then deceased, and it must be made according to the "tenor and meaning" of the whole will. Whatever inclusive power may be ascribed in the word "among" in other relations, here it must give

*45

way to the force *of an exception within the tenor and meaning of the will, though placed in a different part of that instrument, as effectually as if that exception was repeated and placed in immediate juxtaposition with the direction to distribute "among" surviving children.

It certainly was not either necessary or convenient to reiterate in this connection the complicated provisions relating to Laura, and indirectly to Isaac.

The respective persons intended to take in the final division had already been made cer-

tain, and it only remained to give directions for the final division that would authorize the executors to act. There is nothing in the language of the will last cited that throws any light upon the intentions of the testator as to the measure of the bounty intended Laura on Isaac's account. We come now to the language of the codicil to ascertain whether it has any bearing in defining the intentions of the testator as to the measure of Laura's interest. It says: "I do further direct that the division of my estate shall take place among my surviving children at the period of ten years after my death, instead of twenty years, as specified in my said will, and at such time the amounts devised to my children be first equalized, and the residue divided as therein directed." The words "amounts devised," as here used, refer to the respective shares of the children in the final distribution.

This is shown by the words that follow, viz.: "and the residue divided as therein directed." The residue clearly means the portion of the estate accumulated after the separation of those parts specifically devised and the payment of the debts, legacies, &c. That which is to be equalized is indicated by the will itself, namely, the advances made by the testator to the respective children on account of the fund ultimately devisable by means of specific devises valued by the testator for the purpose of such equalization. The direction in the codicil to "equalize" is a repetition of similar expressions in the body of the will, there applied to the mode of compensating on the final distribution for the differences in the pecuniary value of the various parcels specifically devised. While there is a reading of the codicil that harmonizes with the body of the will as this does, no other reading less harmonious is admissible.

The only additional clause of the codicil to be examined in this connection is that which declares a trust in regard to the interests conferred upon the children. The ob-

*46

ject of this clause was not to *redistribute the testator's bounty upon a plan inconsistent with that disclosed by his will, but to secure objects that were thought by the testator to be important as it regarded the holding by his children of the shares coming to them under his will. The opening language is: "I do further direct that the portions of my estate left to all my children shall be subject to the following," &c. Evidently the testator meant "all the portions of my estate left to my children." The transposition of the word "all," assumed by this reading, is of common occurrence in our language, where inexactly employed. Such a transposition does less violence to the text than would be done to the mind of the testator if it was assumed that he here intended to destroy the elaborate provisions of his will growing out of the peculiar situation and relations of Isaac and Laura, during the lifetime of Isaac, and without any intimation of a motive for so sudden and surprising a change of intention.

The respondents raise another point upon the language of the codicil that may be here considered. They contend that the first clause of the codicil revoking the specific devise to Laura was not to be charged as an advance upon that portion of the estate which she was to receive on account of her relations to Isaac and revoked in effect the entire devise to her. This position needs but brief notice.

The will contained a general devise entitling Laura to participate in the final division to the extent of a child's portion on Isaac's account, also a specific devise of realty, by way of anticipating such general devise. The revocation of the specific devise left the general devise in full force and operation.

It is further contended that Laura took as trustee for Isaac under the devise to her on account of Isaac. The correctness of this position need not be examined; for, assuming its truth, it does not follow that Laura's interest, after the death of Isaac, was diminished thereby. It is clear on the face of the will that the testator intended bounty to Laura by this devise, and not that she should act solely as trustee for Isaac. It is equally clear that such bounty embraced all that was to be derived from a child's portion over and above what might be required for the maintenance and comfort of Isaac and that which might remain after his death without issue. Such being the indisputable fact, the nature and extent of the beneficial interest intended for Isaac, during his lifetime, on the assump-

*47

tion of the existence of a trust, *cannot be made the measure of the legal estate, a beneficial interest that passed to Laura under the provisions of the will. This view deprives the fact of a trust for Isaac of any importance in determining what interest Laura took under the will.

The decree must be so modified as to admit Laura to two one-eighth parts on the final division of the estate.

MOSES, C. J., and WRIGHT, A, J,. concurred.

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7 S. C. 47

ADAMS v. KIBLER.

(Columbia. Nov. Term, 1875.)

[*Vendor and Purchaser* ⇨112.]

Where the object of an executed contract for the purchase of land has been defeated by the purchaser's eviction by paramount title from part of the land, equity will rescind the contract,

though there was no fraud, but only mistake, on the part of the vendor.

[Ed. Note.—Cited in City of Charleston v. Blohme, 15 S. C. 126, 40 Am. Rep. 690; Building Supply Co. v. Jones, 87 S. C. 428, 69 S. E. 881.

For other cases, see Vendor and Purchaser, Cent. Dig. §§ 199, 200, 201; Dec. Dig. ⇐112.]

[*Cancellation of Instruments* ⇐59.]

In decreeing the rescission, equity will require the purchaser to account for the rents and profits of the part from which there was no eviction, during the time he used and occupied the same, and also for waste committed thereon by him.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 123; Dec. Dig. ⇐59.]

Before Mackey, J., at Lancaster, March Term, 1875.

Action by John Adams and Bartlett F. Massey, plaintiffs, against Andrew J. Kibler, defendant.

The case contained in the brief is as follows:

On the 25th day of November, 1862, John Adams bought from Andrew J. Kibler and W. L. Faulkner, executors of the will of James Faulkner, deceased, at public auction, a body of land lying in the County of Lancaster, represented to contain 620 acres belonging to the estate of their testator, at the price of $11.25 per acre; and on the same day executed, to said executors, two sealed notes, to secure the payment of the purchase money, with his co-appellant, Bartlett F. Massey, and one John M. Crockett and one J. W. Twitty as sureties, each made payable for the sum of $3,487.50, bearing interest from date; the one falling due on the 28th day of November, 1863, and the other the 28th day of November, 1864.

In the Spring of 1867, W. L. Faulkner having died in the interval, Kibler, the survivor, instituted suits in the law Court on the notes, against the above named obligors,—which at the date of the trial in the Circuit Court were still pending against the plaintiffs, Adams and Massey.

*48

*On the 4th day of February, 1869, the plaintiffs and John M. Crockett, now deceased, filed their bill in the Equity Court, in this case, alleging outstanding paramount title to four hundred and forty-five acres of the land in the heirs at law of one Amelia V. Hooper, and that they had instituted suit in the law Court for the recovery thereof, and praying that a further prosecution of suits on the notes aforesaid be restrained, and that the contract in relation to the purchase of said land be rescinded.

On hearing the bill, an order was made restraining the further prosecution of the suit, to endure until the further order of the Court.

In the meanwhile, Andrew J. Kibler, having been vouched, came in and defended the title of his testator, James Faulkner, in the action for the recovery of the land against Adams. Nevertheless, on the trial, the heirs at law of Amelia V. Hooper, by the judgment of the Supreme Court, recovered 445 acres thereof, the same being that portion known as the Hooper tract.

It was alleged, on behalf of the plaintiffs, that upon this tract was located a substantial and commodious dwelling house, with the necessary outbuildings, including barn, stables, gin house, screw, standing at the intersection of two public highways, making the whole a desirable country residence, especially for one engaged in the business of agriculture. The tract adjoins lands of the said B. F. Massey, who, previous to the sale, had become the husband of the daughter and only child of Adams, who was at that time possessed of means which fully enabled him to purchase the same as a home for his son-in-law and daughter, whose land adjoining contained no dwelling place suitable for persons in their circumstances and condition in life. Accordingly, in 1866, they removed to and took possession of the same as a home.

After the recovery of this tract by the Hooper heirs, viz., on the 3d of June, 1873, the plaintiffs, Adams and Massey, by leave of Court, filed their supplemental complaint, setting forth the recovery and alleging that the sole motive and object of the entire purchase of the land was thereby utterly defeated; that the portion of land recovered by the Hooper heirs was valuable because of the improvements thereon and the fine quality of this land; but the remainder of the land (the Thompson tract) was cut down, worn out, without buildings and totally unimproved, and claiming an entire rescission of the contract and a perpetual injunction of the suit on the notes given for the purchase money.

*49

*The original complaint charged that the sale of the land in November, 1862, was affected by the depreciation in Confederate money.

The answer of the defendant, A. J. Kibler, denies that the land brought at the said sale more than its gold value; denies that the part recovered from Adams (the Hooper tract) formed the sole inducement for the purchase, and denies that the remaining land (the Thompson tract) was, at the time of said purchase, "cut down, worn out and totally unimproved," as stated in the complaint; avers that the executors of Faulkner, in conveying the whole of said lands to Adams, only conveyed the interest of Faulkner therein, and that the purchaser assumed by his purchase all risk of the soundness of Faulkner's title and is liable for the whole debt; and if not liable for the whole debt, he is liable for the value of that portion of the land (the Thompson tract) not recovered from him.

Testimony was taken upon the question of

fact indicated above, viz., as to the inducements of the plaintiff for the purchase, the condition of the land and the respective values of the Hooper and Thompson tracts, in good money, at the time of sale. In support of the plaintiff's claim, the following testimony was given:

The plaintiff, J. Adams, testified: That the land recovered from him was the improved portion; it contained a good dwelling house and all necessary out-houses in good repair, good well of water, &c.; located near the Waxhaw Church: that his motive for buying the place was, that, being in easy circumstances, he wished to provide a home for his son-in-law, whose land it joined, and one, too, to which he might retire; no suitable place for building on the plantation of his son-in-law; but for the Hooper tract would not have bought the remaining 175 acres at any price; the Hooper tract was the sole inducement for the purchase, chiefly because of the buildings on it.

Cross-examined: The portion of land not recovered by the Hooper heirs is known as the Bobby Thompson place; contains 175 acres; was partly enclosed by fence, that is, on the East and West; on the North there was an old fence; there may have been a fence all round, or on all sides, except the Hooper tract, when witness purchased: witness has cultivated a portion of this land up to the present year; not more than ten or twelve

*50

acres any one *year; say years 1870, 1871 and 1872; knows the fact that B. F. Massey did cultivate this land prior to year 1869, but the amount of land and years he does not know. Witness had charge of the land in 1863, 1864 and 1865; turned it over to Massey in 1866, who had the management of it until 1870; none of the 175 acres was cleared up while witness owned the land; there was a comparatively fresh field cleared up by Faulkner, but that is run all into gullies.

B. F. Massey testified: Knows the place sold by the executors of Faulkner to Adams; composed of two tracts—the Hooper and Bobby Thompson or Cousart tract; 445 acres in the Hooper and 175 in the other tract; would not consider the Bobby Thompson tract very valuable, taken from the Hooper tract; little wood on it except old pine trees; witness is the son-in-law of Adams; was acquainted with his circumstances when he purchased; he had but one daughter, now the wife of witness; apart from the Hooper land, Mr. Adams, as a reasonable man, could have had no motive for the purchase he made; the heirs at law of Mrs. Hooper were witness, his half brother and sister; they brought suit to recover this land and succeeded; action was brought against Mr. Adams, the father-in-law of witness; the plantation of witness adjoins this purchase of Adams; it has no dwelling house fit for use by his family. He and his family reside at this time on the Hooper place; moved there in March, 1866; first house occupied by witness and family after his marriage; went there by the consent of Mr. Adams; Kibler defended the action brought to recover the land; witness returned from military service in 1865; had been in service from the year 1862, nearly all the time of his marriage, up to the year 1865.

Elihu Moore, witness for defendant, testified: Witness knows the land sold in 1862 as estate land of James Faulkner, and purchased by J. Adams; resides now, and resided then, within a few hundred yards of the place: is acquainted with both tracts, the Bobby Thompson and Hooper tracts; considered without reference, i. e., the buildings, &c., the Thompson land was of greater average value than the Hooper; taking the improvements into account, supposes the Thompson tract of equal average value per acre with the Hooper. The Thompson tract was cultivated by Adams from the time of the sale up to the present time; last year about five or six acres; the year before not a great deal—say

*51

about a one-horse *farm. When Mr. Adams bought the Thompson tract there was about six or seven acres of original forest on it; six or seven acres well timbered; some old field pines; not well timbered when Mr. Adams ; a great deal of the oak timber cut down. Witness thinks that the greater part of the timber was cut in the year 1868 or 1869, thinks 1869; Adams told witness at that particular time that he had got 1500 rails from it; means that Adams had split 1500 rails that Winter season; don't think he has split any more rails since that time, but has seen Mr. Adams or Mr. Massey's wagon hauling wood from that place; can't say positively as late as last Winter; all of the fencing was taken from the Thompson tract, and moved to about the line between the Hooper and Thompson tracts; not sure where the line is; knows where one corner is: straight line from there to where it strikes the Massey land; part of the fence moved is still on the Thompson and part on the Hooper tract.

Cross-examined: Don't know where the line between the Hooper and Thompson tracts strikes the Massey land; can't say how much of the fence which Adams and Massey built with rails taken from the Thompson tract is on the Hooper, and how much on the Thompson tract. Don't know where the line is; knows two corners of the Thompson tract; this tract is cut off from the road leading to Cureton's Ferry and the Waxhaw Church; it is surrounded by plantations; no road to it except through the fields; there was an old road to it, but it has not been used since the war; this road was fenced up until 1868 or 1869; this road led through Buck Massey's place; no site for a house convenient to a public road; when Adams bought the Thomp-

son place, only one dwelling house; no other beside the dwelling house; when Adams bought, there was a nice situation and dwelling place on the Hooper tract; good dwelling house, with all necessary outbuildings; situate in the fork of the road to Cureton's Ferry and Landsford, skirting 300 yards on the Cureton's Ferry, and half mile or more on the New Town road and across the road; at the time of the purchase there was on it a gin house, a good well of water and a good deal of timber. The Thompson tract is totally broken, but not much more than the Hooper tract.

R. H. Crockett testified: That he knows the lands; the Thompson tract was worth twice as much as the Hooper tract, even taking into consideration the buildings on the

*52

Hooper tract; the Thomp*son tract was worth ten dollars an acre, witness thinks, in good money; thinks there was a small dwelling house on Thompson tract at time of sale.

Cross-examined: Hadn't seen the Thompson tract for a number of years before sale.

James Thompson testified: Knows land in question; the Thompson tract was most valuable per acre; worth eleven dollars per acre at the time of the sale; thinks that the Hooper was worth at that time, including improvements, six or seven dollars per acre; don't think there were any improvements on the Thompson tract at the time of sale, but it was in a very good fix for farming; has not seen it since about eighteen months ago; the whole tract sold for about eleven dollars per acre.

J. H. Lathen testified: The Thompson tract on the day of sale was worth a great deal more than the Hooper per acre; would as soon have had the Thompson tract as all the other.

Cross-examined: A good deal of the land in question made a bale to the acre; would value Thompson tract at ten dollars per acre, and Hooper land at five or six dollars an acre.

A. J. Kibler, defendant, testified: Knows the land in question; the Thompson tract much the best farming land; worth twice as much as the Hooper; Mr. Faulkner, the testator; principal farm was on the Thompson tract; saw this tract last about two years ago; it had no fence around it then.

Cross-examined: There was a common dwelling house on the Thompson tract, which was habitable on day of sale; it was a small log building with two rooms—that is, one room and a shed room.

Re-examined: The land in question was worth $11.25 per acre when sold, in good money; it brought that at the date of sale. There was no difference between Confederate money and good money here in selling land and corn, &c.; corn sold at that sale at one dollar per bushel, the price before the war.

Re-cross-examined: We received Confederate money at that sale at par.

Defense here rested, and, after hearing argument of counsel, the following decree was pronounced:

Mackey, J. This cause came on to be heard upon the bill, answer, testimony and argument of counsel.

*53

*The Court ascertained the facts to be:

1. That on the 25th day of November, 1862, the plaintiff, John Adams, purchased from the executors of James Faulkner, deceased, a certain plantation, consisting of two tracts—the Hooper tract, containing 445 acres, more or less, and the Bobby Thompson tract, containing 175 acres, more or less, the same having been sold as 620 acres, more or less, for the sum of $6,975, being at the rate of $11.25 per acre.

2. That in the year 1872, plaintiff, Adams, was evicted from the Hooper tract, but still retained the Bobby Thompson tract, which was relatively the more valuable of the two tracts, as testified by the witnesses, and worth the price paid.

3. That the Thompson land has become worn and deteriorated in condition and value by use and culture during the twelve years of occupancy by John Adams, and cannot now be restored in the same condition as at the time of sale.

As matter of law, it is adjudged and decreed:

1. That the defendant, A. J. Kibler, be perpetually enjoined from collecting from the plaintiff, John Adams, or his sureties, on the notes given for the purchase money of the said land, so far as concerns the Hooper land, from which said plaintiff was evicted.

2. That the said John Adams and his surety, Bartlett F. Massey, do pay to the defendant, A. J. Kibler, as executor, the sum of one thousand nine hundred and sixty-eight dollars and seventy-five cents, being the price of the Thompson tract—175 acres at $11.25 per acre—with interest on said sum from the 26th day of November, 1862, and that defendant have leave to enter up judgment and have execution therefor.

From this order the plaintiffs appealed on the following grounds:

1. Because, it is respectfully submitted, His Honor erred in not decreeing an entire rescission of the contract in relation to the sale of the land therein mentioned.

2. Because the evidence in the case fully established that the said contract was made with reference to Confederate currency, as a basis of value, and His Honor erred in not grading down the price of the Bobby Thompson tract to the good money standard.

3. Because the value of the Bobby Thompson tract, apart from the main body of the land, was not one of the issues in the cause,

*54

*and His Honor should have directed an issue to ascertain its relative value.

Moore, with whom was Allison, for appellants:

But the simple and only question in the case is: Have the plaintiffs the right to a rescission of the contract in relation to the entire body of land sold by the defendant?

1. The testimony of the plaintiffs, Adams and Massey, taken in connection with the attendant facts and circumstances, it is submitted, clearly indicates that the portion of the land known as the Hooper tract (445 acres) was not only the principal but the sole object of the purchase by Adams. Upon this portion of the land was located all of the improvements of any value—a good and substantial dwelling house, with all the necessary outbuildings, well of water, &c. The only daughter of Adams, then a man in easy circumstances, had not long before become the wife of Massey. The husband's landed estate lay adjoining the Hooper portion of the land, but contained no dwelling house or other place of residence suitable for the accommodation of the newly-married pair. What more natural than that a parent should desire to supply this important deficiency for an only child?

On the other hand, the Thompson tract (175 acres) offered no such inducements for the purchase. A comparatively small tract, somewhat remote from any public highway, and, according to the testimony, almost inaccessible by any traveled way whatever, with but a single log building upon it, which was evidently much dilapidated and had fallen into disuse as a human habitation for any one, disassociated from the Hooper tract, it could have presented no reasonable motive for its purchase by Adams; and accordingly he swears he would not have purchased it alone at any price.

It cannot be doubted, therefore, but that the representation by the executors of Faulkner that the Hooper tract formed a portion of this land which they offered for sale was the sole inducement for the purchase by Adams.

Whether this misrepresentation on their part was intentional or not, equity will afford relief to the purchaser.—Glover v. Smith, 1 DeS. Eq., 433; Grey v. Handkinson, 1 Bay, 278; State v. Gaillard, 2 Bay, 11; Kibler v. Cureton, Rich. Eq. Cases, 143; Van Lew v. Parr, 2 Rich. Eq., 321.

*55

*From the cases of Gillam v. Briggs, (Rich. Eq. Cases, 432,) and Van Lew v. Parr, (2 Rich. Eq., 321,) in equity, and the law cases of Carter v. Carter, (1 Bail., 217,) Bordeux v. Cave, (id., 250,) and Westbrook v. McMillan, (id., 259,) it is submitted, the following rules are deducible:

1. That, after conveyance, the law Court cannot rescind or set aside a sale of land merely for defect of title, either partial or total, but that in an action on the obligation given for the purchase money by the vendor the vendee may avail himself of such defect of title, by way of failure of consideration, either before or after eviction. In case of total want of title in the vendor, the obligation to be regarded as a nudum pactum and void.

2. That where a total want of title in the vendor has been ascertained by the eviction of the vendee, equity will interfere and decree a rescission, whether the contract be in fieri or fully executed, but will refuse to interfere (unless under very special circumstances) where there has been no eviction.

3. That where there has been a partial want of title in the vendor, ascertained by the eviction of the vendee from that portion of the real estate sold which constituted the principal motive for the purchase, equity will interfere and decree a rescission of the entire contract, but will, at the same time, proceed to make such further decree as will restore the parties, as far as practicable, to the condition in which they would have been had no such contract been made.

In this case, Adams has been evicted of nearly two-thirds of the entire land sold, including that part containing the dwelling house, &c., which constituted not only the principal but the sole object of the purchase. The misrepresentation by the executors of Faulkner, that they had the right to sell this part of the land in connection with the Thompson tract, was, it is conceded, unintentional; while, therefore, under the rule last above mentioned, the Circuit Court should have decreed a rescission of the entire contract and a reconveyance (if necessary) of the Thompson tract, Adams should have been only required to account for the value of the rents and profits of the Thompson tract and for any waste that may have been committed on the same while in his possession.

III. But, conceding that the appellants are not entitled to a rescission of the entire contract, and that the "Hooper" and "Bobby Thompson" tracts were, at the date of the

*56

sale, of equal relative *value per acre, inasmuch as the sale was made on the basis of Confederate currency, (see testimony of the defendant, A. J. Kibler,) the price of the Bobby Thompson tract should have been graded down to the good money standard and the appellants decreed to pay only the value, in good money, of $1,968.75 in Confederate currency on the 25th day of November, 1862, viz., the sum of $845.48.—Parker v. Wilson, 3 S. C., 296.

IV. Again: The decree does virtually rescind or annul the contract between the executors of Faulkner and the appellants, because it was out of the power of the Court, without destroying, so to alter the same as

to require the appellants to pay the same price per acre for a part of the land which Adams had contracted to pay for the whole body. It follows that, instead of decreeing the payment for the land, which Adams never would have purchased by itself, he should have been directed merely to account for the rent of the same and any waste that may have been committed.

V. The value of the Thompson tract, apart from the main body of the land bought by Adams, was not in issue in this cause. It was, therefore, error to determine its value, at least without first directing an issue, so as to have enabled Adams to produce evidence in relation to the question.

VI. But unless the decree does amount to a rescission of the entire contract, the complaint should have been dismissed without prejudice and the parties left to litigate their rights before a jury in the action pending on the obligation given for the purchase money of the land.

Kershaw, contra:

The questions arising under this appeal are:

1. Whether the partial failure of consideration proven in this case entitled the appellants to a rescission of the entire contract.

If it was a total failure, it might have been under the rule in Gray v. Handkinson, (1 Bay, 276,) and Tucker v. Grimke, (4 DeS., 53.)

Or if there were a very great deficiency, so as entirely to defeat the objects for which it was purchased, as in Glover v. Smith, (1 DeS., 433.)

Unless he had notice.—Wainwright v. Reed, 1 DeS., 573.

The leading case is that of Moore & Nesbit v. Lanham, (3 Hill, 304,) where the authorities are collected and explained.

*57

*The rule deduced is, "that on the sale of lands, the failure of title as to part only of what is conveyed is a breach of warranty, or implied covenant of seizin, which will entitle the vendee to his action at law, in case he has paid the price, or to an abatement, in case he be sued to recover it.—Evans v. Denby, 2 Sp., 8; Means v. Brickell, 2 Hill, 657.

The rule is peculiar to South Carolina, and is derived from the civil law, which implies in every sale a warranty of title, and "ought not to be extended."—Hood v. Huff, 2 Mills, 159.

But there is no implied warranty at a sale by a public officer.—Commissioner v. Thompson, 4 McC., 434.

Nor at a sale by an administrator.—Prescott v. Holmes, 7 Rich. Eq., 1.

It rests, therefore, in this case, solely upon the ground of failure of consideration, and the question is one of fact. How far has the consideration failed?

This has been properly settled by the Court, and the evidence sustains it.

2. Whether the contract should have been reduced to the value of Confederate money.

The proof establishes that the contract was not made with reference to a depreciated currency.

3. Whether the value of the land left in possession of appellant, with unquestioned title, was one of the issues in the cause.

This is sufficiently answered in stating the question.

4. Whether there should have been an issue ordered to try the value.

The issue in this case arises under Section 277 of the Code of Procedure and is triable by the Court.

The relief sought was equitable relief and the issues were competent to be tried by the Court.—Wait's Ann. Code, 445, note c.

February 17, 1876. The opinion of the Court was delivered by

MOSES, C. J. The right of the appellants (the plaintiffs below) to a rescission of the contract is resisted, because, as it is alleged by the respondents, there was only a partial failure of consideration—the eviction by an outstanding title not extending to the whole land sold by the executors of Faulkner to Adams.

The power of the Court of Equity to afford relief, where its interposition is sought to re-

*58

dress a loss caused by a failure of con*sideration, would indeed be narrow if limited only to the extent of affording reparation by a proportional abatement of the price agreed to be paid for the subject matter of the contract. In the purchase of a tract of land, while the diminution in quantity might attach only to a few acres, the effect of even such a loss might so depreciate the whole for the purpose intended by the purchaser as to render the retention of the remaining part entirely profitless and undesirable to him. One buying a plantation with a view to its cultivation, is generally not more influenced by the number of acres it may contain than its adaptation as a whole to the purpose he contemplates in the investment. To obtain a particular location for a special object to which he proposes to devote it, he may be willing to pay for a larger extent of territory merely to possess a specific portion which it includes, and which may form the only inducement which has led to the purchase. Some of the cases have gone so far as to hold, as in Glover v. Smith, (1 DeS., 433 [1 Am. Dec. 687],) that a deficiency of 101 acres in the supposed purchase of 662 acres would be a ground for the rescission of the contract if the purchase would be greatly deteriorated by the decrease.

In the earlier decisions it was held that if the object of the purchase was defeated by a loss through an older grant of that portion

which induced it, the vendee might, even when sued on the bond at law, claim a rescission of the contract by a verdict in his favor.—Gray v. Handkinson, 1 Bay, 278; State v. Gaillard, 2 Bay, 11 [1 Am. Dec. 628]. On these authorities rested the conclusion of the Courts as to the admissibility of parol testimony in a suit at law to show a failure of consideration by a deficiency in the quantity of land sold and conveyed, and to claim an abatement in the price in consequence of it. The decisions are fully reviewed in Means v. Brickell, (2 Hill, 657,) and the doctrine affirmed. Neither is its application confined to cases where the misrepresentations are with a fraudulent design, for even if made through mistake, yet if they formed an inducement to the contract, they constitute a good defense to the action. The effect upon the purchaser is not changed by the motive and intent of the misstatements of the seller. It may be conceded, as is said by Johnson, J., in Johnson v. Purvis, (1 Hill, 322,) "That the impracticability of giving effect to the defense in a Court of law where a total rescission of the contract is claimed is a sufficient justification for referring it to the chancery jurisdiction." There all the equities of the several parties can be more prop-

*59

erly *adjusted, and the whole matter adjudicated by such orders as may secure their relative rights. The point now before us is submitted by a complaint, which prays that the collection of the notes for the purchase money may be enjoined and the entire contract rescinded. The relief is, therefore, sought by a "case of chancery," to use the language of the Constitution.

The application of the principles to which we have adverted must depend on the facts developed in the cause. Looking to the testimony adduced on the trial, the Court has not a doubt that the end and purpose of the appellant in the purchase was defeated through his eviction from the Hooper tract by a better title. The entire scope of the evidence is conclusive as to the incentive which urged the purchase. It was to acquire the very tract from which he was ejected as a settlement and residence for his son-in-law; and while he was willing to buy the body of land, including the Thompson tract, the two parcels constituting one plantation, there is nothing to prove that without the Hooper tract he would have purchased the other. The very fact on which the respondents relied, to wit, that the Thompson tract was worth eleven dollars per acre, while the Hooper tract was only worth six or seven dollars the acre, shows that he was willing to pay a price far above its value in order to consummate the end he designed by the purchase.

If, however, he bought the whole plantation with a view to its cultivation as an agricultural investment, can it be asserted with any show of reason that the buildings and improvements on the Hooper parcel and its eligible location, the Thompson piece, being, it may be said, without any, did not materially contribute to the inducements which influenced Adams in the contract? Is not this conception of his motives the only legitimate inference to be drawn from the testimony? There is something still beyond all this. The plantation contained, as it was alleged by the vendors, six hundred and twenty acres. Of these Adams has lost by a superior title four hundred and forty-five leaving him but one hundred and seventy-five acres, the deficiency being over two-thirds, and the portion lost containing all the buildings and improvements necessary to the proper and ready conduct of a farming interest. It would be difficult in a search through all the decided cases to find a single one of the like character, where a party has been compelled to take the land while even allowed an abatement of the price for the deficiency. Can any one believe that if Adams, when he

*60

proposed to *buy, had been aware of the great difference he would have made the contract by which he is now sought to be bound? He relied on the statement of the respondents that the plantation contained six hundred and twenty acres, the Hooper tract constituting a portion, and we cannot see upon what principles he should be forced to take a title, when the disproportion of the quantity he contracted to buy is so very great.

While, however, the contract should be rescinded, the right of the parties which follows such result must be respected. It is, therefore, ordered that the agreement referred to in the pleadings be rescinded, the notes of the appellant and the conveyance executed to them cancelled and annulled, and the title to the Thompson land held to vest in the executors or the surviving executor of James Faulkner, the vendors to the said Adams. It is further ordered that Adams be required to account for the rents and profits of the Thompson place while he had possession of it, or for any waste he may have committed thereon. Each party to pay his own costs.

It is further ordered that the case be remanded to the Circuit Court for such orders as may be necessary to give effect to the conclusions herein expressed.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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7 S. C. 60

TILLMAN v. WALKUP.

(Columbia. Nov. Term, 1875.)

[*Bills and Notes* ⇦315.]

Where to an action on a sealed note, brought by the assignee thereof, the answer alleges that the assignment was collusive and pretensive, but sets up no defense which would have been valid had the action been brought by

the payee: *Held*, That evidence to sustain the allegation that the assignment was collusive and pretensive was properly rejected by the Court below.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 751; Dec. Dig. ⟸315.]

[*Assignments* ⟸70; *Executors and Administrators* ⟸518.]

A Court of the State of North Carolina has no jurisdiction to remove an executor holding his office under the will of a testator who was domiciled in South Carolina at the time of his death, and whose letters testamentary were issued by a Court of Probate of the State last named.

[Ed. Note.—Cited in Martin v. Fowler, 51 S. C. 174, 28 S. E. 312; Heyward v. Williams, 57 S. C. 241, 35 S. E. 503.

For other cases, see Assignments, Cent. Dig. § 129; Dec. Dig. ⟸70; Executors and Administrators, Cent. Dig. § 2309; Dec. Dig. ⟸ 518.]

[*Executors and Administrators* ⟸518.]

To an action on a sealed note given to a South Carolina executor, an answer alleging that the note was given in North Carolina for rent of land lying in that State, that the payee had been removed from the executorship by a Court in North Carolina and an administrator with the will annexed appointed in his place, and that the note had been paid to the administrator, states no valid defense to the action.

[Ed. Note.—Cited in Dial v. Gary, 14 S. C. 580, 37 Am. Rep. 737.

For other cases, see Executors and Administrators, Cent. Dig. §§ 2299–2309; Dec. Dig. ⟸ 518.]

*61

*Before Mackey, J., at Lancaster, February Term, 1875.

Action by J. W. Tillman, plaintiff, against W. W. Walkup, defendant, on a sealed note for $130, dated January 29th, 1870 given by the defendant to B. J. Cureton, and assigned by him on February 21st, 1870, to the plaintiff.

The answer alleged that the note was given by the defendant and Samuel Givens, as sureties of one M. Rone, to B. J. Cureton as executor of the last will and testament of W. J. Cureton, deceased, for rent of land situate in the State of North Carolina, belonging to the estate of the testator; that defendant resides in the State last named, and that there was no proper and valid assignment of the note, and if it was transferred, as alleged by the plaintiff, the transfer was pretensive and collusive as between plaintiff and the executor; and for a further defense, that, under proceedings had in the Court of Common Pleas of Union County, in the State of North Carolina, B. J. Cureton was removed from his office as executor of W. J. Cureton, deceased, and John N. Davis appointed administrator with the will annexed of the estate of the testator in said last named State, with sole power to manage the estate and collect all debts due by parties therein; that all the obligors in the note were residents of North Carolina, and that they had paid the note to Davis, the administrator.

At the trial the plaintiff proved the assignment and closed. The defendant then offered evidence to sustain the allegations of the answer, but His Honor held that the only issue in the case was as to the execution of the assignment that the answer disclosed no other defense to the action, and on that ground he excluded the evidence, and the defendant excepted to his ruling.

The jury found for the plaintiff the amount due on the note, and the defendant appealed.

Allison, Wylie, for appellant.

Moore, contra.

February 27, 1876. The opinion of the Court was delivered by

MOSES, C. J. If the defense set up could have availed, had the action on the note been brought by B. J. Cureton, the payee, any collusion in its transfer between him and the respondent could not have prejudiced the appellant, and the testimony proposed to

*62

that *end was properly rejected. The points submitted will, therefore, be considered as if the complaint had been in the name of Cureton, the payee. The appointment of Davis by the Court in North Carolina as administrator with the will annexed of W. J. Cureton, and the removal of B. J. Cureton, the executor under the will, to whom letters testamentary had been granted by a competent jurisdiction in this State, within which the testator was domiciled at the time of his death, in no way affected the rights of Cureton as executor in South Carolina. Our Courts hold "that neither the ordinary nor any other tribunal has the power to discharge an executor, though the Courts of Equity may take the assets out of his hands where they are in danger of being wasted." —Osborn v. Black, Sp. Eq., 431; Haigood v. Wells, 1 Hill Eq., 60.

Whatever may be the effect of the order made by the Court of North Carolina, it is without force beyond its jurisdiction, and cannot affect assets in the hand of the executor in South Carolina, on which no process of the foreign Court could attach or operate.

Chancellor Kent, in Murrell v. Dickey, (1 John. Ch., 155,) says: "It is well settled that we cannot take notice of letters testamentary, or of administration granted abroad, and that they give no authority to sue here. It is not only the law in England, but it has been very generally adopted in this country." To the same effect are the authorities in this State.—See Conover & Co. v. Chapman, 2 Bail., 436; Collins, administrator, v. Bankhead & Parker, 1 Strob., 25; Kirkpatrick v. Taylor, 10 Rich., 393; King v. Clark, 2 Hill Eq., 611. What may have been the consequence of a voluntary payment to Davis, the administrator in North Carolina, if the debts had been over due to the testator,

in his lifetime, and the note in the hands of the said administrator, it is not necessary to consider. The note here is payable, however, to B. J. Cureton. It was never in the possession of Davis, and though on its face expressed to be in right of the payee as executor, it could not have descended to Davis, even if he had been duly appointed in this State the administrator de bonis non with the will annexed of the testator. Cureton, the payee, held the legal right and title, independent of his character as executor. At his death it would, by operation of law, pass not to the administrator de bonis non of the testator, but to his own executor or administrator, who alone could maintain an action for its recovery.—Williams v. Seabrook, 3 McC., 371; Smith v. Carrere, 1 Rich. Eq., 123. It is true that a liability would attach

*63

*on such executor or administrator to account for its proceeds to the administrator de bonis non of the testator, W. J. Cureton, and a Court of equity, on behalf of his creditors and legatees, might pursue it if traced to the possession of one who received it with notice of the trust by which it was affected. That the maker of the note resided in North Carolina when it was executed, is of itself no bar to the right of action by the executor in South Carolina, if he finds him within the jurisdiction of its Courts. The debt was one to the executor here. It was a personal contract with him. If considered an asset held in his official relation, it was subject to the debts of the testator in the order and priority prescribed by the laws of this State, and Davis, who never held the note, could not by his acceptance of payment divert the proceeds from the appropriation to which they were so subject. As was said by Chancellor Kent in Doolittle v. Sims, (7 John. Ch., 47,) "administration only extends to the assets of the intestate in the State in which it was granted; if it were otherwise, the assets might be drawn out of the State to the great inconvenience of the domestic creditors, and be distributed on very different terms, according to the laws of another jurisdiction."

The motion is dismissed.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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7 S. C. 63

STATE v. WATSON.

(Columbia. Nov. Term, 1875.)

[*Criminal Law* ⇐675.]

Evidence on the part of the State to contradict testimony given by the prisoner to prove an alibi is not cumulative because it tends indirectly to strengthen the evidence in chief to fix the offense on the prisoner.

[Ed. Note.—Cited in Weaver v. Whilden, 33 S. C. 193, 11 S. E. 686.

For other cases, see Criminal Law, Cent. Dig. § 1607; Dec. Dig. ⇐675.]

[*Larceny* ⇐12.]

Where the evidence to sustain an indictment for larceny was that the money, the subject of the larceny, was snatched by the prisoner from the prosecutor's hands and made use of by him, and there was other evidence tending to show a felonious intent: *Held*, That it was not error to refuse to charge that the evidence proved only a trespass, and that if any offense was proved it was robbery and not larceny; nor that it was error to charge that if the jury believed the money was taken by surprise and converted by the prisoner to his own use it was larceny.

[Ed. Note.—Cited in State v. Watson, 7 S. C. 69.

For other cases, see Larceny, Cent. Dig. § 23; Dec. Dig. ⇐12.]

[*Criminal Law* ⇐572.]

Where the defense is an alibi, it is error to charge that there must be no halting, but the defense must be proven beyond a reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1290; Dec. Dig. ⇐572.]

[*Larceny* ⇐68.]

[Whether an act charged as larceny was perpetrated with felonious intent is a question for the jury.]

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 180; Dec. Dig. ⇐68.]

*64

*Before Cooke, J., at Greenville, ———— Term, 1875.

Indictment against Ed. Watson, alias John F. McCord, for grand larceny.

The case stated in the brief for this Court is as follows:

This was an indictment for grand larceny. On his arraignment, the defendant pleaded not guilty.

The Solicitor introduced evidence to the effect that some time in January, 1875, the defendant met one James Downs in the city of Greenville, and asked him if he did not wish to buy some whiskey. That Downs replied that he would take one gallon at one dollar and a half, and then went off to sell some cotton which he had brought to market. That soon after, the defendant came to him again and told him where the whiskey was, and the two started together for the place designated. That on the way they met a colored man and saw him drop something from his pocket. Defendant picked it up; the colored man came back and defendant said to him: "You have lost something, have you not?" The colored man replied: "Yes, I have lost a little trick, and there was a ribbon in it." Defendant said that there was no ribbon in it, and the colored man offered to bet fifty dollars on it. Defendant wanted Downs to bet, and he would not. Defendant then said: "Pay me for the whiskey, it is close by." Downs took out his money, and defendant snatched it all from him except a few small bills, and proceeded to bet with the colored man. Downs insisted that he should not do it, but he persisted and lost it. Defendant then told Downs that he would pay him his money back if he would walk

back to the store, where he could borrow the money. They went to a store; but defendant failed to borrow the money and proposed to give his note for it. In pursuance of this proposition, he wrote on a piece of paper what purported to be a note and gave it to Downs; it was not signed.

The defendant introduced a number of witnesses to prove that he was not in Greenville at the time of the occurrence, which was fixed, but that the witnesses had seen him in Newberry on that day.

In reply, the Solicitor introduced a witness to prove that he had seen the parties together in the store on the evening in question and had seen the writing.

The defendant's attorney objected to this evidence as cumulative and not in reply. The Court overruled the objection, to which ruling the defendant's attorney excepted.

*65

*At the close of the evidence for the State, the defendant's counsel requested the Court to charge: 1. That the evidence proved only a trespass; and, 2. That if any offense was proved, it was robbery and not larceny. The request was denied, and His Honor charged that if the jury believed the money was obtained by surprise and defendant converted it to his own use, it was larceny. The defendant excepted to the rulings.

His Honor also charged the jury that where the defense is an alibi, there must be no halting, but that the defense must be proven beyond a reasonable doubt. To this portion of his charge the defendant's attorney excepted.

The jury returned a verdict of guilty.

The defendant appealed on the following grounds:

1. Because the offense proven was nothing more than a trespass.

2. Because, if any criminal intent was shown, the offense was robbery and not grand larceny.

3. Because it is respectfully submitted that His Honor the presiding Judge erred in admitting cumulative evidence on the part of the State in reply.

4. Because His Honor the presiding Judge charged the jury that where the defense is an alibi, there must be no halting, but that the defense must be proven beyond a reasonable doubt, which, it is respectfully submitted, was error.

5. Because the verdict was otherwise contrary to the law and the evidence.

Jones, Jones & Mower, Earle & Wells, for appellant:

I. The person who took the money did so in the presence of the owner, and it was not taken secretly. There is nothing to indicate that it was obtained with a felonious intent. It is the intention which distinguishes larceny from trespass.—2 Russell, 2, note. The fact must be done clandestinely.—2 Russell, 7; 2 Wharton, 1876.

II. Clearly, the money was not taken clandestinely. If force was used, and a criminal intent proven, it was robbery, not larceny.

III. That cumulative evidence is not admissible in reply, is well settled. Downs, the prosecutor, had sworn that defendant went to a certain store to give a note. The defendant relied upon an alibi, and the introduction by the State of a witness afterwards to confirm the prosecutor on the question of identity was clearly cumulative.

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*IV. Evidence of an alibi might well create a reasonable doubt; and if it did, the defendant was entitled to the benefit of it. It is respectfully submitted that the language of the charge was too strong. An alibi need not be proven "beyond a reasonable doubt." —Adams v. State, 42 Ind., 373; 2 Green's Criminal Reports, 686.

Blythe, Solicitor, contra.

March 1, 1876. The opinion of the Court was delivered by

WRIGHT, A. J. If the error assigned in the charge of His Honor the presiding Judge was confined to the admission of the testimony offered by the State, in reply to that submitted on the part of the defendant, and to the instruction which he gave to the jury in regard to the character of the offense, to be determined by the circumstances which attended its commission, we could not have interposed.

When the testimony was offered to sustain the alibi on which the appellant rested his defense, it was clearly the right of the State in reply to disprove the allegations of the witnesses who were introduced to establish it. It did not add force to the facts on which the State relied to maintain the charge preferred by the indictment, but was offered to disprove the defense set up. If its effect indirectly strengthened the testimony submitted by the State to fix the offense on the appellant, it was no more cumulative than if the defense had been that the money alleged to have been stolen was not the property of Downs, as laid in the indictment, but belonged to some other person, and the Solicitor had offered testimony contradictory thereof. The evidence was competent, because it was in direct reply to the defense set up. Nor did the presiding Judge err in refusing to charge that the offense was only a trespass.

He properly left it to the jury "to determine from the testimony that if the money was taken by surprise, and the defendant converted it to his own use, it was larceny."

The motives with which the goods are taken is an essential inquiry for the jury. To make out the offense of larceny, there must be a felonious purpose. The taking must be done animo furandi—with a view of depriving the true owner of his property and converting it to the use of the offender. It

may be by force or surprise, and the instruction of the Court is in conformity with what may be found laid down in Roscoe's Evidence in Criminal Cases, p. 469. A new trial must be ordered, however, on the exception to the

*67

charge *of the Court, which was as follows: "Where the defense is an alibi, there must be no halting, but the defense must be proved beyond a reasonable doubt."

This would seem to be a reversal of the rule by which, in criminal cases, the law requires a jury to be governed.

The defendant is not bound to prove his innocence beyond all reasonable doubt. This would compel a solution of a reasonable doubt created by the evidence against the defendant; whereas if such a doubt of his guilt follows from the whole testimony, he is entitled to its benefit.

The administration of the criminal law is always with humanity to those charged with its violation, and it would fall far short of the reverence in which it is justly held, if, in a case of conflicting testimony the jury are obliged to convict because the defendant may not have proved his innocence beyond a reasonable doubt.

The defense through an alibi forms no exception to the general rule. Though, as Mr. Justice Foster says, "it ought to be heard with uncommon caution," still, when made out, "though negative, it is really positive evidence."

The motion for a new trial is granted.

MOSES, C. J., and WILLARD, A. J., concurred.

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7 S. C. 67

STATE v. WATSON.

(Columbia. Nov. Term, 1875.)

[*Larceny* ⇦19.]

To sustain an indictment for larceny in stealing money, the evidence was that the prisoner snatched the money from the prosecutor's hands and handed it to a third party, who walked off with it: *Held*, That it was not error to refuse to charge that the evidence proved only a trespass, and that if any offense was proved it was robbery and not larceny.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 46; Dec. Dig. ⇦19.]

[*Larceny* ⇦12.]

Nor was it error to charge that if the jury believed the money was taken by surprise, and that the defendant converted it to his own use, it was larceny.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 23; Dec. Dig. ⇦12.]

Before Cooke, J., at Greenville, Term, 1875.

Indictment against Edward Watson, alias John F. McCord, for grand larceny.

The case is stated in the brief, which is as follows:

*68

*This was an indictment for grand larceny, and the defendant, on his arraignment, pleaded not guilty.

The State introduced evidence to show that on the 20th day of January, 1875, the defendant met one B. G. Hamly, in the city of Greenville, and asked him if he wanted to buy some whiskey. Hamly said that he did, and would get something to put it in. In about an hour the defendant came back and asked Hamly if he was ready. Hamly replied that he was, and they started together to get the whiskey. That on the way they saw a colored man, who dropped something with a red string in it, which defendant picked up. That soon after the colored man came back looking for what he had dropped, and defendant told him that he had it. That defendant and the colored man then began disputing as to whether or not there was a ribbon in it, and finally proposed to bet concerning it. That defendant asked Hamly if he had any money, and that the latter replied that he had. That defendant said, "Let me see it." Hamly then took out his money, amounting to $46, and defendant snatched it from him and handed it to the colored man, who walked off.

Defendant then proposed to repay Hamly, and they walked on towards the place where defendant said the whiskey was. Defendant stopped two or three times to talk with people whom he met, and Hamly, feeling assured that he would not get his money, left him.

At the close of the testimony, the defendant asked the Court to charge the jury:

1. That the evidence proved only a trespass.

2. That, if criminal, the offense was robbery and not larceny.

The Court refused so to charge, but charged that if the jury believed that the money was obtained by surprise and that defendant converted it to his own use, it was larceny.

Defendant excepted.

Verdict, "Guilty." Sentence, ten years in State Penitentiary.

The defendant appealed upon the following grounds:

1. Because the offense proven was nothing more than a trespass.

2. Because, if any criminal intent was shown, the offense was robbery and not grand larceny.

Jones, Jones & Mower, Earle & Wells, for appellant.

Blythe, Solicitor, contra.

*69

*March 1, 1876. The opinion of the Court was delivered by

WRIGHT, A. J. The circumstances of this case are precisely like those in that of the

State v. The Same Person, tried at the same term of the Court, except here the defendant did not set up and rest his defense upon an alibi, as the defendant did in that case.

The motion for a new trial must be dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

7 S. C. 69

LOYNS v. TEDDER.

(Columbia. Nov. Term, 1875.)

[*Agriculture* ⇐12.]

An agricultural lien not recorded within thirty days, though afterwards recorded, is good between the parties, and may be enforced by warrant issued by the Clerk.

[Ed. Note.—Cited in Wingo v. Parker, 19 S. C. 16; Davis v. Days, 42 S. C. 71, 19 S. E. 975; Nexsen v. Ward, 96 S. C. 323, 80 S. E. 599.

For other cases, see Agriculture, Cent. Dig. § 41; Dec. Dig. ⇐12.]

Before Townsend, J., at Chambers, at Marion, December, 1874.

On the 4th of February, 1874, David Tedder gave to A. W. Loyns a lien under the Act to secure advances for agricultural purposes. It bore date on the day it was given, and was recorded in Marion, where Tedder resided, on the 26th of May, 1874.

On the 26th of November, 1874, on the affidavit of Loyns, a warrant to the Sheriff to seize the crop of Tedder was issued by the Clerk of the Court, and this was a motion, made on behalf of Tedder, to set aside the warrant, on the grounds:

1. Of payment.

2. That the lien was not recorded within thirty days, as prescribed by the Act.

His Honor denied the motion on the first ground and sustained it upon the second.

Loyns appealed to this Court.

McIver, for appellant.

Harllee, contra.

*70

*March 1, 1876. The opinion of the Court was delivered by

WRIGHT, A. J. The important question which is presented for the consideration of this Court, is whether a contract made as provided by the Act "to secure advances for agricultural purposes" can be enforced between the persons where the rights of creditors or third parties are not involved, when such agreement has not been recorded within the time prescribed by the Act.

The recording of the instrument in writing is no part of the agreement between the contracting parties: it is simply notice to and for the protection of creditors or third parties. The full and required execution of the agreement between the contracting parties is to them what the recording is to creditors or third parties—explicit notice; and though the instrument may not be recorded within the time required by statute, when reduced to writing, signed and delivered, as between the parties, the contract is complete, valid, binding, and should be enforced as between them.

This doctrine seems to have been well adjudicated and settled. The Act of 1785, (7 Stat., 232,) required as follows: "That no conveyance of land, tenements or hereditaments, within this State, shall pass, alter or change from one person to another any estate or inheritance in fee simple, or any estate for life, nor shall any greater or higher estate made or take effect in any person or persons, or any use thereof to be made by bargain or sale, lease or release, or other instrument, unless the same is made in writing, signed, sealed and recorded in the Clerk's office of the County where the land mentioned to be passed or granted shall lie, in manner following, that is to say: if the person or persons who shall make and seal such instrument of writing shall reside within the State at the time of making, signing and sealing the same, then the recording shall be within six months from the signing, sealing and delivering," &c. Under this Act, where a deed was not recorded within the time prescribed by the same, in the case of McFall v. Sherrard, (Harp., 296,) it was held that the actual notice supplied the omission to record within six months. Also, by the Act of 1823, (6 Stat., 212,) as to the recording of marriage settlements, that statute says "that no marriage settlement shall be valid until recorded in the office of the Secretary of State, and in the office of the Register of Mesne Conveyance of the District where the parties reside: Provided, That the parties shall have three months to record the same; and if not recorded within three months, the same shall be null and void."

*71

*In the case of Givens v. Branford, (2 McC., 152 [13 Am. Dec. 702]) which arose under this Act, it was held that a marriage settlement, though not recorded, protects the property settled against the claims of a creditor who had received explicit notice of the settlement previous to his contracting. The learned Judge who delivered the opinion of the Court in that case has cited sufficient authority to clearly show that the views expressed in this opinion are fully sustained.

The instrument in question was recorded, but not within the time prescribed by the statute; but having been recorded, and no other lien having been given upon respondent's crop, and no creditor or creditors intervening, it was competent for and the duty of the Clerk of the Court to proceed, accord-

ing to law, to enforce the conditions of the agreement.

The motion is granted.

MOSES, C. J., and WILLARD, A. J., concurred.

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7 S. C. 71

EX PARTE WILLIAMS, IN RE CAMPBELL v. COUNTY OF CHARLESTON.

(Columbia. Nov. Term, 1875.)

[*New Trial* ⇐136.]

A verdict obtained by a plaintiff in a regular course of proceeding cannot be vacated and set aside by the Circuit Judge upon an ex parte application and without notice to the plaintiff.

[Ed. Note.—Cited in Steele v. C., C. & A. R. Co., 14 S. C. 331.

For other cases, see New Trial, Cent. Dig. § 276; Dec. Dig. ⇐136.]

[*Appeal and Error* ⇐110, 238.]

An order of the Circuit Court setting aside a verdict for the plaintiff without notice to him is appealable, and no motion need be made in the Circuit Court to set aside the order.

[Ed. Note.—Cited in State v. Port Royal & A. R. R. Co., 45 S. C. 468, 23 S. E. 380; Daughty v. Northwestern R. Co., 92 S. C. 365, 75 S. E. 553; Stokes v. Murray, 94 S. C. 21, 77 S. E. 712.

For other cases, see Appeal and Error, Cent. Dig. §§ 740, 1382; Dec. Dig. ⇐110, 238.]

[This case is also cited in Mordecai v. County of Charleston, 8 S. C. 102, without specific application, and in Wheeler v. County of Newberry, 18 S. C. 135, as an example of the practice in suing counties of bringing action directly in name of county.]

Before Reed, J., at Charleston, April, 1875.

F. Campbell brought an action by summons and complaint against the County of Charleston to recover the sum of $7,594.96, alleged to be due by the defendant to the plaintiff, on certain claims which he held against the County. C. W. Buttz, Esq., Solicitor of the First Circuit, appeared for the defendant and filed an answer on its behalf. The case was placed on Docket No. 1, and during the present term of the Court it came on for trial. A verdict was rendered for the plaintiff and entered by the Clerk on the minutes.

*72

*A number of other cases, by other plaintiffs, against the same defendant, in which the proceedings were the same, except that in some the service of the summons and complaint was made upon the County Commissioners, were heard at the same time and verdicts found for the plaintiffs.

The verdicts were rendered on the 25th of February, and on the 9th of April G. W. Williams & Co., Alva Gage and six other persons and firms filed a petition to the Court, in which they stated:

"That they are citizens of the County of Charleston aforesaid, and are the owners and holders of property, both real and personal, therein.

"That the said property so owned and holden by them is liable to be taxed for the payment of all judgments and other just claims against the said County.

"That at the February Term, A. D. 1875, of the said Court, to wit, on or about the day of February, in the said term, verdicts were rendered against the said County, in all about , the sums recovered thereon amounting in the aggregate to the sum of , a list of which verdicts is hereto appended.

"That your petitioners are informed and believe that the said verdicts were irregularly and improperly recovered against the said County, because:

"1. The complaints, in many of the cases in which verdicts were recovered as aforesaid, are wholly insufficient and irregular, inasmuch as they allege and aver that the said County is indebted to the plaintiff in a certain sum, without setting forth nature and consideration of said indebtedness, nor that the claims so sued on have been presented to and audited by the Board of County Commissioners in the manner provided by law.

"2. That the summons and complaint in said cases were none of them personally served upon the Board of County Commissioners, but in some few cases were served upon the Chairman of the Board alone, and in the great majority of said cases the Board of County Commissioners had no notice whatever that such claims were in action until after said verdicts were recovered, and could therefore, take no steps to contest the same.

"3. That one C. W. Buttz, assuming to act as the attorney of the Board of County Com-

*73

missioners, did, in the majority of said *cases, accept service thereof for the said Board, and did afterwards allow verdicts to be recovered therein, without contest, against the said County and without the knowledge and consent of the said Board of County Commissioners; but that the said C. W. Buttz was not the attorney of the said Board of County Commissioners, and assumed so to act without their authority or consent, and that all his actings in such capacity are null and void and of no force and effect to bind the said County.

"4. That in many of said cases no answers were filed by said C. W. Buttz; and in such cases as answers were put in by him denying the liability of the County and the right of the plaintiffs to recover therein, such answers were withdrawn by the said C. W. Buttz at the trial and verdicts were allowed to be taken therein against the County without the knowledge, assent or authority of the said Board of County Commissioners.

"5. That in many cases in which verdicts were recovered as aforesaid, no vouchers or other proof of said claims sued on were fil-

ed with the complaints or given in evidence.

"6. That many of such claims as were produced in evidence or filed with the complaints in said cases have never been audited, allowed or approved by the said Board of County Commissioners.

"7. That interest was claimed and recovered in said verdicts upon amounts which had never been examined, approved or allowed by the said Board of County Commissioners.

"8. That, as your petitioners are informed and believe, many of the claims upon which verdicts have been rendered, as aforesaid, against the County are fraudulent, illegal, null and void, and that the same can be shown and proven if only opportunity is afforded for their careful examination.

"And these petitioners further show unto your Honor that the said verdicts, as they are advised and believe, have been recovered through the 'mistake, inadvertence, surprise or excusable neglect' of the Board of County Commissioners in not properly defending the same, or through the improper and unwarrantable conduct of the said C. W. Buttz in assuming to act as the attorney of the said Board without authority as aforesaid, to the manifest injury and damage of your petitioners.

"And your petitioners further show unto your Honor that they are advised and believe that the said County cannot be bound by

*74

*the neglect and inadvertence of the said Board of County Commissioners, or by the unwarranted and unauthorized acts of the said C. W. Buttz as aforesaid, to the great injury of the citizens of said County.

"Wherefore your petitioners pray unto your Honor to set aside the verdicts so recorded, as aforesaid, against the County, and to grant new trials in the said cases, and to grant leave to the Board of County Commissioners to put in proper answers to the complaints in the said cases, and to defend the same."

The Board of County Commissioners adopted a resolution to concur in the foregoing petition and in the application to the Court to set aside the verdicts and grant new trials, and two of them—W. Bell Smith and Stephen Brown—made an affidavit, in which they declared, in effect, that Mr. Buttz had no authority to appear for or represent the County in the cases referred to in the petition, and that many of the claims sued on, wherein verdicts have been recovered, are fraudulent and void, and that they have a valid and sufficient defense thereto.

On the same day the petition was filed Mr. Buttz addressed a letter to His Honor the Circuit Judge as follows:

"In answer to the petition of G. W. Williams and others, and W. Bell Smith and Stephen Brown, two of the County Commissioners, so far as relates to the statement that I had no authority to represent the County of Charleston in the suits now pending in Court, I have the honor to state that I was not only employed by the old Board of County Commissioners, but the new Board had never disputed my right to act for the County, so far as I am concerned, until this day; that the statement signed by Williams, Brown and Smith is not only not true, but Smith and Brown well knew that, on the 1st day of February, 1875, they, each of them, swore to the answers that I had prepared to a majority of the cases then pending against the County; that answers were not withdrawn in more than two or three cases out of sixty, and in those cases the plaintiffs were represented by leading members of the bar, and no defense could be made: that after the cases were tried, about the 6th of last month, I presented my bill, itemized, giving the title of each case in these cases, which bill was approved and paid by the Board of County Commissioners—Messrs. Brown and Smith joining Mr. Cunningham in approving

*75

and paying the same. I have *no objection to the judgments being set aside, but object to their being set aside on the ground that I was not authorized to appear for the County Commissioners or for the County of Charleston in these cases. I regret very much that men of standing and character should sign such a paper."

On the 13th of April His Honor Judge Reed filed the following order:

On hearing and filing the petition of George W. Williams & Co., and others, citizens and taxpayers of Charleston County, together with the affidavit of the County Commissioners and the resolution of the Board of County Commissioners, and it appearing therefrom that the verdicts recovered against the County at this term of the Court were improvidently rendered, because of the mistake, inadvertence, surprise or excusable neglect of the County Commissioners, and that the said cases should be more thoroughly investigated, it is ordered that the verdicts recovered against the said County of Charleston, in the above mentioned cases, be set aside and vacated, and that the County Commissioners put in proper answers and defend the the same. And it also appearing that the trial of these causes requires the examination of numerous and long accounts, it is further ordered by the Court, upon its own motion, that the said cases be referred to A. H. Brown, Esq., as Special Referee, to hear and decide all the issues of law and fact, with leave to report any special matter.

Three of the plaintiffs, to wit, Francis Campbell, J. J. Borger and M. N. Waring, appealed from the above order upon the following grounds:

1. Because the said order is in violation of the laws of the State of South Carolina, the parties whose rights are taken away by the same not having been made parties in the

cause, the proceedings being entirely ex parte, and the order having been taken without notice, not even a rule to show cause having been served.

2. Because the said proceedings are irregular, the causes of these appellants having been brought to trial at the regular term of the Court, and, on the hearing, a verdict having been rendered upon each case by a jury in favor of the plaintiff, and no exception having been taken at the trial, and no

*76

objection made at the time of *the entry of the verdicts in the minutes of the Clerk by the defendant's attorneys, and no motion made for a new trial, it is beyond the power of the Circuit Judge to disturb the verdicts so rendered unless all the parties in interest are notified and allowed an opportunity of protecting their rights made under the forms prescribed by law.

3. Because the said order is in violation of Section 11, Article I, of the Constitution of South Carolina, which declares "that the right of trial by jury shall remain inviolate."

4. Because the said order is in violation of the fifth and seventh amendments of the Constitution of the United States, which declare "that no person shall be deprived of life, liberty or property without due process of law. And that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

5. That the said order is wholly erroneous and contrary to law.

[For subsequent opinion, see Mordecai v. County of Charleston, 8 S. C. 100.]

Mordecai, Rutledge & Young, for appellants.

Miles, contra.

March 9, 1876. The opinion of the Court was delivered by

WRIGHT, A. J. The verdicts obtained in these cases were by due process of law, as all the rules and formalities incident to obtaining proper and legal verdicts were complied with.

By these verdicts the appellants obtained rights which cannot be taken from them except they be made parties to the action which seeks to divest them of such acquired rights. The verdicts could only be disturbed by some direct proceedings to that end, on proper motion.

The appellants or their representatives should have had due notice of such motion and the grounds upon which it was to be based, and all the rules of procedure provided by law in reference to new trials should have been complied with.—Ingram v. Belk, 2 Rich., 3.

It is clear from the record in these cases that there was neither "mistake, inadvertence or excusable neglect." All the parties to the action were properly represented; hence Section 197 of the Code has no application to them.

*77

*It is unmistakable that Mr. Buttz was the legally-constituted attorney of the County Commissioners, as appears from the correspondence between him and Judge Reed and other evidence set forth in the brief. He was employed by and labored for them, and received pay from them for services rendered.

The order of reference in these cases is erroneous, for, if carried into execution, it would deprive the parties of a trial by jury, which the appellants claim, and which they are entitled to by the Constitution of the State.

It is claimed that the appellants have no standing in this Court, for the reason that they did not move the Court below to set aside the order setting aside and vacating the verdicts in the several cases, and the case of Earle v. Stokes (5 S. C., 336,) is cited as authority.

In that case the appellant, Stokes, was ordered by the Court to do a certain act, which act he refused to do, and treated the order made by the Court as a nullity.

For such disregard of the order he was attached for contempt, and from that (the second order) he appealed, and it was held by this Court that where an order is made by the Court of Common Pleas in term time, though irregularly made, it cannot be treated as a nullity.

When the Court of Common Pleas makes an order, as prescribed or mentioned by Section 11 of the Code, an appeal from such an order may be taken, and the party aggrieved by such order is bound to take notice of it, whether it be regularly made or otherwise, if the judgment of this Court upon it is desired.

Notice may be taken of such order by motion to set aside or by appeal directly from it.

It is stated by counsel for respondent that the action of the Court below in setting aside and vacating the verdicts rendered in these several cases was "based upon information derived from an investigation directed by the Court to be made by the committee of the grand jury and their assistant," and such "assistant" of the grand jury was appointed by the Court.

It is an unheard-of practice for a Court of justice to appoint an assistant to the grand inquest of a County. It is a practice without precedent, warrant of law or foundation in justice, and should not be sustained.

*78

*The motion is granted and judgment in these several cases should be entered.

MOSES, C. J., concurred.

WILLARD, A. J. I concur in the judgment of the Court upon the ground that the

order appealed from was erroneous for want of proper notice to the parties prejudiced by it and an opportunity to be heard in opposition to it.

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7 S. C. 78

COUNTY COMMISSIONERS v. WINNSBORO NATIONAL BANK.

(Columbia. Nov. Term, 1875.)

[*Counties* ⇐158.]

The County Commissioners and the School Commissioner cannot maintain an action against one holding as bailee a sum of money belonging to the County treasury to compel him to make distribution of the same among the different departments of the government as if it were assets in equity subject to the jurisdiction and orders of the Court.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 221; Dec. Dig. ⇐158.]

[*Constitutional Law* ⇐74.]

The administration of the funds of a public treasury belongs to the executive department of the government, and the judicial department has no jurisdiction to seize such funds and distribute the same under its orders.

[Ed. Note.—Cited in State ex rel. Scott v. Smith, 7 S. C. 282; Sanders v. County Com'rs, Id. 361; State ex rel. Marshall v. Starling, 13 S. C. 266.

For other cases, see Constitutional Law, Cent. Dig. § 124; Dec. Dig. ⇐74; States, Cent. Dig. § 120.]

[*Costs* ⇐90.]

County Commissioners have no right to demand and receive of the County Treasurer a sum of money in gross; their duty is simply to audit legal demands upon the County and certify the same to the County Treasurer for payment. The County Treasurer is the legal custodian of the County funds, and the duty of disbursing the same is on him.

[Ed. Note.—Cited in Sanders v. County Com'rs, 7 S. C. 363, 364.

For other cases, see Costs, Cent. Dig. §§ 350–355; Dec. Dig. ⇐90.]

Before Mackey, J., at Fairfield, January Term, 1875.

This was an action by Henry Jacobs and others as County Commissioners of Fairfield County, and W. J. Crawford as School Commissioner of the same County, plaintiffs, against the Winnsboro National Bank, defendant.

The summons was for the relief demanded in the complaint, and the complaint, after stating in the first and second paragraphs thereof that the plaintiffs were the County commissioners and the School Commissioner of Fairfield County, and that the defendant is a banking association duly organized, &c., proceeded as follows:

That on the 30th day of March, A. D. 1874, one J. S. Fillebrown took from the safe of the County Treasurer of Fairfield County a package of money, said to contain about eight

*79

thousand dollars; *that he has deposited said package with the Winnsboro National Bank, the defendants, and intends to carry the same to the State Treasury.

That the money contained in said package belongs to the County of Fairfield, and has been appropriated for County and school purposes, having been raised by taxation for County purposes.

Wherefore the plaintiffs demand judgment against the defendant; that it be required to hold said money on deposit subject to the further order of this Court, until a legal inquiry and determination of the ownership of said money may be made.

On the 7th May, 1874, an order was made by the Circuit Judge as follows:

"On hearing the complaint herein, and the affidavit filed therewith, no answer or demurrer having been filed, and upon hearing the suggestions of William Nelson, County Treasurer, of William J. Crawford, School Commissioner, and of Henry Jacob, Chairman of the Board of County Commissioners, on motion of Mr. Rion, attorney for the plaintiffs, and by request of Mr. Attorney General Melton, it is ordered that the Attorney General be made a party to these proceedings; and that it be referred to C. C. Macoy, Esquire, as Special Referee to take testimony and report touching the ownership of the funds referred to in the complaint herein; that he hold said reference without delay at Fairfield Court House, and to make his report to the Judge of this Court, at Chambers."

"I acknowledge service of this order, and waive any amendments of pleading or other formalities for the purpose of making me a party." [Signed by the Attorney General.]

In pursuance of the above order the Referee reported:

"This Referee finds that on the 30th day of March, 1874,—the day on which H. A. Smith, County Treasurer of Fairfield County, was arrested—the funds in question were taken from the safe of said County Treasurer by J. S. Fillebrown, Clerk of the Comptroller General, for safekeeping, and by him were deposited with the Winnsboro National Bank, the defendant; that on the 31st day of March, 1874, the complaint in this action was filed, and the said bank was, by order on that day granted, enjoined from paying out said funds until the further order of this Court. In

*80

pursuance of the same *order, the funds were counted by A. M. Mackey, Trial Justice, by the School Commissioner, and by the Chairman of the Board of County Commissioners, and were found to be—

Currency	$8,526 25
Bills receivable	8 00
	$8,534 25

"These funds having arisen from taxes collected in Fairfield County, their proper place is in the safe of the County Treasurer, as it

would have been if Smith had turned them over to his successor, and they must be so considered; for I hold, as matter of law, that the acts of Fillebrown in no way or manner had any effect, either as regards the ownership of these funds or the rights or interests of claimants thereof."

He further reported as a finding of fact that the proportion of said fund due to the State was $298.74, the proportion due the Board of County Commissioners was $1,287.23, and the proportion due the School Commissioner was $6,948.28.

The Attorney General excepted to the report, on the ground that the Referee should have reported the whole fund as due and belonging to the State.

On the 28th January, 1875, the following final order was signed by His Honor the Circuit Judge:

On hearing the report of the Special Referee herein, the exceptions thereto, and the argument of counsel, it is ordered, on motion of Mr. Rion, plaintiffs' attorney:

I. That the exceptions to the Special Referee's report herein be overruled, and that said report be confirmed.

II. That the Winnsboro National Bank, the defendant, do turn over, out of the funds in question, the sum of $298.74, being the amount reported to be due the State of South Carolina, to William M. Nelson, as County Treasurer of Fairfield County.

III. That the said County Treasurer do, out of said sum, first pay the costs and disbursements of this action, and do remit the balance to the State Treasurer of the State of South Carolina, for the use of the State.

IV. That the said Winnsboro National Bank, the defendant, do turn over to the said County Treasurer, of the funds in question,

*81

the *sum of $1,287.23, the amount reported to be due to the Board of County Commissioners of Fairfield County, to be held by him subject to the orders of the Board of County Commissioners, to be disbursed by them according to law.

V. That the said Winnsboro National Bank, the defendant, do turn over to the said County Treasurer, of the funds in question, the sum of $6,948.28, the amount reported to be due the School Commissioner of Fairfield County, to be placed by him to the credit of the school fund of Fairfield County, to be drawn out in pursuance of law.

VI. That the said Board of County Commissioners of Fairfield County, and School Commissioner, do each pay to James H. Rion, plaintiffs' attorney, by order on the said County Treasurer, five per centum of the amount reported due them, as aforesaid, as a fee for his services herein, to be paid by the County Treasurer out of the respective funds hereinbefore specified.

The Attorney General appealed on the grounds—

1. Because the said judgment gives relief not asked for in the complaint; and there being no answer or other pleadings raising proper issues, plaintiffs have no right to any relief other than that demanded in the complaint.

2. Because the said plaintiffs have no right or interest in the fund to warrant the judgment pronounced in said action.

3. Because, if any judgment could have been made in said action respecting the ownership of said fund, the judgment of the Court should have been that the State of South Carolina was entitled to the tax collected for State purposes, to wit, twelve-fifteenths of said fund, and that the County of Fairfield was entitled to the tax collected for County purposes, to wit, three-fifteenths of said fund; and the same should have been ordered to be paid to the County Treasurer of Fairfield County, to be by him applied according to law.

Melton, Attorney General, for appellant.
Rion, contra.

March 15, 1876. The opinion of the Court was delivered by

WILLARD, A. J. The leading question in this case is, whether the County Commissioners and Commissioners of Schools have a

*82

right *of action to recover from the County Treasurer specific amounts standing to the credit of their respective offices, to be disbursed in their several departments, by a proceeding in the nature of a bill in equity to seize and administer such funds as legal assets.

Criminal proceedings, for official misconduct, were instituted against the Treasurer of Fairfield County, and an agent of the Comptroller General, for the security of the moneys in the hands of the County Treasurer during such prosecution, took possession of a sum of money in the County treasury and deposited it temporarily with the defendants, a national bank, as a special deposit. The present suit was commenced by the persons holding the offices of County Commissioners and School Commissioner of that County. The complaint alleged as follows: "That on the 30th day of March, A. D. 1874, one J. S. Fillebrown took from the safe of the County Treasurer of Fairfield County a package of money, said to contain about eight thousand dollars; that he has deposited said package with the Winnsboro National Bank, the defendant, and intends to carry the same to the State Treasury; that the money contained in said package belongs to the County of Fairfield, and has been appropriated for County and school purposes, having been raised by taxation for County purposes." The prayer was that the defendant be required to hold said money on deposit subject to the further order of this Court, until

a legal inquiry and determination of the ownership of said money may be made.

An injunction order was made upon such complaint and an affidavit supporting it. This order contained other provisions than such as properly belonged to an injunction order, that will be noticed hereafter. So far as it operated as an injunction order, it is not a subject of review at the present time, as no motion appears to have been made to dissolve it as such, and as its force, as a preliminary injunction, was expended with the recovery of final judgment. By the terms of the order just mentioned, the Court assumed the control and administration of the fund thus brought ex parte to its notice, and gave directions as to its custody by the bank, "subject to the orders of the Court of Common Pleas of Fairfield County, to be made upon a legal inquiry and determination of the ownership of said money by the Court."

This order appears to have been made without notice to any of the parties interested in the fund, and in an action in which the only defendant was a mere bailee of a special

*83

deposit, and in which neither *the County nor the State was represented either as a plaintiff or a defendant. This order was dated March 31, 1875.

On the 4th of May following, H. Jacob, Chairman of the Board of County Commissioners for Fairfield County, one of the plaintiffs, filed a suggestion informing the Court "that on the 31st day of March, 1874, and while still County Treasurer, Henry A. Smith reported to him that there was in the Winnsboro National Bank the sum of $1,304.40 appropriated to County purposes." On the same day, W. J. Crawford, School Commissioner of that County, filed a suggestion as follows: "That on the 31st day of March, A. D. 1874, and while still County Treasurer, Henry A. Smith reported to him that there was in the Winnsboro National Bank the sum of $6,366.95 appropriated for school purposes."

The reasons for the filing of these suggestions on the part of parties to the action, and the bearing of the matters suggested, are not explained, nor can we understand them from the course of practice with which we are familiar.

On the same day with the last named, W. M. Nelson filed a suggestion alleging that since the commencement of the action Henry Smith had resigned as County Treasurer, and that he had been appointed and commissioned such County Treasurer.

No order making Nelson a party defendant appears, nor does it appear that he followed up the filing of his suggestion with any motion to be made a party to the record.

On the 5th day of May an order was made by the Circuit Judge as follows: "On hearing the complaint herein, and the affidavit filed therewith, no answer or demurrer having been filed, and upon hearing the suggestions of William Nelson, County Treasurer, of William J. Crawford, School Commissioner, and Henry Jacob, Chairman of the Board of County Commissioners, on motion of Mr. Rion, attorney for the plaintiffs, and by request of Mr. Attorney General Melton, it is ordered that the Attorney General be made a party to these proceedings, and that it be referred to C. C. Macoy, Esq., a Special Referee, to take testimony and report touching the ownership of the funds referred to in the complaint herein; that he hold said reference without delay at Fairfield Court House, and do make his report to the Judge of this Court at Chambers."

It appears from this order that no answer was interposed in behalf of the County Treasurer; that the reference to ascertain the ownership of the fund was requested by the

*84

Attorney General, and *that the Attorney General was made a party. The formal entry of an order making him a party, and the amendment of the pleadings to that effect, was waived by the Attorney General, and no answer appears to have been interposed by him.

Thereupon the Referee proceeded to take testimony, and reported certain sums due out of the funds in the County treasury to the State, to the County Commissioners and to the School Commissioner, and recommended that the fund in suit be ratably distributed among such parties.

The only party that filed exceptions to the Referee's report was the Attorney General in behalf of the State. A final judgment was given distributing the fund accordingly, from which the Attorney General has appealed.

The question as to the correctness of the judgment is embarrassed by the unusual and irregular course of proceeding. The attempt to seize a sum of money belonging to a public treasury temporarily separated from such treasury, and to convert it into a fund in equity, subject to distribution, as assets for the payment to the various departments of the government,—the sums which by law they should receive from the treasury,—is a proceeding without precedent and incomprehensible to the judicial mind. But the difficulty in the present case arises from the fact that the County Treasurer, the legal custodian of the fund, and whose duty it was to see that proper steps were taken to prevent the funds in the treasury from being improperly disposed of, either through the forms of law, or contrary to them, has not answered or interposed a claim to the fund in such form as to bring the question of the ownership of the fund before us. We are left to conjecture to find the explanation of this circumstance. It is possible that the County Treasurer thought that his whole duty was discharged when he gave the Court the information that he had been appointed Coun-

ty Treasurer in the place of the officer from whose hands the money had been taken. If so, he was clearly mistaken. The responsibility for the custody of the funds of the County did not belong to the Circuit Judge, but belonged by law to the County Treasurer. The custody and disbursement of this fund was an administrative duty that could not be devolved upon a judicial officer. The Judge can perform judicial functions alone, and only act as he is moved by the parties in interest. The County Treasurer, as the legal custodian of the funds, was bound to see that

*85

the claims of the County Treasurer to *hold and administer the funds were properly represented before the Court. This function could not be performed by the Circuit Judge, for it is the business of an advocate, which is inconsistent with the functions of a Judge. On the accession of the new County Treasurer to his office, he became, in law, chargeable with the fund in question, to the same extent as if it had been placed in his hands by the outgoing County Treasurer.

It does not follow that if the fund is distributed contrary to law, even through the forms of a suit, that the County Treasurer is absolved from liability. If third parties are permitted by a public officer to litigate as among themselves, and take judgments affecting public property or funds in the hands of such officer, although such officer may suffer himself to become bound by such proceedings as between the parties thereto, still he may be held accountable for not interposing, as the representative of the public interests in his hands, to protect such public interests. The County Treasurer should have been made a party to the complaint, as representing the County treasury, and should have answered the complaint, so that the rights of the County treasury to the fund could have been directly passed upon. It happens, however, that the result can be indirectly reached through a defect in the rights of the plaintiff to maintain this action.

The appeal of the Attorney General puts in question the right of the County Commissioners and the School Commissioner to receive the amount which by law was subject to disbursement through their respective departments. Assuming, for the purpose of illustration, that there were funds in the hands of the County Treasurer which by law he should transfer to the plaintiffs for disbursement, then the proper remedy to enable the plaintiffs to obtain such funds was a writ of mandamus to compel the County Treasurer. The fund in question must be considered precisely as if it was in the personal custody of the County Treasurer; and unless the money in the County treasury could be seized and converted by the Court into an equitable fund for distribution among those having legal or equitable claims to it, such a remedy could not be pursued in the present case.

It is clear that removing the money to the defendant's custody did not change the legal title of the County Treasurer to it. That act was not so intended. On the contrary, we must assume it was to secure the money so that it might be returned to the County Treasurer in case he was restored to the

*86

exercise of his official powers, or *to his successor in office. Such a change of title could not result by operation of law, for the legal intendments are with the best legal right.

The question is simply, then, whether the plaintiffs could bring such an action and have the funds in the treasury seized by the Court for distribution. An action at law could not be maintained by the plaintiffs on the title they set forth to recover moneys belonging to the County treasury, considered as property wrongfully withheld from the rightful owners. Something is said about appropriation by the County Treasurer of those funds, but there is no evidence that any portion of the funds in the treasury had been set apart, as specifically intended, for either the County Commissioners or the School Commissioner, or that anything equivalent to delivery of possession had taken place. The whole fund was an unit, and the County Treasurer could alone divide it into its parts, unless a Court of equity possessed authority to take the fund into its own hands and to make the division requisite. Although the authority to divide the fund rested with the County Treasurer alone, yet parties having a statute right to the fund were not without remedies, for the Courts of law, could, by mandamus, compel the performance of such act. This jurisdiction by mandamus acts upon the person holding the office and neglecting the performance of a legal duty, and not upon the property committed to his care. The remedy is strictly personal, and the penalties for refusal to obey the writ are purely personal, falling on the incumbent as an individual.

Can a Court of equity seize and administer funds in a public treasury? It certainly never has been done, and that affords strong, though perhaps not conclusive, reason that it ought not to be done. There are reasons why it should not be done. Our Constitution adopts a rule to a greater or less extent governing all communities organized upon a partition of public authority among different and co-ordinate departments of the government. It separates executive duties from judicial. It classes among the executive duties those embracing the administration of public property and funds. The judiciary cannot draw to itself the actual administration of public property and funds without overstepping the bounds that the Constitution has set to it. While the Courts can act upon the person holding an office in such

manner as to compel him to perform his official duties, they cannot push him aside and take the public property and funds in their

*87

own hands and administer them. *these principles are of universal recognition. The judicial powers and responsibilities should be more carefully watched and preserved than those of any other department of the government, for judicial power represents the strength of the government. This, although a passive quality and a function less brilliant than that of directing the active public energies, constitutes the essential condition of public security and progress, and renders possible the accomplishments of beneficent ends and the defeat of evil purposes. Encroachments of judicial authority upon the domain of other co-ordinate branches of the government are the more dangerous, because tending to convert a conservative into a destructive power.

We do not feel at liberty to assert for the judicial authority powers so objectionable and unprecedented as those claimed to be exercised in their behalf by the plaintiffs.

The law regulating the powers of the County Commissioners (General Statutes, 146,) nowhere authorizes the County Commissioners to demand and receive from the County Treasurer, in a gross sum, the amounts to be disbursed by them. On the contrary, the County Treasurer is the disbursing officer, entitled to hold the unexpended funds of the County, and the proper duty of the County Commissioners is to audit legal demands against the County, and to certify them for payment to the County Treasurer. Payment of demands thus audited and certified is to be made by the County Treasurer directly to the parties entitled to such payments, and he is not permitted to pay moneys to the County Commissioners to be disbursed by them. This defeats the right of the County Commissioners to maintain such an action as they have brought in the present case.

If the School Commissioner has any right whatever to demand in gross moneys held by the County Treasurer applicable to disbursement for school purposes, (a right that need not be considered here,) yet it does not appear that any of the requirements of law as it regards the character of the vouchers upon which payments are to be made from the County treasury for school purposes, have been complied with. The School Commissioner has no right to maintain an action.

The judgment must be set aside, and an order made relinquishing the fund in question and dismissing the complaint without costs: for this purpose, it is remanded to the Circuit Court.

MOSES, C. J., and WRIGHT, A. J., concurred.

7 S. C. *88

*WITSELL v. CHARLESTON.

(Columbia. Nov. Term, 1875.)

[*Husband and Wife* ⇐181.]

Under Article XIV, Section 8, of the Constitution of the State, a married woman has power to alienate her equitable estate in stock held by her at the time of the adoption of the Constitution.

[Ed. Note.—Cited in Oliver v. Grimball, 14 S. C. 565; Pelzer, Rodgers & Co. v. Campbell & Co., 15 S. C. 597, 40 Am. Rep. 705; Witte Bros. v. Clarke, 17 S. C. 314, 327; Aultman & Taylor Co. v. Rush, 26 S. C. 528, 2 S. E. 402; Wallace v. Craig, 27 S. C. 520, 4 S. E. 74; Rabb v. Flenniken, 29 S. C. 283, 284, 7 S. E. 597.

For other cases, see Husband and Wife, Cent. Dig. § 713; Dec. Dig. ⇐181.]

[*Wills* ⇐656.]

A declaration in a bequest of personal property for the sole and separate use of a woman, that it shall not be liable for her debts or the debts or contracts of any husband she may marry hereafter, imposes no restraint upon her power of alienation.

[Ed. Note.—Cited in Wallace v. Craig, 27 S. C. 519, 4 S. E. 74; Robinson v. Ostendorff, 38 S. C. 72, 16 S. E. 371; Langston v. Smyley, 38 S. C. 124, 16 S. E. 771.

For other cases, see Wills, Cent. Dig. § 1548; Dec. Dig. ⇐656.]

[*Husband and Wife* ⇐171.]

A married woman having power to alienate her separate estate may pledge the same as security for her husband's debts.

[Ed. Note.—Cited in McLure v. Lancaster, 24 S. C. 281, 58 Am. Rep. 259; Gleaton v. Gibson, 29 S. C. 518, 7 S. E. 833.

For other cases, see Husband and Wife, Cent. Dig. § 671; Dec. Dig. ⇐171.]

[*Corporations* ⇐134.]

A municipal corporation is liable to a cestui que trust for an illegal transfer to a stranger of shares of its stock standing in the name of a trustee.

[Ed. Note.—Cited in Rabb v. Flenniken, 29 S. C. 282, 7 S. E. 597.

For other cases, see Corporations, Cent. Dig. §§ 521 525, 527, 528; Dec. Dig. ⇐134.]

[*Husband and Wife* ⇐115.]

[Cited in Clawson v. Hutchinson, 11 S. C. 326, to the point that the word "held," as used in a constitutional provision protecting as separate property "the real and personal property of a woman held at the time of marriage," does not exclude equitable interests nor rights in action.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 408; Dec. Dig. ⇐115.]

Before Reed, J., at Charleston, June, 1875.

Action by Mary S. Witsell, plaintiff, against the City Council of Charleston and George W. Williams & Co., defendants.

The case was referred to J. E. Burke, Esq., as Referee, and the facts are fully stated in his report, which is as follows:

This case was referred to me to inquire as to the matters stated in the pleadings, and to report upon all the issues of law and fact involved in the case, with leave to report any special matter.

I beg leave to report that I have been attended by the attorneys herein, have examin-

ed the pleadings, and taken the testimony herewith filed as a part of this report, and find the following facts:

I. That Alexander Fraser died in the year 1854, leaving a last will and testament, whereby he bequeathed to plaintiff a legacy of $9,000, payable on the death of his wife, Mary Fraser; and directed that such legacy should be invested for plaintiff's sole, separate and exclusive benefit and behoof, and not be in any manner liable for her debts, or for any debts and contracts of any husband she might marry thereafter.

II. That said testator provided in his said will that the legacies bequeathed therein should be paid in such stocks or bonds as his estate might be invested in at the decease of his wife.

III. That Mary Fraser was appointed executrix of said will, and proved the same, and qualified thereon October 20, 1854. She died subsequently, and after the close of the late civil war, (the precise time is not given in the evidence,) leaving a will whereof Jane Neyle was appointed executrix. Said Jane Neyle proved said will and duly qualified as executrix.

IV. That at the time of the death of Mary

*89

Fraser, a part of her *husband's estate was invested in stock issued by the City Council of Charleston; and in the distribution of the estate plaintiff selected $4,280 of said stock in part payment of her legacy of $9,000.

V. That after the death of Mary Fraser, Jane Neyle, the executrix of her will, endorsed the certificate of stock which plaintiff had selected as part of her legacy, and which stood in the name of estate of Dr. Alexander Fraser, as follows: "Transfer to Jane Neyle, trustee of Mary S. Witsell. Jane Neyle, executrix."

VI. That the said Jane Neyle departed this life in 1869, and Henry M. Neyle administered upon her estate; and he endorsed said certificates as follows: "Transfer the within scrip to Charles E. Miller, trustee of Emanuel and Mary S. Witsell, and pay the interest, as it becomes due, to the order of Mary S. Witsell." Signed Henry Neyle, administrator Jane Neyle.

VII. That Emanuel Witsell and plaintiff were married in 1858. Plaintiff was a daughter of Jane Neyle, who lived with Dr. and Mrs. Emanuel Witsell up to the time of her death.

VIII. That the scrip for the said stock was kept in a trunk in the house of said Dr. Witsell, and after the death of Mrs. Neyle was held by the plaintiff, who drew the interest thereon regularly until January, 1872.

IX. That in January, 1872, Dr. Witsell and plaintiff entered into an agreement with one P. Gadsden Hasell to obtain from him advances for that year's crop. The agreement was in writing, and was signed by plaintiff and her husband. This agreement was not produced, as it could not be found. It appears, however, from the testimony, that Hasell agreed to advance $1,000 in sums as should from time to time be needed, and was to be secured by lien on the crop; and $2,500 of the said city stock was to be pledged to secure the deficiency which would exist should the crop security prove insufficient. That Mrs. Witsell consented to the pledging of the stock, and gave her husband the scrip to be delivered to Hasell.

X. That Dr. Witsell delivered the said scrip to said Hasell, without any other endorsements than those before stated; but Hasell desired it endorsed by Charles E. Miller, trustee, and returned it to Dr. Witsell to procure that endorsement. The latter took it to Walterboro, and had it endorsed Charles E. Miller, trustee, in blank, he witnessing the signature. After it was so endorsed, Dr. Witsell took it to Mr. W. L. Campbell, now

*90

City Treasurer, but then a *clerk in the office of the City Treasurer, to inquire if it were properly endorsed. Mr. Campbell inquired for what purpose it was to be assigned; and on being told that $2,500 of it was to be pledged to Hasell as a security for advances, he wrote over the signature of Mr. Miller the words: "Transfer $2,500 to P. Gadsden Hasell, and the balance to Charles E. Miller, trustee of Emanuel and Mary S. Witsell." Subsequently, said certificate was presented at the office of the City Treasurer of the City Council of Charleston by P. Gadsden Hasell, and new certificates of stock were issued as directed in the last endorsement on said stock, viz., $2,500 to P. Gadsden Hasell and balance to Charles E. Miller, trustee.

XI. That, subsequently, said P. Gadsden Hasell failed, but not before he had advanced Dr. Witsell some $600, as the complaint alleges. The scrip he had received he had in the meantime assigned to G. W. Williams & Co., the defendants herein.

XII. The allegation of the complaint that the said Emanuel Witsell had placed the said scrip in the hands of said Hasell as collateral security without plaintiff's knowledge or approval is not sustained by the testimony of either plaintiff or her husband; and I therefore find that such scrip was so pledged with the knowledge and consent of plaintiff. I also find that Dr. Witsell acted as agent for his wife in regard to pledging the stock to Hasell.

Conclusions of law:

Prior to the adoption of the Constitution of 1868, it is clear that the plaintiff during coverture could have made no valid disposition of the city stock, part of her legacy as aforesaid, nor could she have placed any valid charge upon it. This stock was a part of her separate estate, created by the will of Mr. Alexander Fraser; and, by the well-settled law of this State, she could not dispose of it or change it except in the form and

manner authorized by the said will. This instrument, so far from authorizing any mode of alienation or change thereof, seeks rather to restrain the same by declaring that the property shall not be liable for her debts.

It is contended that the present Constitution and laws of this State have made a change in this respect. That in 1872, Mrs. Witsell, the plaintiff, could dispose of this property in any manner that she pleased. That she did pledge it to secure an engagement of her husband, and did authorize the transfer made by the City Council's Treasurer.

*91

*The Constitution, Article XIV, Section 8, provides: "The real and personal property of a woman held at the time of her marriage, or that which she may thereafter acquire, either by gift, grant, inheritance, devise, or otherwise, shall not be subject to levy and sale for her husband's debts, but shall be held as her separate property, and may be bequeathed, devised or alienated by her the same as if she were unmarried."

An Act entitled "An Act to carry into effect the provisions of the Constitution relative to the rights of married women," approved 27th January, 1870, provides:

"Sec. 1. That the real and personal property of a married woman, whether held by her at the time of her marriage or accrued to her thereafter, either by gift, grant, inheritance, devise, purchase, or otherwise, shall not be subject to levy and sale for her husband's debts, but shall be her separate property.

"Sec. 2. A married woman shall have power to bequeath, devise or convey her separate property in the same manner and to the same extent as if she were unmarried," &c., &c.

S. L., vol. 14, p. 325.

Under the will of Mr. Alexander Fraser, I am of the opinion that the plaintiff was entitled, after the death of Mrs. Mary Fraser, to the beneficial interest in the legacy of $9,000, which was to be invested for her sole and separate use, and of course to the same interest in the city stock, which she selected as a part of that legacy; and that the rights and obligations of the parties were properly expressed when Mrs. Neyle, as executrix of Mr. Fraser's will, ordered, by endorsement thereon, the scrip for the said stock to be transferred to herself as trustee. I think that Mrs. Neyle held the legal estate in said scrip, with the beneficial estate, for her sole and separate use in the plaintiff.

If this is correct, then the language of the Constitution and law above quoted does not apply to this case, as I think that in both the language refers to property the legal title to which is held by a woman, or the legal title to which is given or granted to her after marriage. Property in which she is interested, but which is held by a trustee, cannot, I think, be said to be held by her.

But, however this may be, it is clear that wherever the legal title might have been, whether in Mrs. Neyle or in the husband, as trustee, that Mrs. Witsell had a separate estate in the stock, which was not liable for the debts of her husband, exclusive of the

*92

provi*sions of the Constitution and laws referred to. And I think that the said provisions were only intended and do only apply to such property held by or coming to a married woman, as to which the marital rights of the husband would attach, and which would be liable for his debts or subject to his disposition.

The second Section of the Act of 1870, before quoted, though appearing in itself to refer to all the separate property of a married woman, is fairly and properly to be construed, I think, in a more restricted sense. The Act was intended expressly to carry into effect the provisions of the Constitution referred to, and the first two Sections thereof mean nothing more than Section 8 of the 14th Article of the Constitution.

If the construction now given to the present Constitution and laws is correct, it follows that, while with regard to what was before their adoption as the separate property of a married woman, she can only exercise the power of disposing given by the instrument creating the separate estate; yet with regard to such other property as the husband could before have control of in whole or in part, she has the entire and absolute jus disponendi. Such result seems to me to justify the construction now given; for, while it may be the policy of the present law to take away any control from the husband, and to give the absolute control to the woman over such property which was given or came to her unfettered with any condition or qualification, it may not be, and is not necessarily, its policy to interfere with those restraints and limitations upon her power of disposition which the former law imposed upon property settled to her separate use. And it may not especially be its object to interfere with such restraints as existed by law at the time when the settlements were made, or, as in this case, when the will spoke. Whether or not the Constitution or the Legislature could have done away with such restraints if they pleased, I think that they have not in fact done so.

In support of these views, I beg leave to refer to some of the authorities that have been submitted to me.

Under a statute at least as strongly in favor of the rights of a married woman as those of our own under consideration, the Supreme Court of the United States held that they did not apply to the inchoate right of dower in the husband's lands; and Mr. Justice Bradley, who delivered the opinion of the Court, said that the statute referred "to property which, but for the statute, he (the husband) would acquire an interest in

*93

by right of marriage. The sole *object of the statute was to prevent his acquiring such interest in her property."—Sykes v. Chadwick, 18 Wall., 145 [21 L. Ed. 824].

A law of Pennsylvania of 1848 enacts that "every species and description of property, whether consisting of real, personal, or mixed, which may be owned by or belong to any single woman, shall continue to be the property of such woman as fully after her marriage as before; and all such property, of whatever name or kind, which shall accrue to any married woman during coverture, * * * shall be owned, used and enjoyed by such married woman as her separate property," &c., &c. The Act further gives her the power of disposition by will and during coverture by joining with her husband. In 1852, real estate was conveyed to the wife in fee for her sole and separate use. She joined with her husband in a sale thereof, and the sale was held good.—Haine v. Ellis, 24 Penn., 253.

A husband deposited money with the Pennsylvania Company, the income to be used for the support of his wife. Afterwards, husband and wife assigned the same according to the form of Act of 1848. The Court held that the Act of 1848 does not enable a married woman to dispose of property held by a trustee for her separate use. Over such property she has no power that is not expressed in the instrument by which the trust is created.—Pennsylvania Co. v. Foster, 11 Casey, 35; Penn. State Rep., 134.

In Wright v. Brown and wife, (44 Penn., 224,) the Court held that Haine v. Ellis is not a correct enunciation of the law. That the Act of 1848 has no relation to estates settled to the separate use of married women, whether a trustee be named in the deed of settlement or not; and that in both cases, married women have no power of alienation beyond such as is expressly given in the instrument by which the estates are created.

In Daly v. Callaghan, (16 N. Y., 71,) quoted on behalf of defendant, the City Council, there was a lease of real estate to a married woman, under statutes similar to those under consideration; the Court held that she could sue for possession alone, without joining her husband. In giving the opinion of the Court, Judge Bowen said that "the object and intent of the Act in question was to give to married women the use, control and right to dispose of all property of every description held by them at the time of marriage or acquired subsequently, without regard to the manner in which, or the face of the instrument by which it was transferred."

*94

*It does not appear that the case was property settled to the separate use of the married woman. But when it is considered that under the laws of New York, as I believe is the case, the English rule, prevailed as to the power of a married woman over her separate estate, the effect of the statutes would be to place all her property, whether acquired under such settlement or otherwise, at her disposal; and such expressions as the above would be fully justified, without deciding anything in conflict with the construction I have given.

In Yale v. Dederer, (8 N. Y., 265,) also quoted by defendant, the Court said: "In this juncture of the case, we must assume that the appellant's title is legal and not equitable: her statement would be false, if we take for granted the existence of a trust for her benefit, created within the last twenty-eight years." The Court also says that "it is quite another question, however, whether she may not change her legal estate, held under this statute, in the cases and to the extent recognized by Courts of equity in respect to estates held under a trust for her separate use."

This case seems to make a clear distinction in these expressions, and in others, between those estates which were, under prior laws, the separate estate of the wife, and those which became so by the operation of the statutes similar to those before us.

After a full examination of all the authorities to which I have had access, there seems to me nothing to warrant a decision that such statutes as those in question enlarge the jus disponendi of a married woman over any property but such as becomes her separate estate by the statutes themselves, and which, but for such statutes, would fall under the control of her husband.

To apply the conclusions of law to which I have come: As no such power was given in Mr. Fraser's will, the pledging of the stock to which Mrs. Witsell assented was void; the transfer by the City Council to Hasell was void so far as the City Council are concerned, and the plaintiff is entitled to recover $2,500 of stock, or the value thereof, with the interest due thereon from 1st January, 1872. The transfer to Hasell was not made by the person holding the legal estate, or any estate at all in fact; and even if it had been so made, the City Council was bound to know the trusts, under the circumstances of this case, and are responsible for the want of proper authority to transfer.

In order, however, to bring the entire case to the attention of the Court in this report, I beg leave to call attention to another point

*95

*which arises therein from a construction of the law different from that which I have adopted.

Admitting that, under the present law of South Carolina, the plaintiff had a right to use or dispose of the stock in question as she might think proper, the question has been raised: what did she do? Did she authorize a transfer of $2,500 thereof to Hasell?

It is contended for the City Council that she did. For the plaintiff, that she did not authorize an absolute transfer, but of a pledge to secure the advance actually made by Hasell.

Now, Mr. Miller never was the lawful trustee of this stock, but the endorsement upon the scrip referred to him as such, and, under the impression that he was such trustee, Hasell desired his signature, which was procured by Dr. Witsell.

Suppose that Miller really was the trustee for the sole and separate use of the plaintiff, the City Council could not properly transfer without the consent of the plaintiff. It was bound to know whether or not she did consent, and by its own rule, as stated in the answer of the said defendant, Mrs. Witsell should have endorsed her name on the scrip.

However, though she did not sign it, if the plaintiff or her agent had declared to the City Council or its agent that she desired or acquiesced in an absolute transfer to Hasell, then she would be bound.

I think that Dr. Witsell was her agent in this transaction, and that if he had represented to Mr. Campbell that there was to be an absolute transfer, she would be bound to the extent of the $2,500.

But the only authority expressed to the City Council on behalf of Mrs. Witsell carried with it the knowledge that the stock was to be pledged to secure the advances to be made by Hasell; that it was not to be an absolute conveyance, but a pledge.

The City Council knew, therefore, that Hasell held the $2,500 transferred to him upon trust; and when he applied to transfer the same, upon the sale by him to G. W. Williams & Co., they were bound at their peril to know that he was justified in the sale thereof.

To the extent of the $600 admitted in the complaint, Hasell had a right to sell and transfer; and if it is held by the Court that Mrs. Witsell could dispose of the stock, then, in accordance with the point last considered, the plaintiff would be entitled to $2,500, less the said $600 of stock, or stock for $1,900,

*96

or the value thereof, *with interest from 1st of January, 1872. I think there is no valid claim against the defendants, G. W. Williams & Co.

The City Council of Charleston excepted to the report of the Referee on the grounds:

1. Because the said Referee reports as a conclusion of law that the plaintiff, after the adoption of the Constitution of South Carolina of 1868, had not such a separate estate in the city stock in controversy as gave her the right of transferring and conveying the same to P. Gadsden Hasell; whereas the said Referee should have reported as a conclusion of law that the Constitution of 1868 gave her absolute control over the said stock, and any assignment or transfer of the same, or any part thereof, to P. Gadsden Hasell was binding upon her.

2. Because the Special Referee erred in reporting as a conclusion of law that plaintiff was entitled to recover $2,500 of the city stock of this defendant, or the value thereof, with interest on the same from January 1st, 1872; whereas said Referee should have reported as a conclusion of law that as plaintiff agreed in writing to pledge the stock in question, and delivered the certificate thereof to the pledgee for that purpose, and as she, by her husband, her authorized agent, procured said certificate to be endorsed for the purpose of allowing said Hasell to transfer the same, she is estopped from denying the validity of the transfer to said Hasell, and is not entitled to recover.

3. Because the Special Referee erred in reporting as a conclusion of law that the defendant knew that the $2,500 of city stock was to be pledged to Hasell; whereas said Special Referee should have reported as a conclusion of law that the knowledge of Wm. L. Campbell, a clerk in the office of the City Treasurer, that said stock was to be pledged was not the knowledge of this defendant; and that said Campbell, when he filled up the blank on the back of said certificate of stock with a direction to transfer $2,500 to P. Gadsden Hasell, was acting as the friend and agent of Dr. Emanuel Witsell and not in his character as clerk of the said City Treasurer; and, further, that if such direction on the back of said certificate was improperly placed thereon by said Campbell, this defendant is not liable for such error, and it was bound to make the transfer on its books when demanded by said Hasell, and such transfer is legal and valid.

*97

*Reed, J. On hearing the report of J. E. Burke, Referee, and the exceptions thereto, it is ordered that the exceptions be overruled and the report confirmed.

It is further ordered that the plaintiff recover against the City Council of Charleston one thousand dollars, the value of the stock improperly transferred to P. G. Hasell, and the costs of this action.

The City Council of Charleston appealed.

Corbin & Stone, for appellant.

Pressley, Lord & Inglesby, contra.

March 15, 1876. The opinion of the Court was delivered by

WILLARD, A. J. The plaintiff charges that the defendants have illegally transferred city stock, standing in the name of a trustee, to a stranger. It appeared by the endorsement on the stock at the time the transfer was made that the party who authorized the transfer held the stock subject to a trust in favor of the plaintiff. Under our decision in Magwood v. South Carolina Railroad [5 S. C. 379], the city corporation

could not legally make such a transfer unless the trustee possessed authority to cause such transfer to be made. The question whether the trustee possessed such authority depends, in the first instance, upon the power of the plaintiff, as a married woman, to authorize the sale of property placed in the hands of a trustee for her use and enjoyment, and for its protection against liabilities for her own debts and those of her husband; and if it be found that the plaintiff possessed such authority, whether she exercised it.

It was contended that C. E. Miller, by whose direction, endorsed on the stock, the transfer was made, appeared by the endorsements on the stock itself not to have the authority of a trustee as it regards the stock. It will not be necessary to examine this objection, for, as will appear hereafter, the determination of that question, one way or the other, cannot affect the final results of the case.

The plaintiff had no authority to give validity to the transfer, unless derived from the Constitution, (Article XIV, Section 8,) or the Act "to carry into effect the provisions of the Constitution in relation to the rights of married women," passed January 27, 1870, (14 Stat., 325.)

*98

*It is contended that the plaintiff authorized her husband, as her agent, to pledge the stock in question to enable him to carry on his business of planting. It was not, therefore, the case of an investment of trust funds by a trustee consented to by a married woman, the cestui que trust, as in Frazier v. Center, (1 McC. Eq. 270,) nor was it the case of a trustee incurring obligations for the benefit of the trust estate, as in Cater v. Eveleigh, (4 DeS. Eq., 19 [6 Am. Dec. 596].) On the contrary, it is simply the question of the power of a married woman to charge her separate estate for the benefit of her husband —in the present case, to enable him to borrow money to carry on his business. Independent of the effect of the Constitution enlarging the powers of married women, and the Act of the Legislature intended to carry these constitutional powers into effect, she possessed no such authority as was decided by this Court in Dunn v. Dunn, (1 S. C., 350.)

The Section of the Constitution in question is as follows: "The real and personal property of a woman held at the time of marriage, or that which she may thereafter acquire, either by gift, grant, inheritance, devise, or otherwise, shall not be subject to levy and sale for her husband's debts, but shall be held as her separate property, and may be bequeathed, devised or alienated by her the same as if she were unmarried: Provided, That no gift or grant from her husband shall be detrimental to the just claims of his creditors."—Constitution, Art. XIV, § 8.

The first question that arises is, whether equitable interests in lands are embraced by the terms of this Section. The object of the Section is threefold: First, to convert the property of a wife, acquired before or during marriage, into a legal separate estate; second, to prevent its subjection to the payment of her husband's debts; and, third, to confer upon the married woman the same power of disposition or alienation, as to such separate estate, as that enjoyed by a femme sole. The subject matter upon which this characteristic is impressed is described as "real and personal property." Are the terms "real and personal" used to exclude from the category certain classes of property, or kinds of possession and ownership, ordinarily embraced under the description "property," where no qualifying terms are employed to narrow their force; or, on the other hand, are these terms employed for the purpose of giving to the idea of property, as thus used, its most comprehensive significance? If the latter is the correct interpretation, which we

*99

think it is, then *choses in action and equitable estates and demands are included under the words "real and personal property." The latter mode of employing these terms is usual, indeed it is the natural sense of the terms, to be understood when nothing exists to point an intent to use them in an exclusive, rather than an inclusive, sense. This view will be strengthened when we come to look at the object of this Section, but first we must notice an argument urged as affording ground for limiting the sense of these terms.

It is contended that the words "real and personal property of a woman" are qualified and restricted by what immediately follows, viz., "held at the time of her marriage, or that which she may thereafter acquire." It is contended that "held" is used to qualify the general expression "real and personal property." For the purpose of enforcing this view, the word "held" is interpreted in a technical sense. It is said that a cestui que trust does not hold the lands out of which such equitable interest arises, but that they are held by the trustee.

"Held," in the connection in which it is used, does not imply limitation, but is used to give the largest effect to the terms "real and personal property" in their application to property of a married woman.

Is the word "held," standing by itself, to be taken in a technical sense? If so, what is the effect of such reading? As a technical term, "held" embraces two ideas—that of actual possession of some subject of dominion or property, and that of being invested with legal title or right to hold or claim such possession. We speak of lands being held in fee, or for a term of years, or by adverse possession, meaning that possession is had of these lands under claims to such possession of the nature described by these terms. So we speak of a legal title being held in re-

spect of lands, that expression not necessarily implying the actual possession of the lands to which such title relates. This term is constantly applied to cases of possession had of anything that is the subject of property. It does not follow, then, merely from the fact that "held" is taken in a technical sense, that it limits the expression "real and personal property," for if everything capable of being possessed may be "held," then the use of that word does not lead to the exclusion of choses in action and equitable interests and estates from that category.

*100

*But the argument goes further and contends that in its application to a trust estate the term "held" is to be used in a particular technical sense. We speak of trust estates as held by one and enjoyed by another. That to which we refer as held in this case is the title with or without actual possession. This limited sense of the word "held" depends entirely on the context in that mode of using it, and not upon its own inherent force of expression; change the context and this qualified meaning of the term disappears. It does no violence to technical propriety to say of lands in the hands of a trustee that a beneficial interest in such lands is "held." It is clear that unless the words "real and personal property" are read as precisely equivalent to "the title to real and personal property," there is no ground whatever to apply the argument in question to the case in hand.

On the contrary, the Section affords a definition of "held" by supplying its equivalent, as to which there can be no doubt. It says "held at the time of her marriage, or which she may thereafter acquire." The subjects of holding and those of acquisition are intended to be the same. The object of the particular clause is to put property acquired before marriage on the same footing with that acquired afterwards. "Held" is used as equivalent to acquired, and that word cannot be limited in the way contended for. It is clear both in the language and intent of this clause that there was no design to use the word "held" in any sense limiting the generality of the expression "real and personal property," but that, assuming that the general purpose of the Section requires that these terms shall be read as embracing equitable estates, the word "held" is in entire consistence with that reading.

It remains, then, to gather up the general intent from all parts of the Section taken together. Its object was to enlarge what was theretofore known as the wife's separate estate, so as to embrace all acquisitions, past or future, of such a nature that, if she were a femme sole, they would vest in her as property, and to enlarge her powers over such property to the same extent as if she was a femme sole, and at the same time to shield that separate estate from liability to the husband's debts against her will. The same reason that would exclude equitable estates from this statute would also exclude choses in action and demands of an equitable nature. This would limit the faculty thus conferred without any good reason. The decisions of

*101

the Courts of this State, *followed by us in Dunn v. Dunn, did not rest on the judgment of the Courts that the ends of justice were best subserved by depriving a married woman of all control over her separate estate, except where authority for that purpose was conferred by the instrument creating that separate estate, but upon the fact that the state of the common law prevented equity from enlarging her powers over her separate estate. It was felt that full justice was not attained under that view, and that there was an anomaly in the deprivation of the power to do right, unaccompanied by deprivation of the power to do wrong.

Elsewhere the Courts of equity had found means to escape in a greater or less degree from the dilemma, and put an interpretation upon the powers of married women over their separate estates, that found an exception in the common law rule of incapacity, but in this State the Judges left the rule of the common law in full force until it should be changed by legislative authority. Now that the Constitution has reversed the rule of the common law, and substituted general competence for the former rule of incompetence, as it regards the holding and acquisition of a separate estate, it is not for the Courts, on nice readings of its text, to restore a state of things from which the Courts of equity have long striven to be released.

If equitable estates are excluded because not "real and personal property," in an exclusive sense of those terms, then, as has been said, choses in action and demands that can only be enforced by means of suits in equity are equally excluded; for the expressions real and personal property are more often used as denoting something distinguishable from choses in action than for distinguishing equitable estates from legal estates. It certainly cannot have been intended that rights of this nature should be excluded from the benefits conferred by the Constitution. When future acquisitions are carefully protected, it certainly could not have been intended to neglect rights of action and demands which might be the means of such future acquisition of tangible property.

We have been referred to cases decided in the Courts of other States on statutes similar in their general intention to our own, some regarded as favoring the view that has been expressed and others as opposing it. When the construction of our own Constitution is free from doubt, little aid can be obtained from the decisions in the Courts of other States. Doubtful expressions, however,

*102

*should receive, to aid their solution, all the light that can be thrown upon them from judicial minds, contemplating them from the different standpoints afforded by the different statutes and circumstances relating to the same subject in other States and countries. In the present case the meaning of our Constitution is free from doubt, and it demands interpretation at our hands according to the expressed intent of the people of the State who framed it as our organic law.

It will not be necessary to look into the Act passed under the Constitution in detail. It could not narrow the sense of the Constitution, and, as we have seen, it is not necessary to look elsewhere for an enlargement of its provisions in order to admit the present case to its advantages.

The next question is, whether the provisions of the Constitution apply to the powers of a married woman over a separate estate consisting of a beneficial interest under a trust of personal property, where such trust was in existence at the time the Constitution went into effect.

At the adoption of the Constitution the legal title to the stock in question was in Jane Neyle in trust for the plaintiff, Mrs. Witsell. Jane Neyle died in 1869, and no trustee has been appointed to succeed her in the trust, unless it was competent for the administrator of the trustee to appoint such a successor.

The objection urged to allowing the Constitution to become operative as to conferring enlarged powers on the cestui que trust is, in effect, that it tends to change the nature of the trusts on which the property was held. Is this the fact?

The trust in question arose under the following words of the will of the plaintiff's testator: "And the said sum of nine thousand dollars to be invested for the sole, separate and exclusive use, benefit and behoof of the said Mary Susan Neyle, and not to be in any manner liable for her debts, or for the debts and contracts of any husband she may marry hereafter."

It is noticeable that this devise did not, in terms, designate a trustee, nor create a trust, but its intention must be assumed to be the creation of a trust in futuro. The only respect in which the trusts thus contemplated are limited, is by the direction that the beneficial enjoyment shall be in M. S. Neyle, now Mrs. Witsell, the plaintiff, and that such estate shall not be liable for the debts either of the plaintiff or of any husband she might marry.

*103

*Had the will imposed certain definite characteristics in the trust, conformable to the then existing laws, and after the purpose of the will had become executed by the creation of the contemplated trust the Constitution had been changed so as to tend to effect a change in the trust in these respects, an interesting question might have been presented affecting the construction and possibly the efficacy of the law in such respect.

The will, however, does not bear such a construction. The only expressed objects of the trust, assumed to have been intended, affect the rights of creditors of the plaintiff and her husband. The powers of the cestui que trust over her beneficial interest are not limited or even named.

There is no ground from which to raise an implied intent that the plaintiff should have no power of alienating her beneficial interest. It may be said that the testator would naturally deem it equally important to prevent the plaintiff from voluntarily parting with the bequest to creditors, as to prevent them from seizing it against her will. Where there is a question of effectuating a general intent in order to prevent a failure of the testator's bounty by reason of some defective expression of his particular intent, a large liberty may be enjoyed in referring the ultimate motive that influenced the testator; but where the end of the inquiry is to withdraw the subject of bequest from the operation of a general statute, especially an enabling statute, such liberty of implications is not admissible. In the latter case the inferences must be limited to that which appears to have formed a part of the testator's mind and purpose.

In the present case the will affords no evidence that the question of the alienation by the legatee was before the mind of the testator. The state of the law was such as to render it unnecessary that any attention should be paid to limiting her powers as a married woman over her beneficial interest. He must be regarded as intending that her powers should be such as the law permitted, not necessarily such as the then existing law permitted, for he is presumed to have known that the law was susceptible of change. If he acted from the opinion that the law was unlikely to be changed, that was equivalent to leaving the matter to be regulated altogether by the law.

The provisions as to protecting the bequests from creditors cannot be construed as intending more than a direction to put the

*104

instru*ment in the form of an ordinary trust for the benefit of a married woman. The declared object is the ordinary object of such trusts.

We must conclude that the trust in question is without defined limitation as it regards the powers of the cestui que trust over her beneficial interest, and that it is subject to the general rules affecting trusts of that nature.

Whatever view may be taken of the question whether one holding a beneficial interest as cestui que trust, under the terms of a will or deed creating a trust, can directly destroy or impair such trust, it appears clear that,

in certain cases, the trust may be indirectly destroyed through the power of alienation conferred upon a cestui que trust who is sui juris. Such a case exists when the whole beneficial interest in the trust estate is in such cestui que trust, without remainder or condition capable of defeating such beneficial interest, and when the whole object of the trust is to secure in such cestui que trust an enjoyment of a certain character. In the case just stated, if the cestui que trust be sui juris, the beneficial interest may be alienated, and no provision of the will or deed intended to prevent such alienation can destroy such power of alienation. If, then, the whole object of the trust was to secure in such particular cestui que trust a certain enjoyment of such beneficial interest, then the alienation of the interest of such cestui que trust, contrary to the intention of the trust, necessarily defeats the trust, because it defeats the whole object that the trust had in view.

Nix v. Bradley, (6 Rich. Eq., 43,) fully sustains the proposition just advanced. Although the alienation in that case only defeated the trust as it regarded a portion of the trust property, leaving it still in operation as to the portion in respect of which there was no exercise of the power of alienation, still power to defeat in part implies power to defeat wholly, for a rule that would protect the whole trust fund against destruction would protect each part with equal efficiency. The case just cited was fully considered and amply supported by authority.

The language of that case is that the power may be exercised by a femme sole who is sui juris, but there is no force limiting it to one who is a femme sole.

At that time the question could not arise in the case of a married woman, for she could have no authority to affect the trust or her beneficial interest under it, except that derived from the instrument creating it. Now that a married woman is in terms in-

*105

vested with *the powers of a femme sole as to her separate property, she is brought within the terms of the decision in Nix v. Bradley, as well as within the principles upon which that case was decided.

It must be concluded that at the time when the stock in suit was pledged, and when it was sold by the pledgee and transferred to a third person, the plaintiff was competent to authorize such transfer, it appearing that she held the whole beneficial interest without remainder or condition that could defeat it. Such being the case, her consent to the pledge of the stock would in equity be equivalent to her formal transfer of it.

Did she consent to the pledge of the stock? The Referee found that the stock was so pledged, with the knowledge and consent of the plaintiff, Mrs. Witsell, but that such authority and consent went only to the extent of authorizing the pledgee to hold the stock as security for advances made. We find no ground for disturbing this finding of the Referee.

The sale of the pledgee was not warranted by the terms of the contract upon which it was pledged. The advances made were not equal to what was agreed to be made; an amount of stock was disposed of greatly in excess of what was requisite to cover the amounts advanced, and the sale was prematurely made. Had the stock been regularly transferred by proper endorsements showing a complete title to the pledgee, a purchaser for value and without notice could have obtained good legal title, and without being chargeable with any equities existing between the plaintiff and the pledgee. But the endorsements showed that the legal title to the stock was subject to a trust, and such notice affected the purchaser. The acts of the city confirming this defective title of the purchaser by cancelling the stock or evidence of indebtedness belonging to the plaintiff, in part at least, and issuing new evidence of indebtedness to the purchaser, caused damage to the plaintiff, for which she is entitled to recover, as the defendant had notice by the endorsement of the trust. The plaintiff was, therefore, entitled to recover the value of the stock thus transferred by the city, less the amount due for principal and interest to Hasell.

It would seem that the judgment of the Circuit Court allowed to the plaintiff the value of the stock sold without deduction. This was erroneous. To the extent of the amount due to Hasell for advances, the plaintiff had by her consent parted with all interest, and that amount cannot enter as an element into the damages she sustained by the improper transfer of the stock.

*106

*The propositions advanced in the third exception by the city need not be particularly considered. The stock contained, in its endorsement, notice of the trust, and, being so charged, they can only discharge themselves by proof of actual authority or consent on the part of the plaintiff, and the proof in this respect falls short of giving them full protection.

The judgment must be set aside and the cause remanded for a judgment in conformity with the foregoing.

MOSES, C. J., and WRIGHT, A. J., concurred.

7 S. C. 106

BASS v. LUCAS.

(Columbia. Nov. Term, 1875.)

[*Insane Persons* ⟸65.]

At a sale of the real estate of a decedent made by a Commissioner in Equity under a decree for partition, B, who was one of the distributees and also the committee of C, another distributee, a lunatic, became the purchaser of two separate parcels of the lands sold, and gave to the Commissioner a separate bond for the price of each parcel and one mortgage of both parcels of land to secure the payment of both bonds. The Commissioner afterwards, in settlement with B of his own and C's shares of the estate, extinguished the larger of the two bonds, and then, in settlement with P, another distributee, assigned to him the other bond and the mortgage. Under a decree obtained by P for foreclosure of the mortgage, E became the purchaser of the land: *Held*, That C had no equity to subject the land in E's hands to the payment of his share of the estate, and this whether E knew the circumstances of the case or not.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 110; Dec. Dig. ⟸65.]

[*Insane Persons* ⟸65.]

After B's purchase of the land he sold part of it to K and took from him a bond and mortgage of that part to secure the payment of the purchase money. B assigned K's bond and mortgage to E, who, under a decree for foreclosure of K's mortgage, purchased that part of the land also: *Held*, That there was no equity to subject this part of the land to C's claim.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 108, 110–114; Dec. Dig. ⟸65.]

[*Insane Persons* ⟸65.]

B, at the time he became the purchaser of the two parcels of land, had no funds to invest belonging to C, and an intention on his part to hold the lands as an investment for C could not give the latter an equity to subject the same to the payment of his share of the estate as against E, the purchaser at the sales for foreclosure.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 108, 110–114; Dec. Dig. ⟸65.]

Before Townsend, J., at Darlington, Term, 1875.

This was an action by James E. Bass, as administrator of Charles Lucas, deceased, and others, against George W. Lucas, Benjamin W. Edwards and others, defendants, to subject real estate of which the defendant Edwards had become the owner to certain alleged trusts in favor of the said Charles Lucas.

*107

*The case is sufficiently stated in the complaint and answer of the defendant Edwards, which are as follows:

The complaint stated that Charles Lucas, of the said County and State, died on the day of November, 1865, and that the plaintiff, James E. Bass, was appointed administrator of his personal estate on the 16th day of March, 1868; that the plaintiffs, Lula E. Lucas and Sarah K. Lucas, were infants, and that Wiley K. Bell had been duly appointed their guardian ad litem on the 5th September, 1871; that Benjamin Lucas, of the same County and State, died intestate on the 12th day of February, 1861, leaving a considerable estate, real and personal, and the following named persons as his distributees and heirs-at-law, to wit: George W. Lucas, Charles Lucas, Mary A., wife of John F. Parrott, Sarah L., wife of Jesse H. Windham, Margaret J., wife of George H. Carraway, and Kimbrough D. Lucas, who died intestate in 1862, leaving two children, the infant plaintiffs named, who were entitled to represent him in the distribution of Charles Lucas's estate; that George W. Lucas and Kimbrough D. Lucas took out administration on the 5th day of March, 1861, and, as administrators, distributees and heirs at law, filed their bill against the other distributees on the 19th of November, 1861, for account and partition, describing in said bill, as part of the land of which intestate died seized, the tract on which he resided, on the waters of Black Creek, "containing nine hundred and eighty-six acres;" that under said bill a writ of partition issued, to which return was made on the 31st day of November, 1861, wherein it was recommended that all the real estate of said intestate be sold, the one on which said intestate lived to be sold in two tracts, the road leading from Society Hill to Darlington Court House being the dividing line, on the following terms, to wit: sufficient to pay costs and expenses cash, balance on a credit of one, two and three years, with interest annually from date, purchasers to give bond with two sureties and mortgage of the premises, which return was confirmed 27th November, 1861, and reaffirmed on the 1st of January, 1862; that the Commissioner reported, 11th February, 1862, that he sold the home tract of land as ordered, in two tracts, on sale day in January past—that East of the public road, of five hundred and twenty-four acres, as per survey, to G. W. Lucas for $5,764, being eleven dollars per acre; that West of the road, of four hundred and thirty-two acres, for $6,224, being four-

*108

*teen dollars and fifty cents per acre, also to G. W. Lucas, which report was confirmed 11th February, 1862. That the Commissioner took from G. W. Lucas two bonds, one for $5,764, the other for $6,224, dated 6th January, 1862, and one mortgage of same date to secure the payment of the land described as containing nine hundred and fifty-six acres, more or less, being represented by a plat accompanying. That the smaller of said bonds, after the payment of large sums thereon by G. W. Lucas, together with said mortgage, was assigned to John F. Parrott on the 3d June, 1863, the larger of said bonds previously, to wit, the 16th of January, 1863, having been given up to G. W. Lucas in the distribution of the estate of Benjamin Lucas. That the administrator's accounts having been audited and sales made as aforesaid, all

the parties interested in the estate of Benjamin Lucas agreed, in writing, to a distribution of the funds in Court and in the hands of G. W. Lucas, surviving administrator, in conformity to a distribution sheet prepared by the Commissioner, which shows each party's share to be $5,468.88½, two of which shares were paid to G. W. Lucas, one his own and the other the share of Charles, by crediting the aggregate, to wit, $10,937.77, on the amount of his indebtedness to said estate, which indebtedness was $16,699.64. This settlement bears date 16th January, 1863.

That on the 22d June, 1861, G. W. Lucas filed a petition stating the incapacity of his brother Charles Lucas to manage his affairs, which was of thirty years' standing, and praying a commission in the nature of a writ de lunatico inquirendo, for inquiry as to the alleged unsoundness of mind; and thereupon, on the 17th January, 1862, an inquisition was filed in Court, which found the truth of the statements in said petition, and (upon petition filed for the purpose) an order was passed by the Court appointing G. W. Lucas committee of the person and estate of Charles Lucas, on his entering into bond in the penalty of ten thousand dollars, which order bears date 11th February, 1862, and with which G. W. Lucas complied, but that he and the sureties on his bond were insolvent (at the filing of this complaint). That the infant plaintiffs, G. W. Lucas, Sarah L. Windham, Mary A. Parrott, Margaret J. Carraway, were the distributees of Charles Lucas, and that G. W. Lucas, as committee of Charles, had never paid to plaintiffs or the other parties in interest any portion of the estate of said Charles which went into his hands as committee. That on

*109

the 21st of December, *1868, John F. Parrott filed his bill in said Court against G. W. Lucas, with whom was afterward joined Erasmus G. Kirven, (purchaser of a portion of said mortgaged lands,) praying that an account be had of the amount due on a bond assigned as aforesaid, and in default of payment thereof by G. W. Lucas the premises mortgaged as aforesaid might be sold to make payment. That on the 24th October, 1870, it was ordered that G. W. Lucas do pay to John F. Parrott $1,008.12, with interest from 6th October, 1869, by first of February next after, or in default thereof that the mortgaged premises described be sold by the Clerk of the Court on the next or some other sale day thereafter for one-third cash, balance on a credit of one year, with interest annually, to be secured by bond and mortgage of the premises, and that the defendants be forever barred of any equity of redemption, and that the proceeds of sale be applied to costs of proceedings and expenses of sale, and then in payment of complainant's claim, and that any surplus be paid to defendants. That on 29th May, 1871, the Clerk of the Court reported that he had sold the mortgaged premises under the last named case on the 1st February then past in four lots, in all seven hundred and fifty-eight acres, being one hundred and ninety-eight acres less than the amount described in said mortgage. That the whole amount of sales was $2,092.87; that the one-third was paid in cash; that Benjamin W. Edwards was the purchaser of all the lots, and that he had complied with the terms of sale, and titles of the whole had been executed to him; which report was confirmed on the day of its date. That a considerable surplus from said sale, liable by terms of the order recited to be paid to G. W. Lucas or Erasmus G. Kirven, still remained in Court. That plaintiffs were ignorant of the disposition of the cash payment, but charged that it was paid over to John F. Parrott. That G. W. Lucas invested the whole of Charles Lucas's share in Benjamin Lucas's estate, in the lands contained and described in said mortgage; and that G. W. Lucas and his sureties being insolvent, and he never having paid them anything on account of their interest in Charles Lucas's estate, the distributees of said Charles were entitled to the sale of said lands to satisfy their claim. That John F. Parrott, E. G. Kirven and B. W. Edwards had notice of the investment by said committee, when made on 16th January, 1863. That said distributees had also a right to an account from J. F. Parrott, E. G. Kirven and

*110

B. W. Edwards of the rents and profits, *as well as the moneys arising from sale of said mortgaged premises; that they, as well as the committee, were trustees for the distributees of Charles Lucas, having dealt with the trust estate with the knowledge of the trust; and demanded:

1. That G. W. Lucas, as committee of Charles, account for the funds which went into his hands as committee, and pay the amount found due into Court.

2. That upon his failure to pay the amount found, said lands to be sold to satisfy the same.

3. That said G. W. Lucas, J. F. Parrott, E. G. Kirven and B. W. Edwards each account for the rents and profits of said lands, and for all moneys which had or might come into their hands or possession, or under their control, growing out of said lands or arising from the sale thereof.

4. That the funds in Court be retained to meet the demands of the distributees of Charles Lucas; and,

5. For other relief.

The answer of B. W. Edwards, not admitting the present insolvency of the bondsmen of G. W. Lucas as committee of Charles, asserted that they were solvent when the bond was taken and the share of Charles was paid over; that on the 20th day of February, 1862, E. G. Kirven purchased 198 acres of

the land bought by G. W. Lucas at the sale of Benjamin Lucas's estate, (on the West side of the road,) and on the same day gave G. W. Lucas bond and mortgage to secure the purchase money, which 198 acres of land were not sold under foreclosure of John F. Parrott's mortgage; that said bond and mortgage of E. G. Kirven were assigned by G. W. Lucas to a creditor who was not charged with notice, and that under proceedings by the assignee to foreclose said mortgage a sale was had subsequent to the filing of the complaint and B. W. Edwards became the purchaser thereof; that he admitted that the proceeds of sale, under the foreclosure of John F. Parrott's mortgage, were in excess of the amount due him, but denied that the excess or surplus was in Court or was answerable to plaintiffs' demand, alleging that under the order of Court the surplus was payable to G. W. Lucas, and that at the time of the sale the said Lucas was indebted to said Edwards in a sum largely exceeding said surplus, which was and still is a valid discount

*111

in favor of *Edwards against said surplus by reason of the order of Court, and that Lucas admitted it so to be, and agreed that it should be so regarded and treated; that he did not admit the investment by G. W. Lucas of Charles's interest in lands, and could not see that he could have done so, as his purchase of the lands was anterior to his receipt of Charles's property; that he denied that John F. Parrott or E. G. Kirven could have had notice of such investment, and most positively denied that he himself had notice of the investment of Charles Lucas's share of his father's estate in lands; but alleged, on the contrary, that all the information that ever came to him concerning the matter was well calculated to convince him that no such investment was made; he was Commissioner in Equity at the time of the partition of Benjamin Lucas's estate, and under agreement of the parties he distributed the proceeds of the sale of the real and personal estate, the choses in action and money in hand, among the distributees; that he knew G. W. Lucas received his own share and that of his brother Charles from personal assets thrown into the distribution by agreement, as well as from proceeds of sale of the real and personal estate, as the distribution sheet shows; that G. W. Lucas treated the share of Charles as so much money, and that in his first annual return after receiving it, as committee of Charles, (which return was sworn to before and received and recorded by him, Edwards, as Commissioner in Equity,) he charged himself with so much money as corpus, and in all his succeeding returns continued so to charge himself, and submitted:

1. That he was a purchaser without notice of any trust under proceedings to foreclose the mortgage assigned to John F. Parrott; and that if any trust did arise by reason of the manner in which G. W. Lucas paid his larger bond, he could not be affected thereby.

2. That, as purchaser of the 198 acres sold by Lucas to Kirven, he could not be affected by any such trust as was set up by plaintiffs, as he had no notice of any such trust; and Kirven could have had no notice of a trust alleged to have arisen long after the date of the mortgage given by Kirven to secure the purchase money of the 198 acres, under which mortgage he, Edwards, was a purchaser.

3. That the balance due by him on the bond, which balance was ordered to be paid to G. W. Lucas, was subject to be discounted by valid claims which he held at the time the order was made and still held against G. W. Lucas, and that G. W. Lucas long since agreed that it should be so discounted.

*112

*His Honor the presiding Judge heard testimony and the arguments of counsel, and then made a decree, in which, after stating the case, he proceeded as follows:

Townsend, J. The first question that presents itself for consideration is: Did G. W. Lucas, as committee of Charles Lucas, invest the share of Charles Lucas in the estate of Benjamin Lucas in the lands purchased at the sale made by the Commissioner? E. G. Kirven, a witness for the plaintiffs, testified that he had a conversation with G. W. Lucas before the sale, and G. W. Lucas said to him that he intended to become the trustee of Charles Lucas and take his part in land. He says Lucas told him this several times, and he remembers his saying so on the day the land was run out. He further says that G. W. Lucas asked him to go on his bond for the purchase money of the lands, and remarked that he intended to take his brother Charles's share in land, and the land would be good for the bond. Kirven did become one of the sureties of G. W. Lucas on his bonds. Kirven further testifies that G. W. Lucas did not point out the land in which he intended to put the money of Charles Lucas; that it was understood, on the day the land was surveyed, that Kirven was to get one hundred and ninety-eight acres of it, and in about one month after the sale the land was conveyed to him by G. W. Lucas. Kirven says he was not at the sale, and that the lands brought a full price. He further testifies that he signed the settlement sheet in January, 1863, as trustee for one of the distributees.

G. W. Lucas, one of the defendants, and a witness, testified that he did not inform E. G. Kirven that he intended to invest the share of Charles Lucas in land, or that he told him that if he would go on the bond he would be safe, as the share of Charles Lucas was to be put in the land and the land would be good for the bond. He further testified that he did not invest any of Charles Lucas's

share in the land, but received it in money, and always regarded it in that shape in his hands. He further testified that he purchased the lands for himself, and at the time was in prosperous circumstances and had a large property.

A. C. Spain, Esq., a witness for the plaintiffs, testified that John F. Parrott came to him to aid in the institution of proceedings against Edwards and G. W. Lucas, and stated that he knew G. W. Lucas had invested the share of Charles Lucas in the lands, but

*113

*did not say in what particular lands. The statement was made to witness after the sale of the land under the mortgage to Edwards.

It appears from the pleadings and the testimony that the lands of Benjamin Lucas were sold in two tracts, in accordance with the recommendations of the Commissioners in partition, and that one of the tracts brought $6,224, and the other $5,764. The settlement sheet shows that the share of Charles Lucas in the estate of his father was $5,468.88½. Charles Lucas, at the time of the sale, was a lunatic, and had been during his whole life, and was living with G. W. Lucas; was received by way of a credit on the bond of G. W. Lucas in January, 1863. This was during the late war, when it was known as an historical fact that Confederate money was the only currency and values of any kind were considerably inflated. G. W. Lucas was appointed committee of Charles Lucas in 1861, and the sale did not take place until January, 1862.

If the witness Kirven is entitled to credit, G. W. Lucas evidently expressed an intention, more than once after his appointment as committee, to invest the share of Charles Lucas in some of the lands belonging to the estate of Benjamin Lucas. Was this intention carried into effect? It would seem so, if the declarations of J. F. Parrott made to A. C. Spain are true. Parrott denied on the stand any knowledge of such an investment, but stated that he did not recollect what had passed between him and Mr. Spain. The witness Spain undoubtedly heard the declarations he testifies to, and the fact that Parrott did not deny having made them is an admission in effect that G. W. Lucas did make such an investment of the share of Charles Lucas. All the circumstances of the case go to show that the declarations of Parrott are true and the execution of the intention expressed to Kirven before the sale. Before the survey of the lands, and certainly before the sale, G. W. Lucas files his petition and obtains the appointment of committee of Charles Lucas. Why this haste to secure this appointment before the estate had been sold and the proceeds are ready for distribution? The only reasonable solution is, that G. W. Lucas desired to purchase the lands, and wished to become the committee before the sale to enable him to use the share of Charles Lucas in making payment in part of the purchase money. Why was the tract of land sold in two parcels? It is true it was upon the recommendation of the Commissioners; this was based upon something, and the presumption is fair that the representations

*114

and desire of G. W. *Lucas, the administrator of the estate, influenced the Commissioners in their action. If such was the case, why did G. W. Lucas wish the land sold in two parcels? The only reasonable answer to this inquiry is, because he desired the one tract for himself and the other for his brother, Charles Lucas. It was but natural that he should wish the share of Charles Lucas well invested, on account of his condition and the likelihood that he would be a charge upon him the residue of his days, and at that time land was considered safe when a permanent investment was contemplated. The land was so divided that one of the tracts brought at the sale only a small amount over the ascertained share of Charles Lucas. The other tract sold for about the share of G. W. Lucas, after the sale of a portion of it to Kirven. This indicates that calculations were made, and the amounts paid for the tracts of land were then probably fixed upon before the sale. The lands were sold on a credit of one, two and three years. In January, 1863, one year after the date of the sale, G. W. Lucas paid much more than the instalments due on the bonds. The amount due by estimation was about forty-four hundred dollars, and yet Lucas paid over ten thousand dollars on the bonds. Why was the large payment made if the share of Charles Lucas was not to go in the land purchased by G. W. Lucas? The larger bond is canceled and surrendered, and the smaller, with the mortgage, left in the hands of the Commissioner. This act was significant. G. W. Lucas either paid the larger because he considered the money of Charles Lucas invested in the tract for which it was given, and he desired to disencumber it, or he left the smaller bond, if it was given for the land in which he intended to invest the fund of his brother, for the purpose of disencumbering his own bond and leaving that bought with Charles's fund to take the chances of another sale by a foreclosure of the mortgage to satisfy the balance due on the bond.

The only testimony to prove that there was no investment of the share of Charles Lucas in the land is that of G. W. Lucas himself. The denial by him is not sufficient to outweigh the other testimony and the circumstances in the case. He has lost the lands and may be anxious for some means to protect the party now in possession of them. The further fact was relied upon in argument, that G. W. Lucas always returned the estate of Charles Lucas as money in his hands. This may be true, and yet it furnishes but little evidence on the point. The

*115

settlement was made in *1863. The first return was probably made in 1864. At that time the Confederate currency had vastly depreciated and was not a very current medium of exchange. G. W. Lucas no doubt knew this, as any one of this State must have known, and it was very convenient for his interest to report the share of Charles Lucas in money of a depreciated kind, and to consider the land, which had an intrinsic value, as his own property. Many persons occupying fiduciary relations did this. This fact, then, in connection with the denial of G. W. Lucas, cannot overthrow the testimony of Kirven and the other facts and circumstances in the case.

I am of the opinion that G. W. Lucas did invest the share of Charles Lucas in his father's estate in land. It is difficult, from the testimony before me, to fully identify the particular land. The circumstances of the case point to the fact that it was the tract containing four hundred and thirty-two acres; this was the smaller tract. The bond given for it was canceled and surrendered to G. W. Lucas. The smaller bond was left, and was afterward assigned in payment of a portion of a distributive share due to the wife of John F. Parrott. The surrender of the large bond was probably at the instance of G. W. Lucas, and also the assignment of the other bond to Parrott. This was done to relieve the land of Charles Lucas from an encumbrance, as G. W. Lucas felt it was his duty to do. It is my judgment that the share of Charles Lucas was invested in the tract of land containing four hundred and thirty-two acres.

But suppose there was no purchase of the land by G. W. Lucas at the sale for Charles Lucas, and no investment at that time of the share of Charles; yet it is a fact admitted by all the parties that G. W. Lucas employed the funds of his brother in payment of one of his bonds given for the purchase money of the smaller tract of land. The fund was thus used in purchasing land; and if a fiduciary relation subsisted between G. W. Lucas and Charles Lucas, the property thus purchased will be impressed with the character of the trust.

"It is a general rule, established to keep trustees in the line of their duty, that they shall not derive any personal advantage from the administration of the property committed to their charge."—Lewin on Trusts, 318.

"A trustee is never permitted to make any profit to himself from the management of the trust estate."—Story, 322.

*116

*"A trustee cannot make any advantage to himself in the management of the trust estate."—McNeil v. Morrow, Rich. Eq. Cases, 174.

"A trustee cannot act for his own benefit on a contract in the subject of his trusts."—1 John Ch., 397.

What was the relation existing between G. W. Lucas and Charles Lucas at the time of the payment of the bond? It was clearly a fiduciary relation. G. W. Lucas held the office of committee, and was a trustee for Charles Lucas, and the duties to be performed by him were those of a trustee.

If G. W. Lucas was a trustee at the time he receipted for the share of Charles Lucas, and availed himself of the benefit of his property in the payment of the purchase money for land, he is clearly not entitled to make a profit to himself in this way. The property thus purchased with the trust funds will be subject to the trusts. When there has been a misapplication of the trust fund, the Court will fasten a trust upon the land or other property in favor of the person beneficially interested in the money.—Story, 1210; McNeil v. Morrow, Rich. Eq. Cases, 172.

If a trustee should misapply the funds of his cestui que trust, the latter would have an election either to take the security or the property in which the funds were wrongfully invested, or to demand payment from the transfer of the original funds.—Story, § 1211; McNeil v. Morrow.

In this case the share of Charles Lucas was credited upon the bond of G. W. Lucas. The share, therefore, was used by G. W. Lucas in the payment of his larger bond, given for one of the tracts of the land, and was for his advantage, and the distributees of Charles Lucas can claim the land into which it can be traced or demand the amount of the trust fund from the trustee.

The case above cited of McNeil v. Morrow holds this doctrine and seems to be decisive of this case. In this case there was the relation of guardian and ward, and yet it was held that the negro slaves were subject to the trust and could be sold for the benefit of the ward.

I cannot perceive any strength or merit in the position assumed in the argument that a guardian has the right to retain the funds of his ward and pay interest annually upon the same, and, therefore, the committee, G. W. Lucas, had that right. Perhaps if he had received the share of the lunatic in money,

*117

and had never in*vested it in property for his own benefit and advantage, then the position would be tenable. But in this case the fund can be traced into property, and there is no evidence that it was ever withdrawn and retained in the shape of money by G. W. Lucas.

Looking at this case in any aspect, I am of the opinion that the tract of land for which the larger bond was given should be considered the trust property of Charles Lucas, and there is an equitable claim or lien upon it in favor of the distributees of Charles Lucas to the extent of the trust funds invested in it.

But before it can be adjudged subject to sale for the satisfaction of this claim, it must

be considered whether other parties have a superior equity or claim to the plaintiffs. The defendant, J. F. Parrott, claims that his lien under the mortgage assigned to him is superior. This mortgage was given to secure the payment of the purchase money of the two tracts of land sold to G. W. Lucas. It was the duty of the Commissioner to have taken two mortgages; this he neglected to do for some reason. When the larger bond was paid, there was an extinguishment of the mortgage pro tanto. When it was assigned to J. F. Parrott, there was an assignment of the mortgage only upon the tract of land for which the particular bond assigned to him was given. Parrott certainly had notice of the payment of the larger bond and the investment of the share of Charles Lucas in the tract for which it was given. He was present when the settlement was made; no doubt saw the surrender of the bond to G. W. Lucas, assented to everything, and afterwards told Mr. Spain of the said investment of the share of Charles Lucas in the land. He has, therefore, no higher equity than the distributees of Charles Lucas upon the smaller tract of land. The tract of land for which the bond assigned to J. F. Parrott was given could have been properly sold under a proceeding for the foreclosure of the mortgage, and a sufficient amount of the funds arising from the sale to pay the bond and mortgage would have been properly applicable thereto. Both tracts, however, were sold; the smaller one should not have been.

It is the judgment of the Court that John F. Parrott must obtain satisfaction of his bond and mortgage out of the tract of land for which the bond was given, and is not entitled to have satisfaction out of the other tract; and that the purchaser Edwards has acquired a valid title to the tract of land for which the bond assigned to Parrott was given by virtue of his purchase, and also to the

*118

other *tract, provided he had no notice of the investment of the share of Charles Lucas in this tract and of the claim of his distributees, or has not invested himself with the duties and responsibilities of a trustee by dealing with the trustee in regard to this particular tract, which was trust property.

Did Edwards have notice sufficient? What kind is necessary? Either actual or constructive, I think will do. If a trustee sell to a bona fide purchaser without notice, such purchaser will not be bound by the trusts.—Rutledge v. Smith, 1 McC. Eq., 119.

A person affected with notice may safely purchase from and protect himself under another destitute of notice.—[Massey v. M'Ilwain] 2 Hill Eq., 423.

Whenever it appears that the purchaser knew that the trustee was applying the fund to his own use, he is prima facie concurring in a breach of trust, and the onus of proof of justification of the trustee is on the purchaser.—Rhame v. Lewis, 13 Rich. Eq., 330.

Edwards denies any notice of the investment of the share of Charles Lucas in the land. It appears he was present when the settlement was made; was the Commissioner who sold the land, and was also the attorney for the estate of Benjamin Lucas. The settlement sheet was made out by him. The receipt from G. W. Lucas of the share of Charles Lucas was taken by him, and, with his full knowledge, the amount of same was credited upon the bond of G. W. Lucas. The larger bond was surrendered to Lucas. Edwards was fully cognizant of everything connected with the settlement of the estate of Benjamin Lucas. He evidently knew that G. W. Lucas was using the funds of Charles Lucas to pay his bond given for the land, and he is therefore to be considered as prima facie concurring in the breach of trust. He has not made proof of justification of the trustee as required by the case before recited, and, under all the circumstances, having come into possession of the tract of land as trust property, with full knowledge of it, I think he ought to be considered as a trustee, or as a purchaser with full notice of the trusts attaching to the property.

Kirven testified that G. W. Lucas told him he intended to invest the share of Charles Lucas in the land, and with this declaration, and what subsequently occurred with his cognizance and consent, he certainly had sufficient notice of the trusts and cannot be protected.

The proof is that the bond of G. W. Lucas, as committee, is now worthless by reason of

*119

the insolvency of G. W. Lucas and the *sureties. Nothing could, therefore, be recovered by the institution of suit upon the same. Edwards has no equity upon which to base a claim that the plaintiffs, by reason of allowing the bond to become worthless, should now look to that for the recovery of Charles Lucas's estate. Besides, the distributees of Charles Lucas had the right of election. They could either pursue the property into which the trust fund could be traced or attempt to recover the original bond out of the committee. They have elected to pursue the property, and this is a right which cannot be defeated by Edwards.

G. W. Lucas claims, in his answer, that he has accounted, but has never paid over the amount found to be due by him as committee. I presume the accounting, alluded to in the answer, is the final return made by him to the Court of Equity. This is not conclusive at all. He should account for the moneys received by him on account of Charles Lucas, and the amount so found due will constitute the estate of Charles Lucas.

It is the judgment of the Court that George W. Lucas has never accounted as committee of Charles Lucas; that the share of Charles Lucas in the estate of his father was invested in part, or used by G. W. Lucas for his benefit, in the tract of land purchased by

said Lucas at the sale made by the Commissioner in Equity, containing 432 acres; that the distributees and heirs at law of Charles Lucas have a claim or lien upon said tract of land by reason of the investment of the funds of Charles Lucas in the same; that John F. Parrott, under the bond and mortgage assigned to him, was only entitled to a lien by reason of the mortgage upon the other tract of land sold; that E. G. Kirven and B. W. Edwards had sufficient notice or knowledge of the investment of the share of Charles Lucas in the tract of land before mentioned to defeat their claim or equity of a purchaser without notice; and that the tract of land in which the funds of Charles Lucas have been traced should be sold and the proceeds distributed among his heirs at law, if the amount found to be due by G. W. Lucas on an accounting is not paid to them by him.

It is therefore adjudged and ordered that G. W. Lucas do account before the Clerk of this Court for his actings and doings as committee of Charles Lucas, and the said officer do ascertain and report to the Court the amount found to be due.

*120

*It is further adjudged and ordered that if the amount so found to be due by G. W. Lucas is not paid to the administrator of Charles Lucas on or before the first day of May next, that the tract of land containing four hundred and thirty-two acres, now in the possession of B. W. Edwards, be sold by the Sheriff of Darlington County on the first Monday in June next, for one-third cash, and the balance of purchase money on a credit of one and two years, with interest from day of sale payable annually, the purchaser to give bond and a mortgage of the premises to secure the payment of the credit portion of the purchase money; and that the cash received and the bond taken with the mortgage be turned over by the Sheriff to the Clerk of the Court for distribution among the parties entitled to the same, according their respective legal rights.

It is further adjudged and ordered that the sale heretofore made by the Sheriff under the proceedings instituted by J. F. Parrott for the foreclosure of the mortgage held by him as assignee shall stand and be regarded as valid so far as the tract containing five hundred and twenty-four acres is concerned, and that after the payment to J. F. Parrott of the amount due on the bond and mortgage the balance of the proceeds of the tract shall be paid over by the Clerk of the Court to B. W. Edwards.

It is further adjudged and ordered that the costs of this action be paid by the defendant, G. W. Lucas.

It is further ordered that the parties have leave to apply for any further orders necessary to carry into effect this decree.

The defendant, B. W. Edwards, appealed.

McIver, for appellant:

The only questions pertinent to this appeal are:

1. Was the share of Charles Lucas in his father's estate invested by his committee in real estate?

2. If so, in what particular piece of real estate?

3. If the share of Charles was invested in the tract of four hundred and thirty-two acres, as adjudged by the Circuit decree, has Edwards the right to the benefit of his plea of a purchase for valuable consideration without notice?

4. If Edwards had notice, did those under whom he claims, Parrott, Kirven, Parker & Kelly, have notice?

*121

*5. If it should be held that Edwards had such notice as would defeat his plea of purchase without notice, then would not equity require that all the sales at which Edwards bought should be set aside, and all of the land ordered to be resold and the proceeds applied in such a way as to meet the equities of the case?

6. If it should be held that the trust funds went into the smaller tract of land and that Edwards had sufficient notice thereof, can that part of said tract, the one hundred and ninety-eight acres, sold to Kirven, be subjected?

Then, after pointing out certain errors of fact in the decree, he proceeded as follows:

The party who undertakes to follow trust funds must be able to trace them distinctly, and show in what particular property they were invested, by clear and satisfactory evidence.—2 Story Eq., § 1210; Oliver v. Platt, 3 How. U. S. Rep., 333; McNeil v. Morrow, Rich. Eq. Cases, 175.

It has not been distinctly shown that any trust funds went into the purchase of the lands in question. It is denied, as we have seen, by Edwards, G. W. Lucas and Parrott, in their answers and in their testimony. The testimony of Spain as to what Parrott told him, is reconcilable with his denial; for this conversation was after the sale to Edwards, and Parrott might then have had notice, and yet had no notice before and at the time of the sale; and notice after the sale would amount to nothing.

The only evidence relied on to show that the trust funds went into this land, is: 1. Testimony of Kirven, which is contradicted by G. W. Lucas, and was at most a mere declaration of intention, which might not have been carried out. 2. The fact that in the settlement of 16th January, 1863, the larger bond was given up to G. W. Lucas, and he receipted for his own and Charles's share. This does not prove that Charles's share was used to pay this bond. It was not sufficient in amount for the purpose, while the share of G. W. Lucas, added to the money paid by him, was more than sufficient.

Charles's share was used to pay balance due by G. W. Lucas, as administrator, and hence it was, as we have seen, charged as cash in the returns of G. W. Lucas, as committee.

But is it shown distinctly into which particular tract of land the trust funds went? It is admitted by the Judge, as we have seen, that it is difficult to identify the particular

*122

land. It could not *have been the larger tract—certainly not the whole of it—for one hundred and ninety-eight acres of it had been sold to Kirven before the transaction from which the investment is argued took place, in accordance with an understanding had with Kirven, at the very time when Kirven says G. W. Lucas expressed his intention to invest his brother's share in land. This intention, therefore, could not have embraced the one hundred and ninety-eight acres, which was very soon afterwards, and before any investment of trust funds is even claimed to have been made, conveyed to Kirven, 20th February, 1862; and it was clearly an error to subject the one hundred and ninety-eight acres.

Did Edwards have notice? No one testifies that he had, and he denies it in his answer and in his testimony.

It is argued that Edwards had notice, because he was the Commissioner who made up the settlement sheet of 16th January, 1863; that, however, did not show that any trust funds went into the land. On the contrary, the return made that day negatived such an idea. The Act of 1840, (11 Stat., page 159,) required trustees, &c., in making their returns, to state "the particulars and value" of the estates in their hands. All subsequent returns showed the same thing. Edwards knew the trustee to be a man of large means, able at any time to pay the amount with which he charged himself as cash in his returns. He heard of no objection at either of the sales under which he purchased, though these very parties lived in the County, and the sales were duly advertised.

If Edwards had notice, and those under whom he claims had no notice, that will be sufficient to protect him.—Hill on Trustees, *165; Notes to LeNeve v. LeNeve, 2 W. & T. Lead. Cas. Eq., 131; Massey v. McIlvaine, 2 Hill Ch., 423.

Edwards claims, first, under Parrott mortgage, which certainly was a lien upon the whole of the land—both tracts.

He also claims under Kirven mortgage, which was given before the settlement of 16th January, 1863.

And he also claims under the mortgage to Parker and Kelly, who are not even charged with having had notice.

The Parrott mortgage was certainly superior to any claim of the plaintiff, and this seems to be admitted; but it is said that this mortgage must be confined to the larger tract—the one on the East side of the road. Why? Where is the authority for such a position? Suppose the tract on the East

*123

side of the road is not sufficient *to satisfy this mortgage—is not the holder entitled to enforce his lien on the other tract? The Court cannot know until it is tested by a sale of the larger tract, separately, whether it will yield a sufficient amount to pay this mortgage.

As to the one hundred and ninety-eight acres sold to Kirven, it certainly cannot be subjected, because it was sold before there was any pretense that the trust funds had been used, and the mortgage on it was transferred to Parker and Kelly, who certainly had no notice; and under this mortgage it was sold and bought by Edwards.

If, however, the whole or a part of the four hundred and thirty-two acre tract is to be subjected, then does not equity and justice require that a resale of the land sold under the Parrott mortgage should be made? For, by the sale already made, that mortgage has got the benefit of the sale of both tracts, whereas it would now be held that it was only entitled to one, and Parrott may have got his money, for aught the Court knows, out of the wrong tract. In other words, Edwards has had to pay for the four hundred and thirty-two acre tract under the Parrott mortgage, and is now to be required to pay again for the same tract. It may be that the sale of the tract which the Judge says is alone liable under the Parrott mortgage was not sufficient to pay that mortgage, and, if so, then Parrott has got money which ought to go to the trust estate. The only way to rectify matters, if the principles of the Circuit judgment are to be sustained, would be to set aside the previous sales and order a resale of the two tracts separately—the proceeds of the one to go to the Parrott mortgage, and the proceeds of the other to the trust fund.

Spain, for plaintiffs.

Warley, for J. F. Parrott, one of the defendants.

March 15, 1876. The opinion of the Court was delivered by

WILLARD, A. J. One of the leading objects of the complaint was to charge certain lands, in the hands of the defendant, Edwards, with certain equities, in favor of the representatives of the estate of Charles Lucas, deceased, a lunatic. They claim, in substance, that Edwards acquired such lands through G. W. Lucas, the committee of the person and estate of Charles Lucas, with no-

*124

tice of the fact *that Charles Lucas had an equitable claim to said lands, and, accordingly, subject to such equity.

The defendant, Edwards, purchased all but

one hundred and ninety-eight acres of the land in question, at a sale under a decree of foreclosure under a mortgage, which he claims to have given him a legal title, and an equity superior to the equity alleged by the plaintiffs, as it regards the whole tract so purchased.

It is necessary to look into the rights of the original mortgagee in order to see what those rights were at their inception, and whether capable of being affected by any equity arising out of the relations of the committee to Charles Lucas, while in the hands of such original mortgagee, or in the hands of J. F. Parrott, his assignee, who foreclosed the mortgage.

It will then be necessary to inquire whether the purchaser of the lands under foreclosure, Edwards, was affected by knowledge of any circumstances tending to preclude him from acquiring that interest in the lands which the mortgage, by its terms, assumed to create.

What, then, was the nature and extent of the interest acquired by the original mortgagee? This inquiry is affected by a claim advanced by the plaintiffs that the mortgage, at the time of foreclosure, did not cover that part of the tract purchased by Edwards, and which is claimed by the plaintiffs. This objection depends upon the force and effect of the mortgage at the time it was created. The mortgage was taken by the Commissioner in Equity in behalf of the distributees of Benjamin Lucas from a purchaser of lands of the estate of Benjamin Lucas, sold under a decree for partition, as security for the purchase money of said lands. The purchaser was G. W. Lucas, and the lands embraced those purchased by Edwards under foreclosure proceedings, already referred to. The sale was made prior to February 11, 1862. G. W. Lucas and Charles Lucas were brothers, sons of Benjamin Lucas, and both entitled to distributive shares of the estate of their father. The mortgage was, therefore, in the hands of the Commissioner acting for the distributees of Benjamin Lucas, a purchase money mortgage, unaffected by any legal or equitable claim that might exist against G. W. Lucas, the purchaser and mortgagor.

The next question is as to the effect and operation of the mortgage as it regards the right of the mortgagee to have satisfaction out of the land. The land covered by the mortgage was sold in two separate parcels, each bringing a distinct price, and both were

*125

pur*chased by G. W. Lucas. Two bonds were given by G. W. Lucas, the one covering the price of one of the lots, and the other bond the price of the other lot of land. A single mortgage was made by the purchaser, covering both lots of land, and conditioned for the payment of both these bonds.

The smaller of these bonds, together with the mortgage, was transferred by the Commissioner to J. F. Parrott, on account of the share of his wife in the estate, under whom the defendant Edwards claims, June 3, 1863. On or before the 11th day of February, 1862, the date of the sale to him, G. W. Lucas was appointed committee of Charles. The precise date of this appointment is in dispute, but need not be more accurately fixed.

On or about January 16th, 1863, the larger of the two bonds was transferred to G. W. Lucas as part of a settlement under which he received his individual share of the estate, and, as committee of Charles, the share of the latter in the estate. The transfer must be regarded as payment of this bond and an extinguishment pro tanto of the mortgage debt.

The facts that Parrott foreclosed this mortgage on account of the bond transferred to him and sold, and that Edwards purchased, have already been stated.

The question here arises, did the mortgage bind the two parcels of land included in it as security for the payment of both bonds, or is it to be regarded, as contended for by the plaintiff, as intended to secure each of these bonds separately on the respective lots in respect to which they were given? There is nothing to prevent a mortgage from operating at one and the same time on several distinct parcels of land so that all are bound for the mortgage debt. Nor is there any reason why two or more distinct obligations may not be secured by a mortgage. Whether such securities are convenient is a question for those who make them, and not for those who enforce them. That was the character of the present mortgage as far as its nature is disclosed by the record before us. The Circuit Judge concludes that the mortgage was several and as to each part of the mortgage debts a security for the corresponding lot of land, on grounds too dependent for their force on conjecture to have weight against the tenor of the mortgage. That a person dealing with the mortgage might, when affected by peculiar equities, be held to that principle in enforcing the mortgage is conceivable, but that result would not grow out of the proper

*126

construction of the *mortgage, but out of the nature of attending circumstances. It is clear that the mortgage in the hands of the Commissioner was a security covering both bonds by a lien on the two parcels of land, considered as a single fund. The extinguishment of one of these bonds by its redelivery to the obligor as part of a settlement of his and Charles's interest in the estate did not in any way affect the validity of the mortgage as a security for the bond that remained unpaid.

Was the mortgage in the hands of the Commissioner charged with any equity in behalf of Charles Lucas? The Commissioner

was merely the hand of the Court; the mortgage money belonged to those entitled to take the estate of Benjamin Lucas, and the security was theirs. The interpolation of the name of the Commissioner changed none of the substantial rights of the parties. If, then, the bonds, had they been taken and secured in the names of the real parties in interest, would have been unaffected by any equity in behalf of Charles Lucas, then the title of the Commissioner is equally unaffected.

It is contended that G. W. Lucas, in purchasing the parcels of land, intended to make provision for an investment of the share of Charles coming from the estate. It is not pretended that he actually purchased in the name of Charles. The parcel of land in question was purchased with G. W. Lucas's bond, excepting a small amount of cash to cover costs and expenses. It does not appear that at the time of such purchase G. W. Lucas held any property or funds belonging to Charles. He had nothing in his hands to invest. This of itself is strong ground for holding that the original purchase of the tract was not intended as an investment in behalf of Charles. The Circuit Judge has, however, arrived at a contrary conclusion, but we do not find that that view has sufficient support from the evidence to overcome the conclusions that may arise from the form of the transaction and the circumstances and situation of the parties.

But assuming that it was the intention of G. W. Lucas, in purchasing the property in question, to place in the form of an investment for Charles one of these parcels of land, still such an intention was, at the time of the purchase, a mere unexecuted purpose. There was then no estate in his hands for any such investment. What might be the condition of things, when Charles's estate should actually come into his hands, could

*127

not be certainly known then. *It might happen that when that payment was made circumstances would render proper or expedient some different mode of investment for the estate of Charles. This lot, as it stood in the hands of G. W. Lucas previous to the payment to him of Charles's share of the estate, certainly was not charged with any equity in favor of Charles. The elements of such an equity are wanting. It was not purchased with Charles's money, for no funds of that character was in his hands. On the contrary, it was purchased with the money and credit of G. W. Lucas, and that established in him the beneficial interest to support his legal title.

This was the position of things when the mortgage was taken for the distributees of Benjamin Lucas's estate, and there can be no doubt that such mortgage was unaffected by any intention that G. W. Lucas may have had as to the future use he should make of the property. In fact, Charles Lucas was himself a distributee unsatisfied as to his share at the time the mortgage was taken, for it was part of the fund to which he looked for the payment of his share of the estate; and so far from his interest being with the mortgagor, it was altogether with the mortgagee.

Was any change effected by the subsequent transfer of the larger bond to G. W. Lucas? We will assume the view most favorable for the plaintiffs in looking at the question, and that was that the bond in question was received by G. W. Lucas as part of the share of Charles; the actual fact, in this respect, need not be determined. Among the distributable assets were two bonds secured by the mortgage. Charles takes one of these bonds and the other distributees the other. Had the bond been specifically assigned to Charles, it would not have affected in the slightest degree the liability of the whole land for the bond that still remained in the other distributees. The fact that it was indirectly assigned to Charles, though in form to G. W. Lucas, assuming it so to have been, would not produce any greater effect than a direct assignment to Charles.

The consequence was, that when Parrott took the bond, as representing one of the distributees, he took it with all the rights of those from whom he received it, and had full power to foreclose and sell both parcels of land, if that became necessary, and the purchaser, under such mortgage, unless affected by some equity collateral to and independent of the mortgage, would hold the land under a title as full as that of Benjamin Lucas during his lifetime.

*128

*Pursuing the assumption that the bond assigned to G. W. Lucas was really the property of Charles, it either became paid by operation of law in the hands of G. W. Lucas, by reason of his being the committee of Charles, or it did not. If it was paid, then it became cash in G. W. Lucas's hands, and the land, although to that extent discharged from that bond, still remained held under that transferred to Parrott. Equity would not, without stronger reasons than the case presents, have considered that cash as invested in a tract of land mortgaged to a third person to secure the debt of the committee. Nor would it have been proper, while the mortgage was unsatisfied, for the committee to have placed Charles's interest in such shape that, in case of the default of the committee to pay the mortgage money, it might be destroyed through the operation of the mortgage. It was then the interest of Charles, as things stood, that the funds should be regarded as cash in the hands of G. W. Lucas, for investment, secured by his bond as committee. But suppose that the bond was not to be considered as paid, in equity, but as a good obligation against G. W.

Lucas belonging to Charles, and capable of being enforced against the land, through the mortgage in Parrott's hands, equity would, in that case, hold Parrott as a trustee for Charles, so far as his right to hold the mortgage security was affected by a part of the mortgage debt being outstanding in a third person. If Parrott chose to foreclose for the satisfaction of his bond, he could do so; but if it should happen that there was not a fund sufficient to pay both debts, and the whole land had been sold, then Charles would be permitted to come in for his share of the money realized on the sales of the property. In either case the purchaser under the mortgage would take a title as good as that of the mortgagee.

A purchaser under such a sale on foreclosure could safely purchase with full knowledge of all the transactions disclosed by the case before us, and yet obtain good title. Assuming Edwards to have had the fullest information, there was nothing to prevent him from obtaining full title to the lands purchased by him under the foreclosure of the Parrott mortgage. If all that is charged in respect to the defendant, Edwards, be true, he was still in the position of one purchasing from another who had acquired a legal title, without notice of an equity, and that was sufficient, without regard to what knowledge he possessed of the transactions.

*129

*It is clear that Edwards' title to the land purchased under the Parrott mortgage is unimpeachable on any legal or equitable ground presented by the case before us.

It only remains to consider the title of Edwards as it regards the one hundred and ninety-eight acres. This tract was embraced in the original mortgage given by G. W. Lucas to the Commissioner, yet it was not sold upon the foreclosure of that mortgage. Shortly after G. W. Lucas purchased from the Commissioner, in February, 1862, he sold this one hundred and ninety-eight acre tract to Kirven, who gave him a mortgage for the purchase money. This mortgage was afterwards assigned to Edwards, and while in his hands was foreclosed, and Edwards became the purchaser.

If Kirven's title was good and unaffected by any equity existing in favor of Charles Lucas, then the title of Edwards is equally good. Kirven purchased and gave his mortgage previously to the settlement under which Charles's share must be regarded as paid into the hands of his committee. There were then no funds in the hands of the committee belonging to Charles to invest, and accordingly no investment can be regarded as having been made.

As has already been said with reference to the other mortgage, the land purchased by G. W. Lucas could not be regarded as an investment in behalf of Charles, for it was purchased wholly on G. W. Lucas's credit, and was covered by a mortgage for the whole purchase money on the sale of the two tracts. It does not appear that there was any clear value in this land, at that time, over and above the amount for which it stood mortgaged.

An attempt was made to prove that Kirven was informed at the time of his purchase that the purchase by G. W. Lucas was intended by him to form an investment for Charles. There is a conflict of testimony on this point, which the Circuit Judge has passed upon, holding Kirven subject to notice. But there is a fundamental difficulty in the way of affecting Kirven's title by the fact, even if G. W. Lucas made the statements attributed to him. It could amount to no more than a declaration of his intentions, at some future time, to place a part of the purchased land in the position of an investment for Charles. It was not in such a position at that time, for, as we must assume, it was mortgaged for all it was worth to pay G. W. Lucas's bonds; besides, G. W. Lucas did not hold at that time any part of the estate of Charles capable of investment. But what-

*130

ever he may have understood, it is *evident, from the testimony, that he did not regard the 198 acres as included in that portion of the land which was intended as an investment for Charles. There is no evidence to charge Kirven with notice of any equity affecting his title to the 198 acres, and accordingly Edwards's legal title cannot be impeached on the ground of any equity in favor of Charles.

There is nothing in the case to show that at the time Edwards purchased such a state of facts existed as would have induced a Court of equity to decree that the land in question should constitute an investment for Charles. We must assume that the committee's bond for the faithful discharge of his office formed a better security than the land at that time. Assuming that equity might have set up the bond delivered to G. W. Lucas as the property of Charles, still that would not affect Edwards, who claims against that bond and not through it.

As Edwards purchased from parties having legal title, and unaffected by any equity, it is unnecessary to consider that portion of the evidence tending to show his knowledge of the state of relations between Charles and his committee.

It is equally unnecessary to consider the effect of the mortgage made by G. W. Lucas to Parker and Kelly, as it cannot affect the title derived by Edwards through the other mortgages covering the whole tract, and it does not appear that Edwards acquired anything under that mortgage that would not, under the circumstances, have passed into his hands under the mortgages already considered.

The judgment must be set aside and the

cause remanded to the Circuit Court for a decree establishing the foregoing conclusions.

MOSES, C. J., and WRIGHT, A. J., concurred.

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7 S. C. *131

*PRINGLE v. SIZER.

(Columbia. Nov. Term, 1875.)

[*Appeal and Error* ⇐884.]

Where there are several orders of the Circuit Court and a party appeals from later orders, leaving the first unaffected by his appeal, he is assumed to admit its correctness, and cannot, after the appeal is decided, go back to the first order and make that the subject of another appeal.

[Ed. Note.—Cited in Hyatt v. McBurney, 17 S. C. 150; Ex parte Knox, Id. 213, 214; Fields v. Hurst, 20 S. C. 294.

For other cases, see Appeal and Error, Cent. Dig. § 3616; Dec. Dig. ⇐884.]

[This case is also cited in Hyatt v. McBurney, 17 S. C. 143, and distinguished therefrom.]

Before Mackey, J., at Lancaster, March Term, 1875.

After the decision of the Supreme Court at April Term, 1870, (reported 2 S. C., 64,) His Honor Judge Thomas, on October 11th 1870, made the following order:

"It is ordered that upon the payment into Court of the sum of $50, to be applied, under the decree of the Supreme Court, to the claim of Chafee, St. Amand & Croft, and the further payment by the defendants of their own costs already incurred in this case, the bill be dismissed, unless within thirty days from the date of this order the proper parties representing the said claim of Chafee, St. Amand & Croft file an amended bill against the defendants to recover any further sum which they may consider due upon said claim under the terms of the said decree. That upon the dismissal of the bill, in accordance with the terms of this order, and the payment of the costs then remaining, by the proper parties representing the claim of Chafee, St. Amand & Croft, that the clerk pay to them the sum paid into Court under the terms of this order."

Four other orders were afterwards made in the cause—from the two last, two of which dated one February 28, and the other May 22, 1874, an appeal was taken by Thomas H. Croft, representing the firm of Chafee, St. Amand & Croft. The appeal was heard in December, 1874, and the decision filed February 28, 1875. It is as follows:

MOSES, C. J. The principal case was heard at April Term, 1870. Its judgment was the law of it. If the firm represented by Chafee, one of the plaintiffs, lost the benefits to which it was thereunder entitled, it was through its acquiescence in the order made by Judge Thomas on the 11th of October, 1870. Its failure to carry out the decree of this Court was too apparent to be mistaken, and yet no appeal was taken to correct the error.—See Pringle v. Sizer, 3 S. C., 337. The enforcement of the decree,

*132

by the very terms of *it, depended on the action of the firm—the party having the real interest—and if it has lost any benefit which it might have derived from it, the result has been the consequence of its own inaction.

If the order of Judge Thomas, not corrected because of the default of the party now complaining, until reversed remains of force, all the subsequent orders made by the Circuit Judge are irregular and must be set aside. We, too, are estopped from interposing by its existing force and effect, no appeal having been taken from it.

A remittitur of the Court, dated March 4, 1875, was sent by the Clerk to the Circuit Court, and thereupon the following order, dated March 11, 1875, was made by His Honor Judge Mackey:

"Thomas H. Croft, as survivor aforesaid, having appealed to the Supreme Court from the judgment of this Court, and said Supreme Court having refused the motion of appellant: Now, on reading and filing the remittitur from the said Supreme Court, and on motion of R. E. Allison, attorney for the respondent, it is ordered that the judgment of the Supreme Court be, and the same is hereby, made the judgment of this Court, and that the respondent, Bela Sizer, have execution for the costs that have accrued thereon. And the Clerk is hereby ordered to apply any money paid into Court in his hands, and now belonging to any party liable for costs in this cause, to the payment of their costs, or a sufficiency thereof to pay such costs as may be included in this order or judgment."

Thomas H. Croft then gave notice of appeal from the orders above recited. The grounds of appeal from the order of Judge Thomas are as follows:

1. Because said order conflicts with the decree of the Supreme Court and is erroneous.

2. Because said order failed to carry out the decree of the Supreme Court.

Those from the order of Judge Mackey are as follows:

1. Because the appeal referred to, having prevailed to set aside the orders appealed from, the presiding Judge, it is respectfully submitted, in his said order of the 11th of

*133

March, 1875, erred in *ruling that the appellant's motion was refused by the Supreme Court.

2. Because said order is, in other respects, erroneous.

Moore, for appellant.

Allison, contra.

March 15, 1876. The opinion of the Court was delivered by

MOSES, C. J. It is beyond question that the decision of the Court in this long contested case, filed February 18, 1875, declared all the orders made by the Circuit Court subsequent to that by Judge Thomas of October 11, 1870, irregular, and by its terms vacated them. The conclusion of the Court in effect sustained the motion then submitted by the appellant. Though the said order of October 11, 1870, was also irregular, it was left of force only because no appeal had been taken from it.

The Circuit Judge, therefore, did not draw the proper conclusion from the judgment of this Court, when, in his order of March 11, 1875, he therein recited that "the Supreme Court had refused the motion of the appellant," and under that assumption made the order last referred to.

It is not denied that the fifty dollars now in the hands of the Court is the pro rata share of the $206.64 applicable to the judgment of Chafee, St. Amand & Croft against Sizer by the decree of this Court in the said case.—[Pringle v. Sizer] 2 S. C., 66. We concur with the view of the counsel for the respondents that, no matter how the other judgments of the same rank against Sizer have been paid, the appellants can claim no larger proportion of the balance in the hands of the respondents than that fixed by the decree. Whether paid by them, or any one for or on their account, their interest in the fund can neither be increased or diminished thereby.

The same reasons which induced the Court, by its order of the 18th of February, 1875, to set aside the Circuit orders then brought for its review, must now operate to declare void the order of March 11, 1875. As long as that of Judge Thomas stood, it remained of active force, if the appellants thought fit to regard it by not seeking its reversal by appeal. It certainly did not carry out the mandate of this Court; but if the parties rested quiet, with full notice of the erroneous construction which the Circuit Judge

*134

gave to it *by his said order, it is too late for the appellant to seek relief by the motion which he now prefers. There is another matter which confirms our view in regard to the right claimed by the appellant. After the order of October 11, 1870, he appealed from other orders subsequently made, to wit, that of February 28, 1874, and that of May 22, 1874, and these were passed upon by this Court in its judgment of February 18, 1875, already referred to. After thus omitting to appeal from the order of Judge Thomas, how can they be permitted to refer back to it and now make it the subject of complaint? His last appeal, excluding a previous order from which he may have claimed relief, but refrained from doing so, is an implied admission that in his view he was without proper cause of exception to it.

The motion to set aside the order of October 11, 1870, is dismissed, but granted as to that of March 11, 1876.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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7 S. C. 134

JONES v. MASSEY.

(Columbia. Nov. Term, 1875.)

[*Wills* ⇐725.]

Testatrix devised the rest and residue of her real estate to her three children and two grand-children, her son J. R. being one of the three children, and directed that on the partition and division of said real estate her son J. R. would have the right, at his discretion, to take the said real estate at its appraised value on a credit of ten years, payable in equal annual instalments, with interest: *Held*, That J. R. was not bound to make his election to take the real estate until there was a return to a writ of partition appraising the lands.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1734; Dec. Dig. ⇐725.]

[Wills ⇐725.]

Held, further, that it was proper to require J. R. to secure the payment of the appraised value of the real estate and the interest thereon by his bond and mortgage, but not by personal security, and also to require him to account for rents and profits, he having been in possession before the division.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1732–1737; Dec. Dig. ⇐725.]

[*Wills* ⇐560.]

Testatrix devised her mills to her son J. R., "with one hundred acres of land around the said mills, to be laid off in such way and manner as will be suitable and proper with reference to the mills and the balance of my estate:" *Held*, That J. R. was not entitled to have the one hundred acres of land laid off immediately around the mills and in one compact parcel.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1220; Dec. Dig. ⇐560.]

[This case is also cited in Fitzpatrick v. Wylie, 76 S. C. 261, 262, 266, 267, 269, 56 S. E. 364, 1039, as to its effect upon the citing case.]

Before Mackey, J., at Lancaster, February, 1874.

This was an action by Churchill B. Jones against Sarah R. Massey and others, for partition.

The case was as follows:

Elizabeth Massey made her last will and

*135

testament bearing date *the 16th day of December, 1858, and shortly thereafter departed this life, leaving the same of force. By the first and third clauses thereof, she devised and bequeathed as follows:

1. I give, devise and bequeath to my son, James R. Massey, for and during his natural lifetime, subject to the limitations and con-

ditions hereinafter stated, my mills, situate on the Catawba River, with 100 acres of land around the said mills, to be laid off in such way and manner as will be suitable and proper with reference to the mills and the balance of my real estate; also the one-half of the balance or remainder of my whole real estate and lands whereon I now reside and cultivate, situate on the Catawba River, composed of several tracts or parcels, for and during the term of his natural life, subject to the limitations and conditions hereinafter stated; also all my horses and mules, (except my two carriage mules,) all my stock of cattle, plantation, smith and carpenter tools, the one-half of my stock of hogs; also my library of books and my silver cup, which was the cup of his father.

The foregoing lands and estate my son, James R. Massey, will take and receive, in addition to what will hereafter in this will be given, and over and above the share which he will hereafter, in this will, receive and be given to him in common with his sisters. James R. Massey, my son, will get under this clause, and in this devise, the mill and 100 acres land, and then the one-half of all the balance or remainder of my whole real estate, subject to the conditions and limitations hereafter in this will stated and expressed; also the other property, personal, herein stated, for which he is not to account, and over and above his share hereafter given him.

3. All the balance, remainder and residue of my estate, real and personal, saving and excepting what is disposed of in the first and second clauses of my will aforesaid, I give, devise and bequeath as follows: To my daughter, Elizabeth Massey, the one-fourth. To my daughter, Sarah Jones, the one-fourth. To my son, James R. Massey, the one-fourth. And to my grand-children, Mary E., Charlotte A. and James R. Massey, children of my deceased daughter, Jane Massey, among them the remaining one-fourth. In the division and partition of the same, I allow the negroes to be laid off and allotted and vested as follows: To James R. Massey, my son, the following negroes: Tom, (the miller,)

*136

Cindy, Isom, John *(carpenter,) Tim, Jim, Henrietta and child, Rhoda, Clayborne, Miram and their future increase; my son James R. to take said negroes at their appraised value and account for said negroes at their appraised value in the division to my other legatees, he accounting to the other three for the excess over his one-fourth. To my daughter, Elizabeth Massey, the following negroes: Robin, Silvey, Jimmie and Daniel and future increase, at their appraised value on the partition and division, she accounting for their value in taking her one-fourth as aforesaid. To my grand-daughter, Mary Elizabeth Massey, the following negroes: Nancy Jane, Jack, Bill and Jessie and their future increase, at their appraised value on the partition and division, she accounting for said value in taking her share, the one-third of the one-fourth, as aforesaid. To my grand-daughter, Charlotte A. Massey, the following negroes: Eaton, Rachel, Kitty and Rosella, at their appraised value on the partition and division of my estate, she accounting for said value in taking her share, the one-third of one-fourth, as aforesaid. I have herein allotted my negroes. To my daughter, Sarah Jones, and grandson, James R. Massey, I have allotted no negroes, but they will receive their share of the value of said negroes from the others. Sarah Jones will receive her one-fourth in money, and James R. Massey his one-third of one-fourth also in money.

On the partition and division of the lands and real estate, my son, James R. Massey, is to have the right, and the power is hereby conferred on him, to take the said real estate and require that the said lands be vested in him at their appraised value on said partition, he accounting for the appraised value of said lands and real estate; this is, however, discretionary with my said son, James R. Massey, and he can act to suit himself when called upon to decide and make his election. If my son, James R. Massey, should decide to take the lands on the partition at their appraised value, this, with the value of the negroes, will far exceed his one-fourth and put him considerably in debt, having to pay back largely, but he must have a long credit, say ten years, if he should desire it, with interest from the day the partition is made, in equal annual installments. The estate share and negroes given to my daughter, Elizabeth Massey, under this section or clause of my will, is given and bequeathed to Dixon Barnes, in trust, for her sole and separate use for life, and at her death to such child or children as she, my said daughter Elizabeth, may leave living

*137

at her death, and in the event *she dies leaving no child or children alive, or the issue of a child, then the share which my said daughter Elizabeth takes and the estate which she gets for life under this will is to return back and be divided among my other legatees named in this third section or clause of my will, according to their rights and in the proportion herein stated and expressed in this third section.

The share which my daughter, Sarah Jones, will receive and take under this my will and this third section thereof is given and bequeathed to her for life for her sole and separate use, and at her death to be equally divided among her children and the children of my deceased daughter Charlotte —the children taking per capita—the said share to pass into the hands of Churchill B. Jones in trust, and as trustee for the trust herein stated for my daughter Sarah.

The share which my grand-daughters, Mary Elizabeth and Charlotte Antoinette

Massey, and the estate and negroes which they will respectively get, receive, take and be entitled to under this my will and this the third section thereof, is given, devised and bequeathed to Dixon Barnes, in trust, for the sole and separate use of the said Mary Elizabeth and Charlotte A. Massey, respectively, during their respective lifetimes, and at their deaths, respectively, to such child or children as they may leave living at their respective deaths; and in the event either or both dies leaving no child or children alive, or the issue of a child, then their share, estate and negroes is to be divided between the survivor and their brother, James R. Massey. If both die leaving no child or issue of a child, James R. Massey, their brother, takes the share of both. The share which my grand-son, James R. Massey, takes and will be entitled to receive under this my will and the third section thereof, is given to him for life, and at his death to such child or children as he may leave alive at his death; and if he dies leaving no child or children alive at his death, or the issue of a child, his share and estate under this my will and the third section hereof is to be divided between his sisters Mary E. and Charlotte A. Massey.

The mills and 100 acres of land and the one-half of the balance or remainder of land and real estate given and devised to my son, James R. Massey, in the first section or clause of my will, together with the negroes and estate which my son, James R. Massey, will get, receive and be entitled to under this the third section or clause of this my will, is hereby given, devised and bequeathed to

*138

my *said son, James R. Massey, for and during the term of his natural life, and at his death to such child or children as he may leave living at the time of his death: and in the event he, my said son, James R. Massey, should die, leaving no child or the issue of a child at his death, then said lands, mills, negroes and estate is to return back and be divided amongst my legatees named in this the third section of my will, and according to their rights and in the proportions herein, in this third section of my will, stated and expressed.

A writ of partition was issued, directing the Commissioners to make partition and division of the lands in conformity with the provisions of the will, and they made a return thereto, dated the 1st December, 1873, wherein they stated that they first laid off to James R. Massey one hundred acres around the mill, represented by a plat referred to; and that they then appraised the whole balance of the lands, consisting of sixteen hundred and fifty-one acres, at the sum of $6,996. The return next proceeded to state and set forth how the Commissioners had divided the said balance between the parties entitled, and what tract they had allotted to each, and its appraised value.

James R. Massey excepted to the return on the grounds:

1. Because the Commissioners, in their said return, have failed to lay off to this defendant, in fact, out of the land described in said writ, the one hundred acres around the mill devised to him in the will of his mother, Mrs. Elizabeth Massey, deceased.

2. Because, in their said return, they have withheld from this defendant the right to elect whether he would take the whole of the said lands and real estate conferred upon him in the third clause of said will at their appraised valuation thereof upon the terms and conditions contained in said third clause, which said lands this defendant would have so elected to take, and still elects to take, in conformity with the right conferred upon him as aforesaid.

On the 26th of December, 1873, His Honor made a decree as follows:

Mackey, J. Upon hearing the amended return of the Commissioners in the above entitled case, made in accordance with the order of the Court of the 5th September, 1873, and

*139

on motion of *S. P. Hamilton, plaintiff's attorney, it is ordered that the same be confirmed, and that the title to the various tracts of land set off to James R. Massey be vested in him, and that the tract set off to Mrs. Elizabeth Beckham be vested in her as her sole and separate property.

It is further ordered that Sarah Jones, Mary E. Massey, Charlotte A. Beckham and James R. Massey, Jr., do make and execute their bond to James R. Massey for the sum of $874.50, payable in two equal annual instalments, with interest from date, and, to secure the same, do give to said James R. Massey a mortgage on all the land set off to said Sarah Jones, Mary E. Massey, Charlotte A. Beckham and James R. Massey, Jr., and mentioned in said return. And upon the making of said bond and mortgage and delivering the same to the Clerk of this Court for the use of the said James R. Massey, that the titles of said tracts of land shall vest in said Sarah Jones, Charlotte A. Beckham, Mary E. Massey and James R. Massey, Jr.

It is further ordered that said Sarah Jones, Charlotte A. Beckham, Mary E. Massey and James R. Massey, Jr., do pay to Mrs. Elizabeth Beckham the sum of $130.50, as they may be respectively liable, on account of the deficit in value of tracts set apart to her.

It is further ordered that upon a compliance by the various parties with the conditions of this order, that the Sheriff of Lancaster County do put the parties in possession of the tracts of land set apart to each of them according to said return and this order.

The above order was afterwards rescinded, but on the 23d of February, 1874, it was renewed by another decree as follows:

Mackey, J. On hearing the report of the

Commissioners appointed by the order of this Court to make partition of the real estate mentioned in the pleadings, and the exceptions of the defendant, filed to said report, it is ordered that the said exceptions be overruled, and that the order of the Court made in the above entitled cause, made on the 26th day of December, 1873, become the decree of this Court. It appearing that the defendant, James R. Massey, has been in possession of all of said real estate since 1859, it would be impossible that this Court should now permit him to purchase the whole of said land at a credit of ten years, as provided by the terms of the will of the testatrix, unless the said James R. Massey do pay to the oth-

*140

er parties interested in such real estate *the rents and profits of their share of such real estate for the past fifteen years, and shall give a bond with two good sureties, besides a mortgage of the real estate so to be purchased by the said defendant, for the payment of the purchase money thereof and the interest on the first day of January of each year.

James R. Massey appealed.

[For subsequent opinions, see 9 S. E. 376; 14 S. C. 292.]

Moore, for appellant.

Hamilton, Allison, contra.

March 15, 1876. The opinion of the Court was delivered by

WILLARD, A. J. The main question to be considered arises in a provision of the will of Mrs. Elizabeth Massey, as follows: "On the partition and division of the lands and real estate, my son, James R. Massey, is to have the right, and power is hereby conferred on him, to take the said real estate and require that the said lands be vested in him at their appraised value on such partition, he accounting for the appraised value of said lands and real estate. This is, however, discretionary with my said son, James R. Massey, and he can act to suit himself when called upon to decide and make his election. If my son, James R. Massey, should decide to take the lands on the partition at their appraised value, this, with the value of the negroes, will far exceed his own fourth, and put him considerably in debt, having to pay back largely; but he must have a long credit, say ten years, if he should desire it, with interest from the day the partition is made, in equal annual instalments."

A suit for partition was brought, a writ of partition issued, and a return made, among other things appraising the value of the lands of which partition was sought.

The appellant claims that upon the coming in of this return he was entitled to his election to take the lands at the value fixed upon them by the appraisal. The right was denied by the Circuit judgment.

The judgment is not consistent with itself. It does not in terms deny the right of James R. Massey to take the lands at the appraised value, but, on the contrary, says: "It appearing that the defendant, James R. Massey, has been in possession of all of said real estate since 1859, it would be impossible that this Court should now permit him to purchase

*141

the whole of said land at a credit of *ten years, as provided by the terms of the will of the testatrix, unless the said James R. Massey do pay to the other parties interested in such real estate the rents and profits of such real estate for the past fifteen years, and shall give a bond, with two good securities, besides a mortgage of the real estate so to be purchased by the said defendant, for the payment of the purchase money thereof, and the interest on the first day of January of each year." Notwithstanding the judgment at once vested the lands partitioned in the various parties in interest in disregard of J. R. Massey's right to purchase, by reaffirming an order previously made to that effect and subsequently rescinded.

James R. Massey was clearly entitled to take the lands at the appraised value, and was not bound to make his election until the value of the land was ascertained by the confirmation of the return of the Commissioners. It was proper that he should be required to give his bond and mortgage for the payment of the principal, in annual instalments, and interest upon it from the date of the judgment. Nothing appears in the case warranting the Court in demanding personal securities in addition to his own bond and mortgage. James R. Massey should be required to account for the rents and profits of the lands held by him other than his own share down to the time of his election. It is objected that the right of election is lost by lapse of time. By the terms of the will the election need not be made until the appraisement of the value in partition. As any of the parties had the right to demand partition, the delay in the appraisement cannot be charged as a default on the part of James R. Massey.

The remaining question is raised by James R. Massey, upon the allotment made by the Commissioners, under the following clause of the will: "I give, devise and bequeath to my son, James R. Massey, for and during his natural lifetime, subject to the limitations and conditions hereinafter stated, my mills, situated on the Catawba River, with one hundred acres of land around the said mills, to be laid off in such way and manner as will be suitable and proper with reference to the mills and the balance of my estate."

The Commissioners, in laying off this tract, gave land contiguous to the mill, but not lying compactly around it, such lands stretching from the mill chiefly in one direction.

The object of this allotment was to define regular boundaries to the land outside of the mill lot. It does not appear that there is any

*142

defect as affecting the conve*nient use of the mill, its approaches and appurtenances. The appellant claims that land immediately around the mill, considered solely with reference to the convenient use and value of the mill, should have been attached. This the will clearly does not authorize. The land must be around the mill, but not necessarily equally distributed about it, for the will directs that the situation of the balance of the real estate should be considered in the allotment. It does not appear that the allotment is in anywise inconsistent with the terms or intent of the will, and it ought to stand.

The judgment must be set aside, and the case remanded, to carry out the requirements of the judgment.

MOSES, C. J., and WRIGHT, A. J., concurred.

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7 S. C. 142

HOLLEY v. WALKER.

(Columbia, Nov. Term, 1875.)

[*Trial* ⇐139.]

If there is any evidence to sustain the plaintiff's action, it should be submitted to the jury, and it is error in such case to order a nonsuit.

[Ed. Note.—Cited in McCall v. Cohen, 16 S. C. 448, 42 Am. Rep. 641; Carter v. Columbia & G. R. R. Co., 19 S. C. 24, 45 Am. Rep. 754; Carrier & Harris v. Dorrance, 19 S. C. 32; Davis v. Columbia & G. R. Co., 21 S. C. 102; Bridger v. Asheville & S. R. Co., 25 S. C. 26.

For other cases, see Trial, Cent. Dig. § 338; Dec. Dig. ⇐139.]

Before Maher, J., at Aiken, September Term, 1875.

This was an action by Charles Holley and others, plaintiffs, against George W. Walker and others, defendants, for partition of a tract of land.

The defendant, Walker, answered the complaint and denied all the allegations thereof.

The plaintiffs gave evidence tending to show that Charles Holley, the elder, died in the year 1843; that a short time before his death he purchased, at the price of $140, the land of which partition is sought by this action, at a sale made by Sheriff Christie, as the property of his son Alfred Holley; that Alfred Holley was then in possession of the land; that he remained in possession until his father's death, with his consent, and that he had been in possession ever since, claiming the land not for himself alone, but for himself and the other heirs of his father; that the plaintiffs were heirs of Charles Holley, the elder, and purchasers of the shares of others of his heirs; and that on the 2d

*143

March, 1874, the same tract of land *was sold by Sheriff Jordan as the property of Alfred Holley, and purchased by the defendant, Walker, at the price of $50.

The Sheriff's deeds of conveyance to Charles Holley and George W. Walker were given in evidence. The former had not been recorded; the latter was recorded on the 21st April, 1875.

The plaintiffs having closed, the defendant moved for a nonsuit. The motion was granted and the plaintiffs appealed on the grounds:

1. That it was clearly proven on the trial that the heirs of Charles Holley, the elder, had held possession of the premises described in the complaint, as his heirs, for more than thirty years, and that such possession gave them a good title, independent of the proper title of Sheriff Christie that was put in evidence, and for that reason His Honor the presiding Judge erred in not submitting the case to the jury.

2. That the proper title of Sheriff Christie to Charles Holley, the elder, together with possession of the premises described in the said title by Charles Holley and his heirs for more than thirty years gave a good title against the world.

3. Because it is respectfully submitted that His Honor the presiding Judge erred in ruling that because Sheriff Christie's deed was not recorded, that the deed from Sheriff Jordan to George O. Walker carried the fee of the entire tract of land described in the complaints, for it is contended that a possession of more than thirty years, independent of the Christie conveyance, gave a good title of said premises to the heirs of Charles Holley, the elder, and that the only interest in said premises that was sold by Sheriff Jordan to George O. Walker was the interest of Alfred Holley, Sr., as an heir of Charles Holley, the elder, and that the small price paid therefor, to wit, fifty dollars, was a strong circumstance, showing that Walker purchased only one-seventh interest in the premises, and not entire tract of 1,000 acres, as he now pretends to have bought.

Croft & Jordan, for appellants.

Finley & Henderson, contra.

April 5, 1876. The opinion of the Court was delivered by

MOSES, C. J. The action is for partition. The plaintiffs claim a title to the land described in the complaint as or through the

*144

heirs *of Charles Holley, admitting that the defendant, Walker, is entitled to one undivided seventh part thereof in right of Alfred Holley, one of the said heirs.

If the title depended alone on the deed of the Sheriff conveying, in 1843, the right and interest which Alfred Holley had in the land

to his father, Charles Holley, and on that of the Sheriff, in 1874, conveying to the defendant the interest then held by the said Alfred, there might have been sufficient ground on which to sustain the nonsuit granted by the presiding Judge on the trial below.

The plaintiffs, however, were not restricted to their title derived through the Sheriff's sale and deed to their ancestor, Charles Holley. In further support of the relief claimed in their complaint, they were at liberty to set up and rely on the title which they averred they held through the possession of the said Alfred Holley, extending to a period of over thirty years, for and on behalf of the heirs of Charles Holley and those who claimed through them. This was to be determined by the facts submitted in evidence, and it was their right to have them passed on by the jury, the only proper tribunal for their solution.

If the plaintiffs established the fact that Alfred Holley was in possession, holding for them, he could not acquire any adverse title, while so remaining, under an agreement admitting and conceding the character of his possession. Its nature, its duration, by whose permission, and the effect of all these combined, were for the jury. It was not competent for the Court, if there was any evidence of the facts thus relied on, to withdraw their decision from the jury and pass upon them as matter of law; as the Court said in Redding v. South Carolina Railroad Company, 3 S. C., 9: "Where there has been a total failure of testimony as in Brown v. Frost, (2 Bay, 126,) and Hopkins v. De Graffenreid, (Ibid 241,) there was nothing to leave to the jury, and it was the duty of the Judge to nonsuit; but as it is said in Rogers v. Madden, (2 Bail., 321,) the practice of ordering a nonsuit in invitum for defective testimony is to be pursued with caution. If the plaintiff has any prima facie testimony, he has the right to a verdict of a jury upon it."

The motion for a new trial must be granted.

WRIGHT, A. J., concurs.

WILLARD, A. J., dissenting. The action is for partition, plaintiffs claiming in right of

*145

heirs of Charles Holley. G. O. Walker *was made defendant for the purpose of extinguishing a claim to the land made by him. The plaintiffs were nonsuited, from which the present appeal is taken.

The land originally belonged to Alfred Holley, a son of Charles. Charles bought the property at Sheriff's sale, under an execution by Malone and Gary against Alfred, and took a Sheriff's deed for the same. This Sheriff's deed was never recorded.

Notwithstanding the Sheriff's conveyance to Charles, Alfred continued in actual possession. It was not shown in behalf of the plaintiff that Charles ever took or held possession of the lands in question; but on the contrary it appears from the plaintiff's witnesses that Alfred continued in possession until the commencement of the suit. Certain statements are in proof as made by Alfred, to the effect that his title was imperfect; but these are fully explained by his embarrassed condition and fear of his creditors.

The defendant, Walker, became the purchaser of the land in question at a Sheriff's sale under an execution against Alfred, and took a deed from the Sheriff bearing date March 2, 1874. This deed was recorded April 21, 1875.

The only ground of title on the part of the plaintiffs is the Sheriff's deed in 1843; but this not being recorded is void as against subsequent purchasers. The defendant Walker had no actual notice of the prior intended deed, and is entitled to take advantage of the want of record.

An attempt was made on the part of the plaintiffs to make title through adverse possession. They contend that from the death of Charles, Alfred held the land in question as one of the heirs of Charles; that his interest as such heir is all that can be affected by the execution and deed to the defendant, Walker. They seek to base a claim to hold by adverse possession on the possession of Alfred, with whom they claim to be tenants in common. It will not be necessary to examine their line of argument in detail, as the fundamental fact is wanting, namely, proof that actual possession was taken under the Sheriff's deed to Charles. The plaintiffs show no title except through the Sheriff's deed to Charles, and that must fail for want of record. In my opinion, the appeal should be dismissed.

7 S. C. *146

*RYAN v. PETTIGREW.

(Columbia. Nov. Term, 1875.)

[*Homestead* ⟸200.]

In an action by the grantee of purchasers at Sheriff's sale, against the defendant in execution, to recover the possession of the land purchased, the defendant cannot avail himself, as a defense to the action, of a return made by appraisers appointed for the purpose, assigning the land to defendant as his homestead, where it appeared that the assignment had not been returned "for record in Court," as the law required, and there was even no evidence that the plaintiffs in execution, who were the purchasers at Sheriff's sale, had notice that the assignment had been made.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 372–377; Dec. Dig. ⟸200.]

[*Homestead* ⟸201.]

An assignment of a homestead does not of itself, under the Act of 1868, exempt the property from sale. To have that effect, it must be returned to and made a record of the Court.

[Ed. Note.—Cited in Bull v. Rowe, 13 S. C. 368; Youngblood v. Lathen, 20 S. C. 375.

For other cases, see Homestead, Cent. Dig. § 378; Dec. Dig. ⟸201.]

[*Constitutional Law* ⊂⊃43.]

[Cited in Choice v. Charles, 7 S. C. 173, to the point that a party failing to interpose a constitutional provision as a bar to an action loses the right to do so after judgment, but to make the bar effective there must have been a judgment on the precise issue.]

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 41; Dec. Dig. ⊂⊃43.]

[*Homestead* ⊂⊃201.]

[Cited in Agnew v. Adams, 17 S. C. 370, to the point that an assignment of homestead is a nullity as against debts contracted prior to the Constitution of 1868.]

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 378, 379; Dec. Dig. ⊂⊃201.]

Before Townsend, J., at Darlington, February, 1875.

Action by W. K. Ryan, plaintiff, against W. B. Pettigrew, defendant, to recover the possession of a tract of 162 acres of land, on which defendant resided, lying in Darlington County.

The defense alleged in the answer was that the plaintiff purchased the land under an agreement by which he was to hold it as a homestead for the use and benefit of the defendant.

At the trial the plaintiff gave evidence tending to show that on the 25th March, 1868, the defendant gave to Mowry & Son his promissory note for $1,566.71, payable on demand, and on the same day confessed judgment to them on the note; that the judgment was entered 2d April, 1868; that fi. fa. was issued to enforce the judgment; that on the 5th December, 1870, the Sheriff of Darlington County levied the execution on the defendant's "half interest in 1,400 acres of land lying, &c., in the County of Darlington, bounded," &c.; that on the 2d January, 1871, the defendant endorsed on the execution a waiver, in favor of the plaintiffs therein, of his "homestead exemption in his real estate," and on the same day the Sheriff sold the land and Mowry & Son became the purchasers at the price of $730; that on the 3d April, 1871, the Sheriff conveyed to the purchasers "all that tract of land situated, &c., in Darlington County, containing 1,400 acres, more or less, bounded," &c.; and that on the 3d July, 1871, Mowry & Son, in consideration of $3,204, conveyed the same land and a lot in the town of Florence to the plaintiff.

It further appeared that on the 25th January, 1868, a bill in equity was filed for partition of the aforesaid tract of land and other lands between the children and heirs of

*147

Martha L. Pettigrew, *deceased, of whom the defendant was one; that Commissioners were appointed to make the partition, who, on the 25th March, 1871, made a return to the writ stating that they had divided the tract of land on which the defendant resided between the defendant and Mrs. Tillman, and had allotted to the defendant "the portion including the buildings thereon." On the 27th June, 1871, the return was confirmed and made the judgment of the Court. It was admitted that 162 acres, the subject matter of this action, was part of the land allotted to the defendant.

On behalf of defendant, evidence was given tending to show that on the 21st December, 1870, the Sheriff of Darlington County issued a commission directed to three appraisers, one to act on the part of the defendant in execution, W. B. Pettigrew, one other to act on the part of the plaintiffs in execution, Mowry & Son, and the other to act on the part of the Sheriff, commanding them to set off to the defendant by metes and bounds a homestead in the said tract of 1,400 acres of land; that on the 27th December, 1870, the appraisers certified that they had assigned to the defendant, as his homestead, by metes and bounds, 167⅛ acres, parcel of said tract of land, and that the homestead thus assigned was the tract of land which was the subject matter of this action.

The certificate or return of the appraisers was not returned "for record in Court," nor was there any evidence that either Mowry & Son or the plaintiff in this action ever had notice of it until it was produced at the trial.

For the plaintiff it was contended that the return of the appraisers could not avail the defendant as a defense to the action: (1) Because it was not recorded in Court as the law directed; (2) because, at the time of the levy, assignment and sale, the defendant was not owner in severalty of the land, but only part owner as tenant in common; (3) because defendant had waived his right of homestead exemption; and (4) because the debt to Mowry & Son was contracted and the judgment thereon recovered before the Constitution of 1868 was adopted.

His Honor the presiding Judge overruled all the plaintiff's objections to the return, at the same time instructing the jury that "the homestead is good and valid." The plaintiff excepted to His Honor's rulings.

*148

*The verdict was for the defendant, and, judgment being entered thereon, the plaintiff appealed.

Ward, Spain, for appellant.
Warley & Dargan, contra.

April 5, 1876. The opinion of the Court was delivered by

MOSES, C. J. The action was for the recovery and surrender of one hundred and sixty-two acres of land, the title to which appellant derived from L. D. Mowry & Son, who, on the first day of January, 1871, had purchased the premises at Sheriff's sale, under an execution on a judgment entered 2d April, 1868. The respondent claims that by virtue of his right as the head of a family he

held a homestead in the land, duly assigned to him according to law; that it was not liable to levy and sale, and that the appellant, by his alleged purchase, had acquired no title. This right is resisted on various grounds set out in the brief, and which will be noticed without regard to the order in which they were presented.

It is not necessary to discuss and decide the abstract proposition submitted by the appellant, which denies to one the right of homestead in property held in common with another. Whether the Constitution and the laws which have been passed in regard to the right conferred by that instrument confine it only to property of the prescribed value in which the applicant holds a sole and absolute estate, is not material in this case. If the appellant had an interest in common with his sister in the land at the time of the assignment of the homestead, the subsequent partition and setting apart to him of the very portion in which the homestead was situated gave, by operation of law, a right in severalty to the same extent as if he alone had held it before such assignment. The right of the case must be determined by the solution of the material question which it involves. At the time of action brought, or even at the moment of trial, had the respondent acquired any right of homestead in the land, the subject of the suit? Was there conferred by law such an interest in the premises as protected them from sale under the judgment and execution of the said L. D. Mowry & Son? Ryan, the appellant, represents the purchaser at said sale, and is entitled to every benefit which Mowry & Son might have claimed had they retained the premises and been plaintiffs in the present action.

*149

*The Constitution (Article II, Section 32,) exempts the family homestead to the value of one thousand dollars from attachment, levy or sale on any mesne or final process issued from any Court, and makes it "the duty of the General Assembly," at their first session, "to enforce the provisions of the Section by suitable legislation." The Act of 1868 (14 Stat., 19,) was passed by the Legislature in conformity with this requisition, and it prescribes the mode and manner by which the beneficent provision of the Constitution was to be secured. It requires the assignment to be made by three appraisers, one to be appointed by the creditors, one by the defendant in the execution, and the third by the Sheriff. The assignment is to be returned by the officer with the process "for record in Court, and if no complaint shall be made by either party no further proceedings shall be had against the homestead." No return has, in fact, yet been made to the Court as contemplated by the Act; and, indeed, so far as appears from the brief, the appellant had no notice of it until it was offered in evidence on the trial; nor was there any proof that his grantors, L. D. Mowry & Son, ever knew that any assignment had been made. So far from any testimony to show that it had been on file in the office of the Clerk of the Court, it appears to be conceded that from the possession of the appraisers it went into that of the party, and there remained until by him exhibited at the trial for his own protection. With every disposition to carry out, in the liberal spirit which actuated the framers of the Constitution, this humane interposition for the benefit of the families of unfortunate debtors, we are stopped at the very threshold by the question: Has there ever been here such a return as was intended by the Act of 1868 "to determine and perpetuate the homestead," the only one in force at the date of these transactions? How could Mowry & Son be held bound by the return, or said to have given effect to it by not complaining, when it was never filed, and there was nothing "in the record of the Court" against which they could aver?

This is the general view which must be taken of the case under the Act of 1868. Regarded in a more limited aspect, the principle which must regulate the point now under discussion leads but to one conclusion: The debt of Mowry & Son was contracted before the adoption of the Constitution of 1868. Has there been any judgment, in respect to this right of homestead exemption, in which Mowry & Son can be held so to have acquiesc-

*150

ed as to deprive them*selves of their rights under the Constitution of the United States to control its validity? That as to debts contracted before the Constitution of 1868 the homestead provision cannot apply, has been decided in respect to a question raised under the Constitution of a sister State, by the Supreme Court of the United States, and this Court, as in duty bound, has given effect to it in the case of Cochran v. Darcy, 5 S. C., 125. A party may lose the benefit of a protection afforded by a constitutional provision if he refrain from interposing it as a bar to a recovery sought against him, and after judgment may be precluded from then resorting to it for the purpose of then redeeming a right thus lost. But to bar him there must be a previous judgment on the very issue. Here, so far from there having been judgment, the return was never made to the Court, and if Mowry & Son had any notice, it was not of the return, against which they might have complained, but of the mere claim of the respondent to a homestead, which they could not meet and resist, until asserted as a right through some judicial proceeding, or interposed, as it now is, to bar the recovery of the premises by force, not of the claim, but of the right.

We think there was error in the charge of the presiding Judge, "that the homestead is

good and valid," and the motion for a new trial is granted.

WILLARD, A. J., and WRIGHT, A. J., concurred.

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7 S. C. 150

ABRAMS v. MOSELEY.

(Columbia. Nov. Term, 1875.)

[*Partition* ⇐55.]

In an action for the partition of a tract of land lying in this State, the complaint alleged that the plaintiffs were entitled under the will of A B to an undivided share of certain lands in Arkansas; that the defendant exchanged those lands for the tract of land of which partition was sought, taking title in his own name: *Held*, That demurrer did not lie, because the complaint did not allege that the will of A B had been admitted to probate in this State.

[Ed. Note.—Cited in Dial v. Tappan, 20 S. C. 175.

For other cases, see Partition, Cent. Dig. § 149; Dec. Dig. ⇐55.]

Before Cooke, J., at Greenville, April, 1875.

Action by Lorenzo D. Abrams and another, plaintiffs, against James P. Moseley and others, defendants, for partition of a tract of land lying in Greenville County.

*151

*The complaint, by its first paragraph, alleged that William Anderson, deceased, late of Cross County, in the State of Arkansas, died in the year 1864, leaving a last will and testament, whereby he devised his lands, containing one thousand three hundred and forty acres, situate in said County and State, to his brother, Lovinska Anderson, his sister, Sarah Ann Moseley, his mother-in-law, Catharine B. Landrum, and his sister-in-law, Martha P. Norfleet, to be equally divided between them, which will was duly admitted to probate; and by its second paragraph, that Lovinska Anderson afterwards died, leaving a will whereby he devised his whole estate to the plaintiffs, who were then minors, to be equally divided between them. By the third, fourth and other paragraphs, it was alleged that the plaintiffs are the children of Sarah P. Moseley, who has recently died intestate; that she was the wife of the defendant, James P. Moseley; that during the minority of the plaintiffs, James P. Moseley and Sarah P., his wife, conveyed to one M. B. Ioor the shares of the said Sarah P. Moseley and of the plaintiffs in the lands in Cross County, Arkansas, and received in exchange therefor the tract of land in Greenville County, in this State, of which partition was sought by this action.

The defendant, James P. Moseley, demurred to the first, third and fourth paragraphs of the complaint "upon the ground that, as it appears upon the complaint, this Court has not jurisdiction of the subject of action as therein stated, inasmuch as said last will and testament of William Anderson is alleged in said first section of said complaint to have been executed and admitted to probate in Cross County, in the State of Arkansas, and does not appear ever to have been admitted to probate in this State; and the lands mentioned in the third and fourth sections of said complaint, which are the subject of action, are, as appears from said third and fourth sections, situated in said Cross County, in the State of Arkansas, beyond the limits of this State, and out of the jurisdiction of this Court."

His Honor the Circuit Judge overruled the demurrer, and the defendant, Moseley, appealed.

Earle & Wells, for appellant.

Moorman & Schumpert, contra.

*152

*April 5, 1876. The opinion of the Court was delivered by

WRIGHT, A. J. The demurrer is not well taken, and the order of the Circuit Judge overruling it is without error. The cause of demurrer assigned by the appellants is that "the last will and testament of William Anderson is alleged in the first section of the complaint to have been executed and admitted to probate in the State of Arkansas, and does not appear ever to have been admitted to probate in this State, and the lands mentioned in the third and fourth sections of said complaints, which are the subject of actions are, as appears therefrom to be, situated beyond the limits "of the State and out of the jurisdiction of the Court." It may at once be admitted, as contended for on behalf of the appellants, that real estate is governed by the lex rei sitæ, and that title to land can be acquired and lost only in the manner prescribed by the law of the place where land is situate. A more comprehensive expression of the rule cannot be found than that contained in the language of the Court in Lamar v. Scott, 3 Strob., 564. This concession, however, does not remove the difficulty in the way of the appellants. There objection is that the respondents cannot claim any right derived through a devise of real estate in another State, unless probate of the will devising it has been obtained from our own Courts.

This, too, may be granted, and yet the demurrer may not be sustained. "Probate is, however, operative merely as the authenticated evidence, and not at all as the foundation of the title to the property disposed of by the will. The title passes to the devisee or legatee at the death of the testator, and the probate of the will relates back to that time."—1 Jarm. on Wills, 215. The title to one-fourth of the property, under the will of William Anderson, vested in his brother, Lovinska Anderson, who, by his last will and testament, devised his whole estate therein to the plaintiffs, then minors. Their complaint is that the defendant, James P. Moseley, has

disposed of their said interest, and invested the proceeds in real estate in this State, to the use and benefit of himself and co-defendants, and they aver that the real estate so devised is stamped with a trust which equity will execute in their favor and behalf. If the defendants, when they answer, deny the charge so alleged, the plaintiffs will be put to their proof, and the question now made may possibly arise, and will be determined by the Court according to the character and form in which it may be presented. To sustain the

*153

de*murrer would be an assumption that probate of the will has not been made in South Carolina, which would be equivalent to holding that the plaintiffs are obliged to set out in their complaint every element of proof necessary to sustain it. This would not be in accord with any rule of pleading with which we are familiar. The motion is dismissed.

MOSES, C. J., and WILLARD, A. J., concurred.

7 S. C. 153

TWITTY v. HOUSER.

(Columbia. Nov. Term, 1875.)

[*Appeal and Error* ⇐1106.]

At the hearing of an appeal from the Probate Court, the Circuit Judge may remand the cause or any particular issue therein to the Probate Judge, with instructions to take further testimony and report the same to the Circuit Court.

[Ed. Note.—Cited in Ex parte White, 33 S. C. 445, 448, 449, 12 S. E. 5.

For other cases, see Appeal and Error, Cent. Dig. § 4392; Dec. Dig. ⇐1106.]

[*Executors and Administrators* ⇐105.]

An administrator *held* not to be liable for money deposited in bank and afterwards lost by its insolvency.

[Ed. Note.—Cited in Crane, Boylston & Co. v. Moses, 13 S. C. 584; York County v. Watson, 15 S. C. 7, 40 Am. Rep. 675; Gary v. People's Nat. Bank, 26 S. C. 547, 2 S. E. 568, 4 Am. St. Rep. 733.

For other cases, see Executors and Administrators, Cent. Dig. § 399; Dec. Dig. ⇐105.]

[*Executors and Administrators*, ⇐528.]

The sureties of an administrator are liable for the amount of a note held by the intestate at the time of his death against the administrator, and it makes no difference that the latter was insolvent when he administered and had continued so ever since.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2386; Dec. Dig. ⇐528.]

[*Evidence* ⇐422; *Seals* ⇐4.]

Where a joint and several note appears upon its face to be under the seal of one only of the drawers, it may nevertheless be shown by parol that the other drawer had adopted the seal as his own and thus made it the sealed note of both.

[Ed. Note.—Cited in Vinson v. Nicholas, 28 S. C. 201, 5 S. E. 357.

For other cases, see Evidence, Cent. Dig. §§ 1956; Dec. Dig. ⇐422; Seals, Cent. Dig. §§ 7; Dec. Dig. ⇐4.]

[*Witnesses* ⇐140.]

A party is not excluded as a witness by Section 415 of the Code unless he has an interest which may be affected by the event of the action or proceeding.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 599; Dec. Dig. ⇐140.]

[*Judgment* ⇐715.]

A question as to the rights of parties under a will *held* to have been settled by Circuit decrees made between other parties many years before.

[Ed. Note.—Cited in Ex parte White, 33 S. C. 442, 450, 12 S. E. 5; State ex rel. George v. Aiken, 42 S. C. 229, 20 S. E. 221, 26 L. R. A. 345.

For other cases, see Judgment, Cent. Dig. §§ 1244–1246; Dec. Dig. ⇐715.]

[*Executors and Administrators* ⇐202.]

The estate of one who was entitled to a certain legacy with a limitation over if he died without issue, and who died without issue, *held* not to be liable for the legacy upon mere proof that the money was paid to his guardian and without proof that the guardian had accounted to him for it.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 730, 738–745, 748, 754, 763; Dec. Dig. ⇐202.]

Before Reed, J., at Orangeburg, January Term, 1875.

This was an appeal from the decree of the Probate Judge of Orangeburg County in a case of D. S. Twitty and J. F. Eisenmann, petitioners, against Peter M. Houser, administrator of John A. Keitt, deceased, David Houser and E. H. Houser, defendants. It bore date February 9, 1874, and is as follows:

The petition was filed in behalf of the plaintiffs and other creditors of the late John A. Keitt, who shall come in and contribute to

*154

*the expense of the suit, praying that the defendant, Peter M. Houser, administrator of the goods and chattels of said John A. Keitt, be required to set forth a full, true and just account of his administration of the assets that have come to his hands, and that he may be ordered to pay and satisfy the petitioners' demands out of any balance that may be found in his hands on such accounting; and in case he fail to do so, that the other defendants, David Houser and E. H. Houser, the sureties on his administration bond, may be decreed to pay and satisfy the same. Due notice having been published, citing all the creditors of said John A. Keitt to appear before me, and to produce and establish their respective claims, the case came on to be heard upon the petition and answer, Messrs. Izlar & Dibble and DeTreville & Whaley, of counsel for the creditors, and Messrs. Glover & Glover, of counsel for the defendants. It was contended that the administrator was liable for the value of the provision crop and mules, etc., on a plantation which his intestate partially superintended the year of his death. The only evidence to establish such a claim was that contained in the record of a case brought by Peter M. Houser, adminis-

trator, against Jacob G. Keitt, to recover the value of said provision crop, mules, etc., in which said defendant pleaded the general issue and the Statute of Limitations, upon which a verdict was rendered for the defendant. This evidence does not, in my opinion, prove a devastavit. Besides, Jacob G. Keitt swears that John A. Keitt was simply overseer on the Whetstone place in 1867, which he (the witness) planted; that the place was his, and he was planting it, and that the said John A. Keitt was to get nothing but the net cotton.

The administrator, P. M. Houser, was indebted to his intestate by a promissory note for $440.33, dated November 11th, 1863. It appeared from the evidence that this note was given for the balance due on another note given before 1861; and it also appeared that P. M. Houser was, when he administered, and now is, insolvent, and it was contended that the amount of this note should not be charged against the administrator as assets to be administered, or, if so charged, that the amount should be scaled, according to the Act of Assembly. I held otherwise, and charged the administrator with the amount of the note and interest.

*155

*Mr. Whaley produced, and proposed to establish as a specialty, a note against the estate of the intestate, of which the following is a copy:

$2,237.10. Charleston, S. C., 29th June, 1867.

One day after date, I promise to pay to the order of E. H. Rodgers & Co., without offset, negotiable and payable at , twenty-two hundred thirty-seven 13-100 dollars, value received, with interest from date at the rate of one and one-half per cent. per month.

Witness my hand and seal.

(Signed) John A. Keitt,
Jacob G. Keitt. [Seal.]

[Endorsed.]

Note	$2,237	13
Interest to 17th January, 1868	227	07
	$2,464	20
Cr.		
By balance due on account rendered 17th January, 1868	$1,994	24
	$ 469	96
Interest to 1st October, 1868	60	39
Balance due on note, 1st October, 1868	$ 530	35

J. G. Keitt was offered as a witness to prove the consideration of the note, and that John A. Keitt had adopted the seal. It was objected by Messrs. Glover & Glover and Izlar & Dibble that J. G. Keitt is an incompetent witness, under Section 415 of the Code, and also on the ground that, the words "witness my hand and seal" having been endorsed at the foot of the note, parol evidence is inadmissible to vary, supplement or modify that expression or to change it to "our hands and seals." Overruling the objection, I hold that the witness is competent, and, being sworn, he says: "John A. Keitt and myself spoke of the note as a sealed note at the time we signed it; both spoke and wondered why Rodgers wanted it sealed at so short a date; we both signed it as a sealed note; the note was signed at

*156

my house by my son and myself; my *son John A. Keitt signed it first; the note was sent up for us to sign; he signed above and left room for me to sign below; it is in Frank Rodgers's hand; came by mail; it came in a letter to Jacob G. Keitt, and went back in a letter of mine, and after it was paid it came back in a letter to me; I am responsible as both principal and security; the note was given for supplies sent to the Whetstone place in 1867, which I planted, and on which John A. Keitt was simply overseer; the account was made in his name, but was made by me; the place was mine and I was planting it; he was to get all the benefit from the net cotton crop; all the cotton was applied to this note, and left the balance and interest, ($530.35,) which I paid; John A. Keitt was to get nothing but the net cotton; that was all he was to have, and the only contract we made; I was to furnish everything."

I therefore adjudge that said note is the joint and several single bill of John A. Keitt and Jacob G. Keitt, and that the balance due thereon should rank as a specialty against the estate of the intestate. A claim was presented by David Houser and Peter M. Houser, the surviving children of the late Andrew Houser, their father, arising out of the devise to them under the last will and testament, and codicil thereto, of said Andrew Houser. The testator left several children and two grand-children, Frances Victoria Keitt and John A. Keitt. David Houser and Peter M. Houser are the only surviving children. Frances Victoria and John A. both died unmarried and without leaving children, the former a minor, and the latter after attaining his majority and entering into the full enjoyment of the estate derived by him from the said Andrew Houser. The will of Andrew Houser provides "the balance of my property to be equally divided among all my heirs—that portion falling to all minors to be left in the hands of the executors or guardians until such time as such minors become of age," &c. The codicil provides: "I give and bequeath unto my grandchildren, Frances Victoria Keitt and John Andrew Keitt, children of Jacob G. Keitt, the sum of $3,000, to be paid to them as they arrive at the age of twenty-one years or marry." The codicil also provides "that if any of my said children or my grand-children above named shall die without leaving children, then that such child's part shall be equally divided among

my surviving children." It was held by both Chancellor Dunkin and Chancellor Caldwell, in the late Court of Equity, in construing the

*157

clause now under *consideration, that the surviving children of Andrew Houser "could not take until the death of both Frances Victoria Keitt and John A. Keitt, without leaving children," and that event having happened, it is now insisted that the surviving children, David and P. M. Houser, are entitled to the two-eighths of the residuary estate, which, in his own right, and as survivor of his sister Frances Victoria, went into the hands of John A. Keitt, the last surviving grand-child. In deference to the twice intimated opinion of the Court of Equity, and without any expression of my own views upon the subject, I have allowed this claim, amounting to $1,850.12, being the amount of the sums paid to Jacob G. Keitt, as guardian of John A. Keitt, and as administrator of Frances Victoria Keitt, by the executor of the will of Andrew Houser, and direct that it be ranked as a simple contract, and not as a specialty, in the payment of the debts of the said John A. Keitt.

A promissory note was presented, dated February 18, 1867, and payable one day after, for $152.95, drawn by John A. Keitt and J. G. Keitt, in favor of W. Brunson or bearer. The counsel for the administrator objected that said note was not rendered to the administrator until March 5, 1873, when the statute barred the claim. I sustained the objection and ruled out the claim. I find that the administrator, Peter M. Houser, holds for the estate of his intestate $3,743.67, which should be applied in payment, first, of the costs and expenses of these proceedings, and a counsel fee of

dollars to the attorneys of the administrator and to the attorneys respectively of the creditors, second, the judgment of Joseph Jackson against John A. Keitt; third, the specialty claims; and, fourth, the simple contracts, pro rata. It is further ordered and decreed that the defendants, Peter M. Houser, David Houser and E. H. Houser, do pay into this Court the sum of $3,743.67, to be by the Judge thereof administered according to this decree among the creditors.

From the foregoing decree the defendants appeal on the following grounds:

1. Because a note of P. M. Houser, for $440.33, dated the eleventh day of November, 1863, is charged against the administrator as assets to be administered, whereas de-

*158

fendants submit that *the proof was that P. M. Houser was, when he administered, and now is, insolvent, and that no portion of said note should be charged against him.

2. Because J. G. Keitt was admitted as a witness in behalf of E. H. Rodgers & Co., to testify in reference to certain transactions and communications between said witness and John A. Keitt, the intestate. Whereas defendants submit that J. G. Keitt was an incompetent witness under Section 415 of the Code of Procedure.

3. Because a note drawn in favor of E. H. Rodgers & Co., for $2,237.13, with interest from June 29th, 1867, less $530.35, paid October 1st, 1868, was allowed as a specialty claim against the estate of John A. Keitt. Whereas defendants submit that said note is not a specialty claim against the said estate, but that it is a simple contract, not under the seal of the intestate. These defendants further submit that the said note, not being a specialty, is barred by the Statute of Limitations, and should not be allowed as a claim against the said estate, and that as to the said John A. Keitt, deceased, there was no consideration for the said note.

4. Because the sum of $2,618.38, the amount of a judgment in favor of P. M. Houser, administrator, against F. J. Pelzer and F. S. Rodgers, less counsel fees, is charged as assets in the hands of said administrator to be administered; whereas defendants submit that there was no evidence that the administrator ever received said amount or any part thereof.

5. Because after said decree was filed, and before fifteen days thereafter had expired, the Judge of Probate declined to allow the administrator to introduce testimony as to the deposit of $2,618.38, by his attorneys, in the Citizens' Savings Bank of South Carolina. Whereas defendants submit that the said testimony should have been admitted, and that the liability of the administrator should be limited to the amount which may be recovered from the assets of the said bank, now being administered in the Court of Bankruptcy.

6. Because the decree allowed a counsel fee to the attorneys, respectively, of the creditors; whereas the defendants submit that a counsel fee should be allowed only to the counsel of the creditors, D. I. Twitty, and J. F. Eisenmann, who filed the petition.

The plaintiffs also appealed on the grounds:

1. Because the said judgment and decree

*159

is erroneous in stating *that the only evidence to charge Peter M. Houser, administrator, with laches in not recovering value of provisions, mules, etc., on plantation cultivated by his intestate during the year of his death is the record of the case of P. M. Houser, administrator, v. J. G. Keitt, to recover the same.

2. Because it is erroneous in the decision that said P. M. Houser is not liable for laches in the instance mentioned in the preceding subdivision.

3. Because it is erroneous in allowing the claim of E. H. Rodgers & Co. against the estate of said intestate.

4. Because it is erroneous in holding said

claim of E. H. Rodgers & Co. to be a sealed claim.

5. Because it is erroneous in the allowance of the claim of David Houser and Peter M. Houser against the estate of said intestate, and in the amount of said allowance.

6. Because the schedule attached to said decree is erroneous in allowing as claims against the estate of the said intestate the following:

"Sealed note of E. H. Rodgers & Co. for $2,237.13, with interest from 29th June, 1867, less $530.35, paid October 1, 1868."

"Claim of David and Peter M. Houser, under the will and codicil of Andrew Houser, $18,050.12."

On the 30th of May, 1874, the following order was granted by His Honor Judge Graham, without notice to the counsel of E. H. Rodgers & Co.:

On motion of Glover & Glover, defendants' attorneys, it is ordered that the defendants have leave to examine witnesses before the Probate Judge respecting the deposit of funds which were received by Glover & Glover in the case of P. M. Houser, administrator, against F. J. Pelzer, F. S. Rodgers, and deposited by them in the Citizens' Savings Bank, and that the evidence of said witnesses be incorporated with the evidence which accompanied the decree of the Probate Judge in the above case. It is further ordered that due notice of said examination be given to Messrs. Izlar & Dibble and DeTreville & Whaley.

Under the above order a number of witnesses were examined before the Probate Judge, and their testimony certified by him to be correct. The evidence tended to show

*160

that in January, 1868, *Peter M. Houser, as administrator of John A. Keitt, deceased, recovered a judgment against F. J. Pelzer and F. S. Rodgers; that on February 1st, 1873, $3,000, the amount then due on the judgment, was paid to "the plaintiff's attorneys, the receipt therefor stating that they would not pay to the plaintiff any portion of said sum without giving due notice of the intention to do so;" that the plaintiff's attorneys deposited the money in the Orangeburg branch of the Citizens' Savings Bank, a body corporate, in their own names, taking a certificate of deposit bearing interest at seven per cent. per annum, and giving notice to the Cashier that the deposit was on account of the case of Twitty and Houser; that on the 25th September, 1873, the certificate of deposit was renewed; that the bank failed in November, 1873, but up to that time it was in good credit, was considered solvent and safe by the whole community; that lawyers, County Treasurers, and business men generally, deposited in it, and that as late as the 23d October, 1873, a report, signed by a number of gentlemen, was published, in which they stated that after an examination of the affairs of the bank they were "enabled to assure its depositors and the public that we fully recognize its claims to their continued confidence."

The decree of His Honor the Circuit Judge is as follows:

Reed, J. This case came up for a hearing before me at the January Term, 1875, at Orangeburg, S. C., upon the record certified to this Court by the Probate Judge of Orangeburg County, and upon exceptions to the decree of the Probate Judge, dated 9th February, 1874, and grounds of appeal of plaintiffs, of defendants, and of E. H. Rodgers & Co., creditors of the intestate, John A. Keitt; also upon additional testimony taken before the Probate Judge, under an order made by my predecessor, at Chambers, May 30, 1874, (to the hearing of which additional testimony Mr. Whaley, representing E. H. Rodgers & Co., objected, and, upon my admitting the same, duly excepted). After hearing the testimony, and the argument of the counsel for the parties respectively, I agree with the Probate Judge as to the matters embraced in the first, second, third and fourth grounds of appeal of the plaintiffs, and in the second and third grounds of appeal of the defendants, and the eighth ground of appeal of E. H. Rodgers & Co., creditors of intestate, and the said grounds of appeal are overruled;

*161

but, without *reference to the evidence of Jacob G. Keitt, I am of opinion that the note of the intestate to E. H. Rodgers & Co. is the sealed note of the intestate and entitled to rank as a specialty debt in the administration of the assets of his estate.

I concur, also, with the Probate Judge concerning the claim of David Houser and Peter M. Houser, except as to the amount of the allowance. In the will of Andrew Houser, the father of David and Peter M. Houser, and the grandfather of the intestate, the following provision appears: "The balance of my property to be equally divided among all my heirs, that portion falling to all minors to be left in the hands of the executors or guardians until such time as such minors become of age." The codicil to the same will has the following: "I give and bequeath unto my grand-children, Frances Victoria Keitt and John Andrew Keitt, children of Jacob G. Keitt, the sum of $3,000, to be paid to them as they arrive at the age of twenty-one years or marry. And I further will and desire that if any of my said children, or my grand-children, above named, shall die without leaving children, then that such child's part shall be equally divided among my surviving children." It seems to have been already adjudicated that the limitation over to the surviving children could only take effect upon the death of both Frances V. and John A. Keitt without leaving children; and the only open question remaining is, whether the words of survivorship refer to the death

of the testator, to the coming of age of the grand-children, or either of them, or to the deaths of the grand-children at any time.

The plaintiffs contend that the words of survivorship, so far as the intestate John A. Keitt's share is concerned, refer either to the death of the testator or to the coming of age of the said John A. Keitt. I am of opinion that the testator intended the surviving children to take the shares and legacy of the said grand-children upon their deaths at any time without leaving children; but I do not think that the estate of John A. Keitt should be charged with any portion of the fund which the testator's executor paid to the administrator of Frances Victoria Keitt for her share of the testator's estate or for her one-half of the said legacy. In regard to the defendants' first ground of appeal, I think the administrator properly chargeable with the note for $440.33, dated November 11th, 1863, and the interest thereon; but inasmuch as the administrator, when he administered, was, and

*162

now is, insolvent, I hold that his co*defendants, who are sureties on his administration bond, are not responsible for the amount of this note beyond the commissions which the administrator is entitled to receive from the estate of his intestate. Upon the testimony taken before the Probate Judge under the order of Judge Graham, dated May 30th, 1874, it appearing that the sum of $2,618.38, the amount of a judgment in favor of P. M. Houser, administrator, against F. J. Pelzer and F. S. Rodgers, less counsel fees charged in the account as assets in the hands of the administrator to be administered, was deposited by the attorneys of said administrator in the Citizens' Savings Bank, where it remained at seven per cent. interest, until the said bank was adjudged a bankrupt, I hold that the defendants are responsible only for such dividends as shall be paid out of the assets of the said bank in the administration thereof in bankruptcy. I do not concur with the Probate Judge in the allowance of a counsel fee to the attorneys respectively of the creditors; the proper fee to be allowed in this behalf should be allowed only to the counsel of D. I. Twitty and J. F. Eisenmann, who filed the petition.

It is, therefore, ordered and adjudged that the decree of the Probate Judge be modified so as to conform herewith, and that the Clerk of this Court do so certify to the said Probate Court.

Exceptions to the decree were taken by the different parties to the proceeding, and appeals taken to this Court on grounds which sufficiently appear in the opinion of the Court.

Izlar & Dibble, for petitioners.
T. B. Whaley, for E. H. Rodgers & Co.
Glover & Glover, for administrator.

April 11, 1876. The opinion of the Court was delivered by

MOSES, C. J. The Court, in determining the several exceptions to the judgment of the Circuit Judge, will first dispose of those which are included in the appeal on the part of the creditors, who have come in under the petition of the plaintiffs, with the purpose of establishing demands against the intestate, John A. Keitt.

In regard to so much of their appeal as resists the right of the administrator to protect himself in the loss of the proceeds of the judgment against E. H. Rodgers & Co.,

*163

by the failure of the bank *in which they were deposited, we entertain no doubt. It does not appear that at the reference any notice was brought to the counsel of the administrator that the amount had been included in the account against him. He would have been at liberty, therefore, in the absence of such knowledge, to resist the charge on any sufficient ground, through an exception to the decree of the Probate Judge. The view which would confine the Circuit Court on an appeal from the Court of Probate to a mere determination of the points made by the notice would so embarrass its mode of procedure as seriously to affect the end proposed by its jurisdiction in matters of appeal from the orders, sentence or decree of a Probate Court.

The Circuit Court, by the sixty-second Section of the Code, is to "proceed to the trial and determination of the question according to the rules of law." If upon the hearing it should appear that either party to any particular issue involved in the judgment would be prejudiced without the hearing of further evidence, or that a surprise would operate to the injury of either, as the Court is without authority to hear the case anew by the examination of further testimony, the ends of justice would be defeated if it had no power to remit it for additional evidence on all the issues or any designated part. Why may not the Court remand the case for a new hearing? and if it can so order, why may it not limit the further inquiry to a single issue? The order of May 30, 1874, does not seem to be open to the objection made.

It is further contended that, assuming the right of the Judge to grant leave for the examination by the Probate Judge on the issue made by the defendants in regard to the fund referred to, there was error in his not holding the administrator liable for the loss of it by the failure of the bank in which it was deposited. In considering the point now under review, it must be remembered that, when collected, the proceeds of the judgment were necessarily to remain in the hands of the administrator until it was ascertained by the proceedings pending in the Probate Court at the time they were received how they were to be appropriated. In the view we take of the liability of the administrator for the loss of this sum, it may be considered as if paid

directly into his hands by the defendants in the judgment, and by the administrator deposited in the Orangeburg branch of the Citizens' Savings Bank of South Carolina. To treat the judgment as an investment, and to charge the administrator with a breach of duty in collecting it, is complicating the al-

*164

ready *very embarrassing subject of trusts with a new element for which no precedent or authority can be found. The conversion of a debt into a judgment is not for the purpose of investment, either as a temporary or permanent fund, for the accrual of interest. So far from this, it is the usual mode of enforcing the payment of the debt on which it is founded. The purpose is not to place the debt in the shape of a judgment so as to remain as an investment, but that by so changing its form it may be forthwith collected, and thus be the means of obtaining money which may be appropriated to the uses of its owner, according to his own interest or caprice. The proper inquiry is, was the act of the administrator under the circumstances induced by that reasonable care with which prudent men, looking to their benefit, usually conduct their own business? The proceedings which were to determine the application of the money held by the administrators were still pending in Court. The deposit was made in a bank paying interest, and the only institution of the kind in the County where the letters of administration had been granted. At the time of the deposit it was in such good standing as to commend itself generally to the community, which is shown by the fact that the merchants, lawyers, officers of the Court and persons resident in and about the town, including several of the County Treasurers, made it the place for the deposit of their money. Even after the alarm of the public as to the condition of the bank, its officers submitted to its patrons extracts from a report, by gentlemen in various parts of the State, in the following language: "After an examination of the affairs of the Citizens' Savings Bank of South Carolina, made at the solicitation of the managers of the institution, we are enabled to answer its depositors and the public that we fully recognize its claims to their continued confidence." To make the administrator liable for the loss which followed from no fault on his part, would inflict upon him a punishment for not foreseeing what others having better opportunity failed to perceive in time to save them from a consequent loss. The views which we have taken of this part of the case are reflected from the principles announced in Fitzsimons v. Fitzsimons, 1 S. C., 400.

So much of the judgment of the Circuit Court as holds that the sureties on the official bond of the administrator are not responsible for the amount of his note to the intestate is clearly erroneous. We have, during the present term, in the case of Jacobs, administrator, v. Woodside & Goldsmith [6 S. C. 490], decided the very point raised in this

*165

*exception, and it is only necessary to refer to it as authority for the same conclusion which we reach here.

It is next in order to consider so much of the appeal on the part of some of the defendants and the two plaintiffs as charges error in the Circuit Court in holding and adjudging the joint and several note of the intestate and Jacob G. Keitt to E. H. Rodgers & Co. to be the sealed note of the intestate, and therefore to rank as a specialty debt in the administration of the assets of his estate.

If the evidence of Jacob G. Keitt is not obnoxious to Section 415 of the Code, it is conclusive proof of the adoption by the intestate of the seal affixed to the name of the said Jacob G. Keitt as his own. Several may adopt the seal of one without so expressing on the face of the papers.—Bull v. Domsterville, 4 T. R., 343. It is the intention which gives effect to the act, and this may be proved by the manner of the signature, or parol evidence, connecting what may appear on the instrument with the declaration of the party, so as to make his intention manifest. The Section of the Code referred to does not exclude the testimony of Jacob G. Keitt, a several co-signor of the note, because he has "no legal or equitable interest which may be affected by the event of the action or proceeding." For although it is against a party "defending the action as administrator," and the testimony is "in regard to a transaction or communication between the witness and a person at the time of the examination deceased," yet the fact that the proposed witness has no interest to be affected by the issue in the case withdraws him from the operation of the provision in the said Section, which, if he had such an interest, would include him. He not only admits in his testimony that he is the principal in the note, but he proves that the consideration for which it was given enured entirely to his own benefit, and that his co-maker was only a surety. The establishment of the note as a valid claim by specialty against the estate of the intestate in no way increases or diminishes the liability of the principal, who is a competent witness under the said Section of the Code, which only excludes a witness "having a legal or equitable interest which may be affected by the event of the action."

The question raised by the appeal of the plaintiffs as "to what point of time do the words of survivorship in the codicil to the will refer," we think has been fully adjudicated by the decrees set out in the brief. Two of them were made by Chancellor Dunkin, and the third was by Chancellor Cald-

*166

well. The parties inter*ested were all before the Court, and appear to have acquiesced in its judgment by not taking an appeal. Near-

ly twenty years have elapsed since they were pronounced, and their effect is sought to be disturbed, not by any one having an interest in the estate of the testator, but by subsequent creditors of one of the grand-children, who took as devisees and legatees under both the will and the codicil. The decrees are conclusive, because on the same points, by a competent Court, and preclude any new inquiry as to their effect on the parties whose interests were determined by them.

We agree with the Circuit Judge that the estate of John A. Keitt is not responsible to the surviving children of Andrew Houser for moneys paid to Jacob G. Keitt as administrator of Frances V. Keitt. Her estate is not in process of settlement before the Court, nor is her administrator a party to the present proceeding. Before any such liability could rest upon the estate of John A. Keitt, it must be made to appear that the portion received by him through the estate of the said Frances G. did not vest absolutely in him, but belonged to the children of the said Andrew Houser, in right of their survivorship under his will.

We do not see how Peter M. Houser, who is the administrator of John Keitt, can claim as a creditor the interest which he, the said John A., was entitled under the will of Andrew Houser, upon mere proof of certain payments made to his guardian on such account, without any evidence of a settlement between the said guardian and his ward, or of some disposition of them to his use. So far as it is disclosed by the brief, there was no evidence of any payments to the said John A. Keitt on such account. David Houser, the other brother, claiming a like interest, could only assert it by a proceeding against the said Peter M. Houser, administrator of the said John A. Keitt. Yet here we find the administrator and his brothers entitled, as they say, as survivors, to the interest which John A. Keitt took in the estate of their father, claiming a right to be paid out of assets in the hands of the administrator on the mere ground that the said David Houser, the executor of the father, made payments on such account to the guardian of the said intestate. Before the other creditors of John A. Keitt should be compelled to submit to an abatement of their debts, by reason of this demand, his administrator must first seek an account from the said guardians of the moneys so received from the estate of Andrew Houser for and on behalf of his ward, the said John A. Keitt.

*167

*It is ordered that the case be remanded to the Probate Court for the County of Orangeburg for such orders and proceedings as may conform its judgment to the conclusions herein expressed.

WRIGHT, A. J., and WILLARD, A. J., concurred.

7 S. C. 167

ROWE v. RAILROAD COMPANY.

(Columbia, Nov. Term, 1875.)

[*Railroads* ⇐ 446.]

In an action against a railroad company for the negligent killing of plaintiff's cow, testimony that the cow was turned out into the street to graze on the commons near the railroad track, that she was found lying in the ditch near the track with two legs broken, and that the land on both sides the track at that point belonged to the defendant, is sufficient evidence to entitle the plaintiff to have his case submitted to the jury, and does not show contributory negligence on the part of plaintiff.

[Ed. Note.—Cited in Jones v. Columbia & G. R. Co., 20 S. C. 256, 257.

For other cases, see Railroads, Cent. Dig. § 1629; Dec. Dig. ⇐ 446.]

[This case is also cited in Davis v. Columbia & G. R. Co., 21 S. C. 102, as to the question of nonsuit.]

Before Carpenter, J., at Richland, May Term, 1875.

This was an action by William S. Rowe against the Greenville and Columbia Railroad Company for negligently killing the plaintiff's cow by a passing train of the defendant.

The action was brought before a Trial Justice, and the complaint alleged that the cow casually and without fault of the plaintiff strayed upon the track and ground occupied by the railroad of the defendant in the city of Columbia.

The case was set for trial on 19th April, 1872, and the defendants then appeared and put in a general denial, and pleaded that the accident occurred at a point where the property on both sides and adjacent to the track, as alleged, belonged to the defendants, and the plaintiff, the owner of the cow, became a trespasser on the rights, privileges and realty of the defendants, and is, therefore, not entitled to recover damages for loss of the cow.

The trial was had on 19th April, 1872, and judgment was entered in favor of the plaintiff for fifty dollars and costs.

The defendants appealed to the Court of Common Pleas of the County of Richland from the said judgment; and on the twenty-first day of May, 1875, the case came on to be heard before the Hon. R. B. Carpenter, Judge of the Fifth Judicial Circuit, and a jury.

*168

*William S. Rowe, the plaintiff, testified that he was the owner of a valuable cow, and that on the thirteenth day of April, 1872, he saw his cow lying in the ditch near the track of the Greenville and Columbia Railroad Company, with two legs broken; it was near the street leading to the penitentiary; it was not far from the depot of the railroad; the track at said point is straight for a considerable distance and no obstructions to the view; trains from either side could

see a considerable distance ahead. He valued the cow at fifty dollars; she was worth more to him, but that was the valuation put upon her.

On cross-examination, witness testified: He returned the cow for taxation at the value of thirty ($30) dollars. He resided in the city of Columbia, near the Jewish burying ground. His land did not abut on the railroad track. He had a fence round his lot. He turned his cow out into the street that she might graze on the commons near the railroad. Had no one to watch her.

In reply: The commons are in the direction of the railroad: everybody turn their cows loose in Columbia.

Zadoc Martin was then introduced and testified: He saw the cow lying near the railroad track, with her legs broken. He did not see the cow struck. Valued the cow at forty dollars.

On cross-examination, witness testified: That he is a watchman in the employment of the Greenville and Columbia Railroad Company; that he knows the land on both sides of the track belongs to the railroad company, at the point where the cow was found injured.

The plaintiff then closed, and the defendant moved for a nonsuit, on the grounds:

1. Because the plaintiff had failed to prove that the cow was killed by the exclusive negligence of the defendants, and because the plaintiff had testified to contributory negligence sufficient to defeat his action.

2. Because the plaintiff wholly failed to prove that there were commons near the railroad track, or in that direction.

3. Because it was proved that the land on both sides of the track belonged to the railroad company, and the owner was not only a trespasser on the track of the railroad company, but was also a trespasser on the land of the railroad company.

4. Because the plaintiff had not proved that his cow was pasturing on his own land, or that it had escaped without his fault.

*169

*5. Because the plaintiff had not shown any proof that the cow was killed by any train upon the defendant's railroad track, or by any employé of said railroad.

The motion was overruled, and defendants excepted.

Defendants offered no testimony.

The Court charged the jury that if they believed, from the evidence, that the cow belonging to the plaintiff had been killed by the defendants, no evidence having been introduced to rebut the presumption of negligence then arising against the defendants, the verdict should be for the plaintiff, notwithstanding the fact that the lands on each side of the railroad belonged to the defendants; and that the fact that the plaintiff permitted the cow to go upon the lands of the defendants, and upon their track, did not amount to contributory negligence, and could not defeat the plaintiff's action.

To which the defendants excepted.

The jury found a verdict for the plaintiff for forty dollars.

The defendants appealed.

Melton, Chamberlain & Wingate, for appellants.

Sloan, contra

April 18, 1876. The opinion of the Court was delivered by

WRIGHT, A. J. This action is brought to recover damages for the loss of a cow alleged to have been killed on the 13th day of April, 1872, by the locomotive and cars belonging to the Greenville and Columbia Railroad Company.

At the conclusion of the plaintiff's testimony, the defendant moved for a nonsuit on the following grounds, which are not now stated in the order in which they were presented:

1. Because the plaintiff had not shown any proof that the cow was killed by any train upon the defendant's road track or by any employé of said railroad.

2. Because the plaintiff had failed to prove that there were commons near the railroad track or in that direction.

3. Because the plaintiff had failed to prove that the cow was killed by the exclusive negligence of the defendants, and because the plaintiff had testified to contributory negligence sufficient to defeat his action.

*170

*There was certainly prima facie evidence that the cow of the plaintiff was killed by the train of the defendant.

The condition of the animal when found, her position in regard to the track of the railroad belonging to the appellant, and all the circumstances offered in evidence, were to be passed upon by the jury. It was a question simply of fact, on which the plaintiff had a right to the judgment of the jury.

A nonsuit should not be ordered where there is testimony, in the absence of counteracting proof, sufficient to sustain a conclusion in support of the fact on which a plaintiff relies to maintain the allegation of his complaint. Where there is an entire absence of evidence, there is nothing to justify the verdict of the jury; but where there is prima facie testimony in support of his complaint, he has a right to the judgment of the jury as to its force and effect.

In Rogers v. Madden, (2 Bail., 323,) it is said: "The practice of ordering a nonsuit in invitum for defect of testimony is to be pursued with caution. If a plaintiff has any prima facie testimony, he has a right to the verdict of a jury upon it."

The course of this Court has been in conformity with the rule thus declared. The two other grounds on which the appellants rested their motion may be considered together.

The second charges contributory negligence in the fact that the appellee failed to prove that there were commons near to or in the direction of the railroad. This would imply that where such an animal as a cow is permitted to leave the enclosure of its owner, he is responsible for the course that "its appetite or curiosity" will incline it to take.

There is no statute in this State which forbids the straying of cattle on unenclosed land, nor is there even an ordinance in the city of Columbia, where this injury complained of was inflicted, that prevents cattle from running in the streets.

The charge of the presiding Judge was in all respects in conformity with the law in Danner v. Railroad Company, (4 Rich., 329 [35 Am. Dec. 678]), which was confirmed by this Court in Roof v. Railroad Company, (4 S. C., 61.)

The motion is dismissed.

MOSES, C. J., concurred.

*171

*WILLARD, A. J. I concur in the judgment, on the ground that there was evidence from which it was competent as matter of law for the jury to find negligence on the part of defendants. The question of contributory negligence could not be raised on a motion for nonsuit. I do not consider that the effect of the charge was to relieve the jury from determining the question of negligence on the part of the defendants upon the facts proved.

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7 S. C. 171

CHOICE v. CHARLES.

(Columbia. Nov. Term, 1875.)

[*Homestead* ⇐201.]

A judgment creditor, whose judgment was recovered in 1867, is not barred by an assignment under a junior judgment of defendant's homestead, made in January, 1870, which was not returned "for record in Court."

[Ed. Note.—Cited in Bull v. Rowe, 13 S. C. 368; Agnew v. Adams, 17 S. C. 370; Youngblood v. Lathen, 20 S. C. 375, 376.

For other cases, see Homestead, Cent. Dig. § 378; Dec. Dig. ⇐201.]

Before Cooke, J., at Greenville, ——— Term, 1873.

On the first day of February, 1867, William Choice, the respondent recovered judgment in the Court of Common Pleas for Greenville County against John Charles, the appellant. Subsequently one A. M. Hamilton also recovered judgment in the same Court against Charles, and under this latter judgment the "Home Place" of the appellant, "including dwelling house, out-house and appurtenances," was assigned to him as a homestead, exempt from levy and sale under execution. The assignment was made in January, 1870, but was not returned for record in Court.

This was a rule upon the Sheriff to show cause why he had failed to enforce respondent's execution by levy and sale of the property included in the assignment, and upon a return being made His Honor made the rule absolute and ordered the Sheriff to make the levy and sale.

Charles appealed, and now moved this Court to reverse the order of the Circuit Court and dismiss the rule.

Earle, for appellant.

Symmes, contra.

*172

*April 18, 1876. The opinion of the Court was delivered by

MOSES, C. J. It appears from the brief that the appellant seeks an exemption of certain property from liability to levy and sale under the execution of the respondent, Choice, which issued on a judgment obtained February 1, 1867, through an alleged assignment of homestead in January, 1870, on a subsequent judgment in favor of one Hamilton. At that time the only legislation "to enforce the provisions of the Constitution" in relation to the matter of homesteads was that contained in the Act of 1868, which is found in General Statutes, page 475. By this, not only is the mere formal mode and manner of the assignment to be regulated and governed, but its validity, as an existing right, must depend on its conformity with all the requisitions therein prescribed.

The argument of the counsel for the motion proceeds upon the assumption that the appellant, if he had proposed to contest the allotment, was bound to "resist it in the manner prescribed by the statute, that is, to file his exceptions within ten days." We have not been referred to any statutes, and on very full examination find no such condition demanded by any Act of the General Assembly at the time of the assignment of the homestead by the Commissioners. The Act of 1868 requires the assignment and process to be returned by the officer "for record in Court; and if no complaint be made by either party, no further proceedings shall be had against the homestead." It would thus appear that not even the parties to the process through which the assignment is to be made are bound by any action under it until it is returned "for record in Court." Here it is sought to affect the judgment creditor, who was no party to the proceeding, because of notice of the assignment, which had not even, at the hearing below, been returned "for record in Court." Against what was he to aver? To whom was he to submit his objection? How was he bound by an outside proceeding, the force of which could have no effect on his lien until submitted "for record in Court?" Until then it is not easy to perceive how his "complaint" could be entertained. The judgment of the respondent, recovered before the

Constitution of 1868, was not affected in its general lien on the property of the appellant by the homestead provisions of that instrument.—Gunn v. Barry, 15 Wall., 610 [21 L. Ed. 212]; Cochran v. Darcy, 5 S. C., 125. A right might be lost by not interposing a constitutional objection, and thus permitting a

*173

judgment *to be obtained, which would operate to bar it; but, as we have said at this term, in Ryan v. Pettigrew [7 S. C. 146], "it must be by judgment, acting directly on the point in issue," and, we may add, necessarily affecting the party who, with full opportunity, failed to resist it. The case, in its general bearing, is so alike to the one before us that we shall forbear to do more than refer to it.

The motion is dismissed.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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7 S. C. 173

GILLISON v. SAVANNAH AND CHARLESTON RAILROAD COMPANY.

(Columbia. Nov. Term, 1875.)

[*Adverse Possession* ⇨60; *Limitation of Actions* ⇨12.]

The charter of C, a railroad corporation, authorized it to acquire lands by statutory proceedings for the valuation thereof, the lands to "vest in the said company in fee simple as soon as the valuation thereof may be paid, or tendered and refused." In 1860, C commenced proceedings to acquire title to a parcel of A.'s land. It was valued, and C appealed from the valuation, but did not prosecute the appeal. C took possession of the land, and, having become insolvent, in 1866 all its property was sold and purchased by S, another and a distinct railroad corporation, who thereupon took possession of the land. In 1872, A commenced his action against S to have the valuation paid or the land restored to him: *Held*, That he was entitled to the relief he demanded.

[Ed. Note.—Cited in Buckner v. Railroad Co., 7 S. C. 328.

For other cases, see Adverse Possession, Cent. Dig. § 282; Dec. Dig. ⇨60; Limitation of Actions, Cent. Dig. § 43; Dec. Dig. ⇨12.]

[*Eminent Domain* ⇨317; *Railroads* ⇨194.]

The transaction was in the nature of an executory contract for the sale of the land, and, until the valuation was paid or tendered, no title passed, and S, as purchaser only of the right to complete the contract, could not avail itself of the defense of purchase for valuable consideration without notice.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 834½; Dec. Dig. ⇨317; Railroads, Cent. Dig. §§ 643–655; Dec. Dig. ⇨194.]

[*Adverse Possession* ⇨60; *Limitation of Actions* ⇨12.]

S could not hold by adverse possession, nor was it protected by the Statute of Limitations.

[Ed. Note.—Cited in Clark v. Smith, 13 S. C. 600; Pegues v. Warley, 14 S. C. 188.

For other cases, see Adverse Possession, Cent. Dig. § 282; Dec. Dig. ⇨60; Limitation of Actions, Cent. Dig. § 43; Dec. Dig. ⇨12.]

[*Eminent Domain* ⇨248.]

A had a lien on the land in the nature of a mortgage, through which he had the right to enforce payment.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 644, 645; Dec. Dig. ⇨248.]

Before Farmer, J., at Beaufort, March Term, 1872.

These were two separate actions entitled: 1. W. D. Gillison v. Savannah and Charleston Railroad Company; 2. T. H. Gregorie v. The same. The brief upon which the appeals were heard is as follows:

The complaint in first case states: (1.) In the month of August, 1860, the Charleston and Savannah Railroad, being desirous of obtaining the right of way through plaintiff's land, called "Spring Hill," (in the first above entitled case,) instituted proceedings according to law, and commissioners were appointed

*174

to assess the *value thereof. (2.) The commissioners, on the 13th of September, 1860, adjudged the quantity of said land necessary for the use of the said railroad to be thirteen acres and seven roods, and assessed the value thereof at $1,000. (3.) From this assessment the Charleston and Savannah Railroad Company appealed, but the appeal was never prosecuted. (4.) The Charleston and Savannah Railroad Company becoming insolvent, their road was sold in 1866, and purchased by certain parties, who formed a new company and obtained a new charter under the name of the "Savannah and Charleston Railroad," and entered into possession of the said road, and have continued in the use thereof unto this time. (5.) The plaintiff has never executed any conveyance or other instrument of writing transferring or releasing his interest in the land set apart by the commissioners for the use of the Charleston and Savannah Railroad Company, and has never been paid in whole or in part therefor, and is, therefore, entitled to claim the possession of the said premises and damages for withholding the same, or for the payment of the sum of $1,000, assessed as aforesaid, with interest thereon. (6.) Plaintiff applied to the Savannah and Charleston Railroad Company for a settlement of his claim, but has been unable to obtain any satisfaction from them. Wherefore plaintiff asked that the Savannah and Charleston Railroad Company may be adjudged to deliver possession of said premises, and to pay damages for withholding the same, or to pay the plaintiff the assessment of $1,000, with interest from the 13th September, 1860. (7.) That the said company be enjoined from making use of the said land until such payment shall be made, and for such further relief as may be consistent with law and equity.

The answer of defendant says: (1.) That as to the allegations in the first, second and third paragraphs of the complaint they have

no knowledge whatever, neither admitting nor denying them to be true. They were not in existence as a corporation at the time the alleged facts are said to have occurred. (2.) It is true the property of the Charleston and Savannah Railroad Company, including the road, right of way, equipments, buildings and furniture, was sold on the 20th November, 1866 at public auction under foreclosure of mortgage, and was afterwards, by an order of the Court of Equity made by Chancellor Carroll, 26th January, 1867, conveyed to them, whereupon they entered into possession and have continued to use and occupy

*175

the same. (3.) No notice of claim of *any sort upon the property sold was given to plaintiff or any other person at the time of the said sale, which had been long advertised in the public prints. Defendants cannot be presumed to know, and do not know, what arrangement, understanding or bargain existed between the plaintiff and the Charleston and Savannah Railroad Company, by which the said company obtained exclusive possession and enjoyment of the premises and continued to be the debtors of the plaintiff for so many years, as appears from his complaint. Some arrangements, then, must have been made, and the failure and neglect of the plaintiff to get his money from the said company, during all that time, can give him no claim against defendants, who purchased the property and not the debts of the said company. (4.) That it may or may not be true that no title deed for the said premises was ever made by the plaintiff to the Charleston and Savannah Railroad Company, and that no part of the said assessed valuation has been paid, but defendants are advised that no written instrument was necessary to pass the title; and that if it were otherwise, the uninterrupted adverse possession of the said company of this defendant for more than ten years would be sufficient to cover any such defect. And defendant avers that the said company, and this defendant afterwards, have together been in adverse possession of the premises for more than ten years, and the claim of the plaintiff for the possession thereof, if he ever had any, which is denied, is absolutely barred by the Statute of Limitations. (5.) Defendant further says that the plaintiff is not entitled to claim payment of this defendant of the sum of $1,000, alleged by him to be due from the Charleston and Savannah Railroad Company. Defendant is not and cannot be made liable for the contracts or debts of another corporation or individual without voluntarily assuming them. Plaintiff alleges that the debt was contracted by the Charleston and Savannah Railroad Company, and defendant has never in any way undertaken to assume or pay it or admitted any liability for it. (6.) Wherefore defendant submits that the plaintiff is not entitled to the relief prayed for.

In the case of T. H. Gregorie v. The Savannah and Charleston Railroad Company, second above entitled, the complaint, the answer and the evidence are the same in every respect as in the case of W. D. Gillison, with the exception that in the case of Gregorie the land set apart was ten acres and two roods, and the assessment therefor was $325.

*176

*1. Plaintiffs, each sworn and examined in his own behalf, proved the facts stated in their case, except that Gillison thinks that the amount of his award was $1,400; and they each further testify that the causes why they delayed prosecuting their claim was the war and general embarrassment of the country at large.

2. Dr. Paul Pritchard, sworn for the plaintiffs, says: He was the agent of the Charleston and Savannah Railroad Company on or about 20th August, 1860, to procure the right of way from parties owning land on the line of the road. That he met commissioners duly appointed to assess the right of way through the lands of Dr. Gillison and Dr. Thomas H. Gregorie, and that in the case of Dr. William D. Gillison the amount was $1,000, and the quantity of land taken thirteen acres and seven roods; and that in the case of Dr. Thomas H. Gregorie the award was $325, and the quantity of land taken was ten acres and two roods. That the Charleston and Savannah Railroad appealed in both cases. That he was appointed by the President and Directors of the Charleston and Savannah Railroad to act as their right of way agent, and he made a record of his transactions at that time, and that from that record he has answered the interrogatories propounded to him in these cases. Witness further states that he did protest, as the agent of the company, against the award in both these cases, and submitted a proposition which the plaintiff, Dr. William D. Gillison, was willing to agree to in place of the above award, which was to take $2,300 in stock. The proposition was never acted upon.

The plaintiffs appealed, and filed the following notice and grounds of appeal:

His Honor, Judge Farmer, having dismissed the plaintiffs' complaints in the cases, without reducing his reasons to writing, as required by Section 291 of the Code, the plaintiffs are unable to know, or to state, on what grounds they have been turned out of Court.

In the absence, therefore, of a written decision, the plaintiffs must assume that His Honor dismissed their complaints upon all the grounds taken in answers of the defendants, and plaintiffs therefore submit as their grounds of appeal:

I. That the defendants offered no testimony whatever, either oral or written, to sustain any of the allegations contained in the several paragraphs of the answer; and

the plaintiffs made no admissions thereof in any way.

*177

*II. Because, supposing the facts to be as alleged by the defendants, the conclusions of law drawn by His Honor are erroneous in this:

1. The Statute of Limitations cannot be set up by a defendant when he enters under a contract to purchase.

2. That the possession of two parties claiming by hostile title cannot be tacked.

3. That the actions in the present cases were commenced within ten years from the time of the award of the commissioners.

4. That the Statute of Limitations was suspended by the stay laws.

5. That the Charleston and Savannah Railroad Company never acquired a title to the land of the plaintiffs, and could not, therefore, convey a title to the Savannah and Charleston Railroad Company, who only acquired by their purchase the right to use and occupy the way, subject to the conditions prescribed by the charters of both companies, which expressly provides that no title shall pass until the assessment be paid or tendered.

III. As to the defense of purchase for valuable consideration without notice:

The plea cannot avail the defendants, because they have neither averred nor proved that they paid any consideration for the property in question, but merely assert that "the property of the Charleston and Savannah Railroad Company was sold on the 20th November, 1866, at public auction under foreclosure of mortgage, and was afterwards, by order of the Court of Equity, made by Chancellor Carroll, 26th January, 1867, conveyed to them, whereupon they entered into possession and have continued to use and occupy the same."

Colcock & Son, with whom were Pope & Haskell, for appellants:

The Charleston and Savannah Railroad had no right to mortgage the land of the plaintiffs, for that company never acquired a title thereto. The charter of that company expressly provides that "the lands and rights of way so valued by the commissioners shall vest in the said company in fee simple so soon as the valuation thereof may be paid, or tendered and refused." This was never done, but, on the contrary, the company appealed

*178

from the assessments and *never prosecuted their appeal.—See testimony of Dr. Pritchard in brief; 13 Stat., § 10, 275.

The Statute of Limitations is not a bar to plaintiffs' recovery, because:

1. That the statute had not run out before suit brought. The assessment was made 13th of September, 1862, and the suit was commenced 12th of September, 1872, which is one day less than ten years, even granting that the possession of the two companies could be considered as one adverse and hostile possession. But defendants cannot claim this period of time, for they did not enter until 1867; and they cannot tack their possession to that of the Charleston and Savannah Railroad Company, for that company entered under a contract to purchase, and never held adverse or hostile possession to plaintiffs, and, as their entry was lawful and peaceable, plaintiffs could not have sued them.

2. Because the Statute of Limitations was suspended by the Stay Laws.

A defendant who has been in possession of lands for a less time than the statutory period cannot unite his possession with that of a previous tenant from whom he purchased, in order to make out the time required by the statute to bar the plaintiffs' right of recovery; for until that period has run out they are both to be regarded, as it respects the true owner, as mere trespassers. A conveyance from the first to the second tenant, under such circumstances, conveys nothing.—King v. Smith, Rice, 10; Beadle v. Hunter, 3 Strob., 336; Alexander v. Burnet, 5 Rich., 200; Dillard v. Philson, 5 Strob., 215; Mazyck v. Wight, 2 Brev., 151; Turnipseed v. Busby, 1 McC., 279; Sumner v. Murphy, 2 Hill, 494.

When a person goes into possession of land under an agreement to purchase it, he cannot hold adversely to the claim of the person under whom he went into possession so as to acquire a title by the Statute of Limitations. —Richardson v. Broughton, 2 N. & McC., 417; Jackson v. Bard, 4 John., 330; Harrington v. Wilkins, 2 McC., 289; Bank v. Smyers, 2 Strob., 28; Watson v. McBurney, MSS. dec., 2 Rice Dig., 100; Willison v. Watkins, Carolina Law Journal, 121.

The charter of the Savannah and Charleston Railroad Company (the present defendants) expressly provides that "nothing herein contained shall be held to discharge or impair any existing lien upon any property now in possession of the Charleston and Savan-

*179

*nah Railroad Company."—13 Stat., § 8, proviso, 443; see also § 6, 441.

Statute of Limitations not a bar when the taking is by eminent domain.—Hannum v. Borough, trustee of Chester, 63 Penn. St., 475, referred to in July number, 1871, Law Review.

The plea of purchase for valuable consideration without notice cannot avail the defendant, because they have neither averred nor proved that they paid any consideration for the property in question, but merely assert that "the property of the Charleston and Savannah Railroad was sold on the 20th November, 1866, at public auction, under foreclosure of mortgage, and was afterwards, by order of the Court of Equity, made by Chancellor Carroll, January 26, 1867, conveyed to them, whereupon they entered into possession and continued to use and occupy the same." —Zorn, trustee, v. Savannah and Charleston

Railroad, decided at November Term, 1873, by Supreme Court, and not yet reported. Willard, J.

It would be unjust and contrary to the first principles of government, and equally contrary to the intention of the statute, to take from the proprietor of the land his undoubted right, until compensation has been paid, or provision made for securing the same.—Gardner v. Newburgh, 2 John Ch., 162.

Campbell, contra:

1. The respondents are not liable for the debts of the Savannah and Charleston Railroad Company, and there is no proof that they ever assumed the payment of the debt of the latter company, alleged by the complaint.

2. These suits were brought on the 12th of September, 1870, and the respondents entered into possession not later than in February, 1867, and have continued in possession ever since, a period of more than five years before suit brought, and this is conclusive of their right to the land claimed.—Statutes, vol. 12, § 11, 276, 1853; vol. 13, § 9, 443, 1866; vol. 12, 543.

3. If the respondents have not already complete right to the use of the lands in question, and the appellants are the owners, still the respondents are by law entitled to hold and use the same, and specific mode and remedy is provided by law for the relief of appellants, and that mode and remedy is not the one adopted in this case.—Statutes, Vol. 13, § 8, 442.

*180

*April 19, 1876. The opinion of the Court was delivered by

WILLARD, A. J. The Charleston and Savannah Railroad Company was authorized by law to acquire lands and rights of way for the purposes of their road by statutory proceedings for the valuation of such lands by commissioners. The statute declares "the lands and rights of way so valued by the commissioners shall vest in the said company in fee simple as soon as the valuation thereof may be paid or tendered and refused."

The plaintiffs, Gillison and Gregorie, were owners of separate parcels of land required for the use of said road, and proceedings were taken against them, respectively, for the purpose of fixing a valuation upon their respective lands. Commissioners were appointed and a valuation fixed. From this action appeals were taken, but never prosecuted. We must assume these appeals to have been abandoned. The railroad company took possession of the lands, but have never paid the amount at which they were valued.

Subsequently, the Savannah and Charleston Railroad Company, a corporation created by law, and distinct from the Charleston and Savannah Company, became the purchasers of the property of the last named company, and as part thereof took possession of the lands of the plaintiffs in the respective suits above entitled. The plaintiffs in each case now claim that the Savannah and Charleston Railroad Company are bound either to complete the contract of purchase created by operation of law or to restore the land.

The only claim to the land possessed by the Charleston and Savannah Company was that of purchasers under a contract for the sale of the land. This contract arose by operation of law, but its incidents are the same, as affecting the parties, as if it resulted from the voluntary act and consent of the parties themselves. The defendants becoming the purchasers of the property of the former company acquired the rights of that company, under the contract of purchase, and could enforce it on complying with its terms.

On the other hand, the respective plaintiffs, on parting with possession of the land, were clothed with an equity to compel performance of the contract, and the land was subject to being treated in equity as if mortgaged to the plaintiffs as a security for so much money as they ought to receive in compensation

*181

for the value of *the land.—Gregorie v. Bulow, Rich. Eq. Cas. 235; Richards v. McKie, Harper Eq., 184; Champion v. Brown, 4 John. 398.

The defendants cannot be regarded as purchasers of the legal title for a valuable consideration and without notice of an equity affecting it. On the contrary, that which constitutes their title is the equitable right of the company to which they succeeded, and they are chargeable with notice of the nature of the possession of the party from whom they purchased.—Daniels v. Davison, 16 Ver., 249.

It is evident that the defendant cannot maintain a claim to hold by adverse possession by lapse of time, for their possession was consistent with plaintiff's claim to enforce their contracts.—Richards v. McKie, Harper Eq., 184; Bank v. Smyers, 2 Strob., 28.

Nor can they maintain their plea of the Statute of Limitations, inasmuch as the contract is executory on both sides.—Gregorie v. Bulow, Rich. Eq. Cas. 235. The fact that it was not necessary, in order to complete the title of defendants, that the vendor should perform any act, but that by the operation of the statute title would pass at once on payment or tender of the money, does not interfere with the idea that the contract is executory on both sides, for the statute in transferring the title merely does in his behalf what the vendor ought to do. The operation of the statute stands in lieu of a direct conveyance by the vendor, and gives to the relations of the parties, as it regards the Statute of Limitations, the same character as if, by the terms of the contract, the vendor was

required to make a conveyance upon payment of the purchase money.

The judgment dismissing the complaint must be set aside and the causes remanded for decrees establishing in the respective cases liens in favor of the plaintiffs on the lands in question, and directing the sale of those lands in satisfaction of such liens, unless payment is made by the defendants of the amounts fixed as the value of said lands by the commissioners, with interest.

MOSES, C. J., and WRIGHT, A. J., concurred.

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7 S. C. *182

*GRIER v. WALLACE.

(Columbia. Nov. Term, 1875.)

[*Bills and Notes* ⇐140, 141.]

A purchaser of slaves, in 1846, paid part cash and gave his promissory note for the balance of the purchase money. He sold some of the slaves, and in 1858 took up the promissory note and gave his sealed note, with a surety, for the amount then due: *Held*, In an action against the surety, that he could not set up as a defense thereto that the slaves were unsound at the time of the purchase.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 354, 356; Dec. Dig. ⇐ 140, 141.]

Before Mackey, J., at York, April Term, 1875.

This was an action by W. M. Grier, as executor of R. C. Grier, deceased, against A. T. Wallace, on a joint and several sealed note for $632.50, given by Robert Whitesides and the defendant to the plaintiff's testator, bearing date the eighth day of January, 1858, and payable one day after date. The defense alleged in the answer was that the note was given for the purchase money of slaves, and that they were unsound at the time of the purchase.

At the trial the defendant gave evidence tending to show that in 1846 Robert Whitesides purchased from R. C. Grier five slaves, named Julia Ann, Henry, John, Milly and Agy, at the price of $1,750; that he paid in cash part of the purchase money, and gave his note to Grier for the balance; that some time that or the next year he sold Julia Ann and Agy, and in 1857 or 1858 he sold John for $1,200 cash; that John and Julia Ann were unsound at the time of the purchase; and that on the 8th January, 1858, Whitesides made a payment on the note given in 1846, took up the same, and gave the note, with the defendant as his surety.

His Honor charged the jury:

That the policy of the law or the decisions of the Courts overriding the Constitution and enforcing the collection of negro bonds was bad and unfortunate, and would not likely be the law long; but that the plaintiff, under the decisions of the Courts, had a right to bring his action, and it was a question for the jury to say whether the defendant had shown to their satisfaction that the slaves were unsound, as alleged in the answer; that, although the defendant, Wallace, was not obligated on the original note given in 1846, yet the note given in 1858, and now sued upon, was nevertheless given for the purchase of the slaves, and that it was competent for the jury to go behind the note of date January 8, 1858, and inquire whether the slaves

*183

were sound in 1846, when Robert White*sides first purchased them; that the question of unsoundness was one for the jury to determine, and that it made no difference whether the unsoundness was known or unknown to the vendor at the time of the sale; that the execution of the note in 1858 was not, in contemplation of law, a settlement or ratification of the contract of purchase made in 1846, and could not preclude the jury from going back to the time of original sale and inquiring into the condition of the slaves.

The verdict was for the defendant.

The plaintiff then moved the Circuit Court for a new trial on the following grounds, amongst others:

1. Because Robert Whitesides, the principal debtor on the sealed note upon which this action is based, having purchased from plaintiff's testator, in 1846, the five slaves, namely, Henry, John, Milly, Julia Ann and Agy, at the price of $1,750, and having then paid in cash part of the purchase money, and given his note for the balance, without any surety thereon, it is respectfully submitted, the note which is now the cause of action, of date the eighth day of January, 1858, given by the said Whitesides and the defendant, A. S. Wallace, must be regarded as a new contract and constituting an entirely new cause of action, and the jury ought not to have gone behind the new contract to consider the alleged unsoundness of said slaves, but should have found for the plaintiff the full amount demanded in the complaint.

The plaintiff appealed on the same grounds as those taken for a new trial.

Williams, Allison, for appellant.

Beatty, Thompson, contra.

April 27, 1876. The opinion of the Court was delivered by

WRIGHT, A. J. This action was brought on a promissory note given for balance of purchase money of slaves which were sold to Robert Whitesides in 1846, by R. C. Grier, now deceased, who left a will, of which the appellant was appointed executor. At the time of purchase Whitesides paid a portion of the purchase money, and executed and delivered to R. C. Grier his note for the balance due.

*184

*On the eighth day of January, 1858, the said Whitsides took up the note of 1846, and gave in lieu another note, with the respondent, Wallace, as surety upon the same.

This action is brought against the surety. It appears that Robert Whitesides purchased five slaves for the sum of $1,750, and paid in cash a portion of the purchase money. That some time the same year of the purchase, he sold two of the said slaves, Julia Ann and Agy; and in 1857 or 1858 he sold the slave John for the sum of $1,200. It is clear that Whitesides realized more than the amount of money he paid for the slaves, and was satisfied with his bargain; for if they had been so unsound as to cause him loss by the purchase, he had a remedy by moving to rescind the contract, which remedy he did not resort to, but sold the slaves he desired and retained the others. The first ground of appeal is the only one necessary to consider to dispose of all upon the record and to fully determine this case.

Whitesides is estopped now from inquiring into the condition of the slaves at the time of their purchase for two reasons—first, because he disposed of the slaves, or a portion of them, thereby giving assurance that satisfaction had been rendered by the contract of purchase; and, secondly, by giving a new note for the old one, twelve years after the purchase, with the respondent, Wallace, as surety upon the same, thereby acknowledging the former transaction as a valid one, and the consideration as a good and valuable one by a higher guarantee, to wit: security in case of failure on the part of the principal. This was a new contract, the former note having been parted with as it was extinguished.—Chastain v. Johnson, 2 Bail., 574; Dogan v. Ashbey, 1 Rich., 37; Gardner v. Hust, 2 Rich., 608.

The principal in this case having failed, the surety must be held bound. As to the remarks of the presiding Judge, "that the policy of the law or the decisions of the Courts overriding the Constitution and enforcing the collection of negro bonds was bad and unfortunate, and would not likely be law long," it is only necessary to say that this Court, and also the Supreme Court of the United States, have decided such debts are collectable, and we do not regard it consistent with the duty of a Judge, who is bound to administer the law as it is announced by those who, under the Constitution of the United States and of this State, are vested with the right of expounding it,

*185

knowingly so to charge a jury as to *impress them with a right on their part to return a verdict contrary to law.

The motion for a new trial is granted.

MOSES, C. J., and WILLARD, A. J., concurred.

7 S. C. 185

McCELVEY v. THOMSON.

(Columbia. Nov. Term, 1875.)

[*Judicial Sales* ⟸17.]

One cannot become a purchaser at a judicial sale where he has a duty to perform in reference thereto which is inconsistent with the character of purchaser.

[Ed. Note.—Cited in Black v. Childs, 14 S. C. 320.

For other cases, see Judicial Sales, Cent. Dig. § 28; Dec. Dig. ⟸17.]

[*Judicial Sales* ⟸17.]

A purchase, under a decree for sale of the Court of Equity, made by a solicitor in the cause for the benefit of himself and the Commissioner who made the sale, set aside, although no actual fraud was shown, and the purchasers held liable for the advanced price at which they had sold the land to a bona fide purchaser for value without notice.

[Ed. Note.—Cited in Anderson v. Butler, 31 S. C. 195, 9 S. E. 797, 5 L. R. A. 166.

For other cases, see Judicial Sales, Cent. Dig. § 40; Dec. Dig. ⟸17.]

Before Cooke, J., at Abbeville, April Term, 1874.

The cases stated in the caption of the report of the Referee, herein contained, and also in the caption of the opinion of the Court, were entitled (1) William McCelvey v. W. D. Mars, as assignee; (2) William McCelvey v. Thomas Thomson and W. H. Parker; and (3) Ex parte William McCelvey, in re William McCelvey v. A. P. Comer and others. They were referred to Silas Johnstone, Esq., as Referee, who submitted the following report, dated 22d April, 1873:

The undersigned, appointed by this Court a Referee to hear and determine the issues of fact and law in the above stated cases, respectfully submits the following report: The questions in these proceedings might properly be presented in a very few words; but inasmuch as every point that could be suggested was raised and strongly contested at the hearing on the reference, a full account of the causes may be expected; and I shall endeavor to state everything which may in any way tend to a fair investigation of the matters in controversy.

Hugh McCelvey, by his solicitor, Thomas Thomson, Esq., (one of the defendants above named,) instituted proceedings by bill filed 25th April, 1866, in the Court of Equity for

*186

Abbeville, against *William McCelvey, (the plaintiff herein,) and one A. L. Welch, for specific performance of a contract in relation to the sale of a tract of land, called the Clay tract. William McCelvey, by Mr. McGowan, his solicitor, answered, pleading full payment for the land to Samuel Jordan, attorney for Hugh McCelvey. Chancellor Johnson, at the hearing, June sittings, 1866, ordered an issue at law, "whether the money was received by Samuel Jordan from William McCelvey as an absolute payment of the

note given for the purchase of the Clay tract;" and though somewhat in anticipation, it may be here stated that the trial of the issue resulted, 19th August, 1869, in finding the note paid. William McCelvey being greatly embarrassed by debt, believing himself utterly insolvent, made a voluntary assignment of all his estate, real and personal, to William D. Mars, the defendant above named, for the benefit of his creditors; the property, (including the Clay tract, which was then in litigation,) to be sold for cash, and the proceeds to be applied, after certain preferred creditors were paid, to the extinguishment of all of his debts. He then, within a few days thereafter, removed from this State.

A. P. Conner and Catlett Corley, being sureties for William McCelvey in a very large amount for the purchase of certain slaves, had procured from him a confession of judgment, to secure them, and immediately after the assignment above mentioned levied their execution on the assigned property. Thereupon Mars, assignee, filed his bill against them, to enjoin the sale under their execution, to reduce their judgment, (then amounting to $9,875,) and to marshal the assets of McCelvey. The injunction was granted 29th September, 1866, and on 7th November, 1866, Judge Wardlaw, Associate Justice, granted an order in both the cases above mentioned, McCelvey v. McCelvey, and Mars v. Conner et al., directing the lands to be sold, (the proceeds of the Clay tract to await the event of the issue at law,) the creditors to be called in, and the assignee to account, giving leave to make William McCelvey, resident then in Texas, a party to the latter bill. A. L. Welch, a party defendant to the bill of McCelvey v. McCelvey, then residing on the lands assigned by William McCelvey, and claiming to have purchased them from him before the assignment, had the sale made under Judge Wardlaw's order set aside. A supplemental bill, Mars v. Conner & Corley, was filed 13th April, 1867, making Welch and the two McCelveys, Hugh and William, parties, to which, 4th June, 1867, an order

*187

pro confesso was taken as to William *McCelvey. At the June Term of Equity, 1867, Chancellor Lesesne, in both the cases, McCelvey v. McCelvey, and Mars v. Conner & Corley, by order, confirmed the Commissioner's report marshaling the assets, (in which the large judgment of Conner & Corley was reduced to $358,) and directed the sale of the lands for cash, the proceeds of the Clay tract still to await the issue at law. In pursuance of this order the Commissioner in Equity, William H. Parker, one of the defendants herein, sold at public outcry, 7th October, 1867, the lands, the Clay and Wells tracts, to Thomas Thomson, a defendant also herein, at the price of $1,820, (the Clay tract at $920); the price of the Wells tract, ($900,) was paid at once, but the proceeds of the sale of the Clay tract having to await the further order of the Court, the Commissioner, though he charged himself with the amount of the sale, did not collect it from Mr. Thomson until a future time. The sales were reported to the Court by the Commissioner, as was the custom of his office, by his books of sale. But said order, confirming this sale, if ever passed, was not produced, nor could be produced at the reference. The whole proceeds of sales, (including the personalty, sold by the Sheriff for $481.55, and turned over by him to the Commissioner,) amounting in gross to $2,301.55, have been applied as directed by the Court, by the Commissioner, to the payment of costs and fees and debts established against William McCelvey. William H. Parker, Commissioner in Equity, executed a deed for these lands, 19th November, 1868, to Mr. Thomson, who, on the same day, conveyed an interest of one-half therein to Parker, and they together, also on the same day, executed a deed for the lands, with warranty, to J. P. Reed and Daniel Brown, trustees, in consideration of the payment of $3,060.

The causes, McCelvey v. McCelvey, and Mars v. Conner et al., were both marked "ended" on the docket, June Term, 1870. Some time in August, 1870, William McCelvey returned to this State, and very shortly thereafter instituted the proceedings in the first two actions stated in the caption of this report. In his complaint against Mars, he states that he had assigned his estate to this defendant for the benefit of his creditors; that the defendant had neglected his trusts; that the debt having been ascertained to be very trifling, compared to the assigned estate, the plaintiff was ready and able to pay them off, and consequently that there remained no necessity for carrying out

*188

the terms of the *assignment, and he prays that the assignment may be canceled; that Mars may be made to account for the administration of his effects; that a Referee for that purpose may be appointed; that the creditors may be called in, the estate marshaled and the balance paid to the plaintiff. Mars, answering, says that within a few days after the assignment was executed, Conner & Corley levied their executions upon the property of the plaintiff, with the intent to sell, and he, the assignee, filed his bill to enjoin them; that the Court of Equity enjoined these creditors from selling the realty, (the personalty was sold by the Sheriff, and never came to the hands of the assignee,) and ordered the lands to be sold by the Commissioner, the creditors to be called in, and the assignee to account before the Commissioner, and to surrender and pay over to that officer such property and funds as might be in his hands as assignee; and that, having once accounted before a Court of competent ju-

risdiction, he ought not to be required to answer again for the same subject matter. This branch of the matters in controversy may be disposed of here, at the hearing before the Referee. The parties did not require Mars formally to account, as it was known that he had turned over to the Commissioner in Equity all the property, choses in action, etc., in his hands, except $100, which he received for the sale of a gin, this amount being all the cash he had ever received; and as he had retained no commissions on his accounting before the Commissioner, it was conceded that he should keep the $100 as some sort of compensation for the expense incurred by him in the administration of the assigned estate. The cause stated second in the caption hereof will now be considered. The plaintiff, in his complaint against Thomson and Parker, sets forth that on the 7th of October, 1867, Thomas Thomson, Esq., at that time a practicing attorney at law and solicitor in equity, and his co-defendant, William H. Parker, Esq., being then Commissioner in Equity for Abbeville District, contrived together to defraud, and did defraud, the plaintiff of a large sum of money in this wise: The lands of the plaintiff, consisting of the Wells and Clay tracts, were offered for sale on that day by order of the Court of Equity, as before stated. Mr. Thomson became the bidder, at the price of $1,820, contrary to his known duty as solicitor to do so. The lands were knocked down to him at that bid, with the knowledge, connivance and acquiescence of Parker, Commissioner, conducting the sale; and that he, Thomson, did

*189

not comply with *the terms of sale until he had sold the lands to other parties at a great profit to himself and the said Commissioner; that Parker conveyed the lands so bid off 7th October, 1867, to Thomson, on the 19th November, 1868, at which time Thomson conveyed one-half interest to Parker, and that on the same day they jointly conveyed the said lands to Reed and Brown, for the sum of $3,060, being a profit of $1,240. The defendant, Thomson, admits in his answer the purchase by him, the sale of one-half interest to Parker, and the joint conveyance with Parker of the lands to Reed and Brown, as stated in the complaint, but denies that he was at any time solicitor for the plaintiff, and also that there was any complicity whatever between himself and his co-defendant, Parker, in relation to the purchase of the land at the sale of the Commissioner. The defendant, Parker, denies that there was any agreement or understanding between them as to the purchase of the land, stating that he did not bid himself, had no intention of becoming a bidder, and was not sure that Mr. Thomson intended to do so, though it was not imagined that he, Thomson, could be excluded from the right to purchase. The facts elicited from the pleadings and from the testimony, of which a transcript accompanies this report, show conclusively to the Referee that there was no combination between the parties defendant in relation to the sale. On the contrary, the proof is that each labored to make the lands sell well, and the sale was fairly conducted. The question then arises, first, is the Commissioner forever forbidden to purchase property which has once been sold by him officially? and, second, could Mr. Thomson, under the circumstances, become a purchaser at the sale mentioned? As to the first question, suppose, for argument sake, the Commissioner himself is the highest bidder at a sale made by him, is the sale absolutely void or voidable only at a time when the Court of Equity of South Carolina was in its perfection, and the chancery bench of this State was not far, if at all, surpassed by any forum in the civilized world? Permission has been granted, in the very order directing sales, to the Commissioner to become a bidder, under peculiar circumstances, at a sale made by him; and under the same circumstances the Court would confirm a purchase made without permission first obtained under that sound, equitable doctrine of considering things done which should have been done. It sometimes happens that the officer of the Court conducting sales is an heir at law to the estate he

*190

is selling, and the property, for *some reason or other, such as that it was his birthplace or was the happy home of his childhood—is very desirable to him; is there any Court of justice which would forbid him to purchase it? It may be said that, being a distributee, it would, in the case supposed, be to his interest to make the sales as profitable as possible, and for that reason his fitness to conduct the sale would be the greater. But that is no answer to the fact that he would desire also to purchase the property at as cheap a price as it could be obtained; and yet there is no question, unless fraud could be shown, that the Court would confirm a sale made under such circumstances. Where, then, is the impropriety of his buying from a former purchaser, even after his connection with the sale by the Court had ceased? Is every subsequent purchaser of a tract of land which was once sold by order of the Court of Equity to be charged with combining with the first purchaser to chill the sale? or is the Commissioner alone to be suspected of it if he afterwards became the owner of the land? Mr. Parker sold the land as directed by the Court. The proof is that he labored to induce persons to bid and that nothing unfair appeared at the biddings; the lands sold well—some of the bidders testified for more than they felt willing to give for them. The sales were reported to the Court by the Commissioner in the usual manner. Whether they were ever confirmed or not, does not appear; but that was no part of the Commissioner's duty. And here it is worthy of remark, if there had been any

combination between the defendants, as is alleged, they would have been prompt to procure an order of confirmation. The purchase money, except that which was to await the further order of the Court, was promptly received and paid out by the Commissioner. A deed was not executed, however, until more than a twelvemonth after the sale. Again, it may be observed that if there had been improper confederation between the defendants, it seems there would have been some hurry in perfecting title, etc. The precise time at which Parker purchased the half interest from Thomson was not shown; but it is in proof they jointly rented the lands to one Carter for the year 1868. The transfer by deed was delayed, however, until 19th November, 1868, the day on which the Commissioner conveyed to Thomson, and the same day, too, on which they jointly conveyed to Reed and Brown. The profit made by these defendants on their joint sale is accounted for by the fact that they conveyed

*191

to Reed and Brown with warranty *against the contingent right of dower in the wife of the plaintiff, and also the claims of title in the land set up by Welch, which, after the purchase by Thomson, had been satisfied or arranged. There is nothing in the whole transfer to show any fraud on the part of the Commissioner, or of his cognizance of a fraud connected with the sale of the plaintiff's estate. Now, as to the propriety of Mr. Thomson becoming a purchaser at the sale: The interests of a client in the hands of his counsel are sacred. An attorney, even for justice's sake, may not be allowed to divulge secrets made known to him by his client. No relation in life, in the comprehension of the law, is held so intimate and confidential. Hence the violation of such a trust is the more culpable. In this instance, however, Mr. Thomson was not counsel for the plaintiff, McCelvey. Indeed, in one of the cases under which this sale was ordered, he was opposed to William McCelvey, and in the other, though representing the assignee, he was not even constructively counsel for the plaintiff herein, for Mr. McGowan was acting for him with unrevoked authority, he, McCelvey, having been made, too, a party defendant to the bill by publication. But even had Mr. Thomson been directly the plaintiff's counsel, could he have been precluded from purchasing at the sale? Authorities without stint were cited in the argument before the Referee, mostly upon the powers and restrictions of agents generally, and very few of them on the relation of attorney and client. One case, of Miles v. Ervin, (1 McC., 524 [16 Am. Dec. 623]), relied upon by both plaintiff and defendant, considers this point probably the most thoroughly, and is a leading case on the subject. In that case, as in all the others that I can find, the bargain was made with the client, and not with an officer of the Court, by its order. It was there held that all contracts between attorney and client in relation to the property in litigation are not necessarily void on the ground of that relationship, (as would be with agents generally); but to render them so, it must appear that they were used to the prejudice of the client.—1 McC., 549. What are the facts here? Competitors at the sale testify that it was fairly conducted, and that Mr. Thomson gave fully as much as, in their judgment, the lands were worth. But to take the strongest view of the matter against the attorney, suppose such proof of the facts had here been introduced, and that the plaintiff were really the client of Mr. Thomson, was the procurement of the sale improper? It will hardly be contended that it was, for

*192

that *very person, the plaintiff herein, assigned his estate; and the Court, taking possession of his assets, also undertook the administration thereof, in the place of the assignee. The sale being ordered by the Court, the purposes of the bill were accomplished and the relation of client and attorney ceased, and the attorney was then as much at liberty to bid as the client himself, or as any one else.

The petition Ex parte William McCelvey, in re Mars, assignee, v. Conner et al., remains only to be considered. The petition recites the facts mainly as they have been hereinbefore set forth, stating that the petitioner was a necessary party to the bill, and that without his being made so by proper process no action was valid as to him, and, consequently, under such circumstances, questions the propriety of an order for sale of his effects; that the petitioner finds his assigned estate misapplied and sacrificed, and his creditors unpaid, and he prays that the entry "ended" on the docket, as to the case of Mars, assignee, v. Conner et al., may be erased, and upon proper terms he may come in and have a rehearing of the causes; that the sale may be set aside, the deeds surrendered and canceled, and, if necessary, the land be sold and the proceeds disposed of according to law in settling his affairs in the assignment of his effects. To this it is replied by the defendant, and he is sustained by the proof, that he was really a party defendant in McCelvey v. McCelvey, one of the cases in which the sale was ordered, and that, by order of Judge Wardlaw, leave was granted to make him a party in the other case, Mars, assignee, v. Conner et al.; that after publication of notice, an order pro confesso was taken against him, and the defendants deny the rights of the petitioner, after a lapse of five years, to have the order "ended" rescinded, and the cause of Mars v. Conner returned to the docket, and the order pro confesso set aside, for the purpose of contesting decrees regularly made by the Court in accordance with his assignment, under which im-

portant rights have vested. This brings up a question or two not hereinbefore considered: Whether or not, for the purposes of the bill in Mars v. Conner et al., William McCelvey was a necessary party, is not a matter for the Referee now. McCelvey insists that he should have been, and the fact is he was made so by a competent order. A notice was published requiring him to answer, and upon his default an order pro confesso was taken against him. It is objected that publication against him was irregular, because his absence was not made known by the usual affidavit.—1 Brev. Dig.,

*193

Title LVII. *§ 23, 203. The practice of the Court of Equity was to require personal service of its process, and this could not be dispensed with, except upon satisfactory proof of the absence of the party beyond the limits of the State. The statute suggests an affidavit of the fact upon which to found the order to publish. This is to the satisfaction of the Court; but if by any other means the Court is entirely satisfied of the fact, the affidavit is unnecessary. Here the fact of the plaintiff's absence beyond the reach of the process of the Court is not only not contradicted, but positively asserted by the petitioner himself. If the publication was irregular, the irregularity was healed by the confirmation of the fact which an affidavit could only set forth; so that he was made a party to the bill, and the pro confesso order was well taken. It is my opinion, however, that the cause was not ended when it was so marked on the docket. The sale made by the Commissioner seems never to have been confirmed. Without confirmation of the sale, where is the title of purchasers? The deed executed by the Commissioner is only evidence of title. The order of the Court confirming the contract with the purchasers is the title, and is necessary to the completion of the purchase. In this instance, the sale being for cash, the Court ordered deeds to be executed upon compliance with the terms of sale; so that it may be this order is a confirmation in anticipation, and there may be no necessity to open the case; and as the party whose interests are affected by it are not seeking it, I do not recommend such a course.

Having stated very fully the issues in these causes which were referred to me, I would respectfully report:

I find as matters of fact—

1. That the plaintiff, on the 20th of August, 1866, executed a voluntary assignment of his whole estate to the defendant, William D. Mars, for the benefit of his creditors.

2. That in pursuance of proceedings had in the Court of Equity for Abbeville District, the assignee fully accounts before that Court, and surrendered the assigned estate to the Court for proper administration.

3. That the Court ordered the sale of the real estate by the Commissioner at public outcry; in pursuance of which order the defendant, William H. Parker, then the Commissioner, in plain and open market, on the 7th of October, 1867, sold the said lands to Thom-

*194

as *Thomson, the defendant, at the price of $1,820, the highest offered, conducting the sale fairly, and exerting himself, as was his duty, to make the sale as profitable as possible to the parties in interest.

4. That the defendant, Thomas Thomson, was not, at the time of said purchase, attorney or solicitor for the plaintiff, directly or constructively; that there was no effort on his part to chill the sale, but that, on the contrary, he induced others to compete with him at the biddings.

5. That there was no attempt to defraud or injure the plaintiff, nor was he defrauded or injured, either on the part of William H. Parker or Thomas Thomson, in the purchase by the latter, or his subsequent conveyance to the former of a half interest therein, or their joint conveyance of the whole interest to Reed and Brown at the advanced price of $3,060.

And I find as matters of law—

1. That the plaintiff, William McCelvey, was legally made a party to the bill, Mars v. Corley et al., and bound by all proceedings had therein.

2. That the defendant, William D. Mars, assignee of the plaintiff's estate, having accounted for and surrendered the assigned estate, under an order of a Court having jurisdiction thereof, is no longer liable to a further accounting.

3. That the defendant, Thomas Thomson, had the right to become a purchaser at the sale in question; that the sale to him was valid, and that he had the legal right to convey the lands, with profit to himself, to whomsoever he chose.

4. That the defendant, William H. Parker, after the sale had been completely made by him, without fraud, was not prevented from subsequently purchasing an interest in the lands, and that he had the right to do so as fully as if he had never had anything to do with the sale as an officer of the Court.

5. That the joint sale of the lands by Thomson and Parker to Jacob P. Reed and Daniel Brown, trustees, was valid.

And I would respectfully recommend that all the proceedings in the different causes herein referred be dismissed.

On behalf of the plaintiff, William McCelvey, exceptions were filed to the above report, on the following grounds:

*195

*1. That the Referee failed to find that the defendants, Thomas Thomson and W. H. Parker, acted in a fiduciary capacity at the sale of the plaintiff's property in the year 1867.

2. That the Referee erred in not finding fraud and collusion of fraud on the part of

Thomas Thomson and W. H. Parker, then Commissioner in Equity, in purchasing the property in question.

3. Because the Referee found, and erred in finding, that the plaintiff had been legally made a party to the bill in Mars v. Corley et al.

4. Because the Referee erred in finding that Thomas Thomson, the defendant, had a right to purchase at the said sale, when it is respectfully submitted that he was acting in a fiduciary capacity of attorney and client at the said sale, and that any and all benefit received by him from said sale should enure to the benefit of his client.

5. Because the Referee erred in finding that W. H. Parker had a right to purchase the said property, when it is submitted that it appears from the evidence that the said Parker, then Commissioner in Equity, confederated with the said Thomson in the purchase of the said land and participated in the profits thereof.

6. Because, in other respects, the report is contrary to the law and the evidence.

The decree of the Circuit Court is as follows:

Cooke, J. The report of the Referee, Silas Johnstone, Esq., in the above stated cases, and the exceptions thereto, having been read, and argument heard, on motion of McGowan, it is ordered that the exceptions be overruled and the report confirmed and be made the judgment of this Court.

The plaintiff appealed.

Monteith & Bauskett, for appellants:

William H. Parker being Commissioner in Equity and Thomas Thomson as Solicitor in Equity, were, on general grounds, prevented from purchasing.—Fox v. Mackreth, 1 Lead. Eq. Cases, 197; Ex parte Lacey, 6 Ves., 629; Ex parte Bennett, 10 Ves., 381, 400.

Thomson, as solicitor for assignee, could not buy to his own advantage.—Whitcomb v. Minchin, 5 Mad., 91; Galbraith v. Elder, 8 Watts, 81, 94, 100; Henry v. Raimon, 1 Casey, 354, 360.

*196

*The doctrine which is applicable to purchase by trustees applies also to all purchases by persons acting in a fiduciary capacity, which imposes upon them the obligation of obtaining the best terms for the vendor, or which has enabled them to acquire a knowledge of the property.

A solicitor having under a decree the conduct of a sale is under an absolute incapacity to purchase at it.—Atkins v. Delmeze, 12 Jr. Eq. Rep., 1.

Assignees of a bankrupt cannot purchase.—See numerous authorities cited in 1 Lead. Eq. Cases, *133, 201, 3d Am. ed.

Commissioners specially forbidden by statutes.—7 Stat., 263, § 8.

McGowan, contra.

April 20, 1876. The opinion of the Court was delivered by

WRIGHT, A. J. The three cases above stated, from their reference together for a hearing and determination of the issues they involve, would appear to embrace the same subject matter upon which, by appeal, the judgment of this Court is asked to correct the errors alleged in the conclusions of the Judge below confirming the report of the Referee.

We shall not attempt to encumber our opinion with a recital of the facts which may be necessary to a proper understanding of the grounds upon which the petitioner seeks relief. They are fully set forth in the report in the proper order as to dates, and their statement will be accepted as accurate, though we may not agree with the conclusions which the Referee draws from them. The cause first stated in the caption seems to have been disposed of at the reference, and is not open to consideration here by any exception in regard to it. Indeed the points to be reviewed on the motion of the appellant are in no wise affected by the determination of any question which arose under it.

The cases secondly and thirdly stated may be considered together. The first of these assails the purchase at the sale of the Commissioner, under the order of the Court, in the cases of both Hugh McCelvey v. William McCelvey, and Mars, assignee, v. Conner, Corley et al., and claims judgment against Thomson and Parker for $2,700, with interest from 7th October, 1867, and costs of suit. The petition, Ex parte McCelvey, in re Mars,

*197

assignee, v. Conner et al., (the third *in the heading,) recites the facts stated in the other case, already referred to, alleges that petitioner was a necessary party thereto, questions the propriety of the sale of the land assigned by him to Mars for the benefit of his creditors, prays that the entry of "ended" on the docket as to the case of Mars, assignee, v. Conner et al., may be erased, that a rehearing of the causes may be had, the sale set aside, the deed surrendered and canceled, and, if necessary, the lands resold and proceeds disposed of under the assignment according to law. Without noticing the inconsistency of the relief sought through the bill against Thomson and Parker, and the petition In re Mars, assignee, v. Conner et al., the one claiming a compensation in money for any wrong committed by Parker and Thomson in the sale and purchase of the lands, and the other that the case may be restored to the docket, a rehearing had, the sale set aside, and the deeds ordered to be canceled, it is enough to say that the petitioner was duly made a party to the bill of Mars v. Conner et al. The order therefor was by one of the Associate Justices, under the authority of the Act of 1859, (12 Stat-

utes at Large, 757,) and the judgment pro confesso properly entered.

Neither is he entitled to a rehearing of so much of the merits of the case as terminated in the order made on June 12, 1867, for a sale of the lands. He was a party to the proceeding; the order constituted a final judgment acting directly on the property the subject of the suit; and though the appellant was allowed by the statute of 1784, (7 Statutes at Large, 210,) if absent from the State and within the United States, two years to appear in Court, and petition to be heard in "relation to the matter of such decree, and such proceedings shall be had, &c., as if no former decree had been made in the said cause," he failed to avail himself of a privilege, by the exercise of which he would have had the opportunity of contesting the propriety of the sale of his property.

While we do not regard the cause as "ended," when the entry to that effect was made by the Chancellor, for objection to the confirmation of the sale may have been made by any one interested on the coming in of the report upon it, yet the petitioner cannot have the decree for the sale set aside, because, a party to the bill when it was ordered, he did not move to contest it within the time permitted by the statute. It by no means, however, follows because a party affected by a judicial sale may be precluded from coming in and contesting either its necessity and

*198

propriety, that he is prohibited *from seeking relief against it on the ground either of fraud in equitable combination or undue influence. While, therefore, the appellant may not be permitted to aver against the title by which the land is held by its present owners, he may be allowed, on the equitable principles which regulate the action of those standing in a fiduciary relation, to know that a profit to which he is entitled has enured to the benefit of others who, by the position in which they stood to him, could be considered only as agents or trustees and in the particular transaction could not acquire a benefit to his prejudice. It is proper and necessary to consider the position which Mr. Thomson occupied at the time of the sale, which was ordered under the case of Hugh McCelvey v. William McCelvey, as well as that of W. R. Mars, assignee, v. A. P. Conner et al. In the first he was the solicitor of the plaintiff, in the language of his own answer to the complaint, here "employed to file the bill of said Hugh McCelvey for the purpose of selling this Clay land." In the bill of Mars, assignee, v. Callet and Conner et al., he was the solicitor of record for the plaintiffs to enjoin a sale of the assignee's property under execution, and to marshal the assets of Wm. McCelvey, to whom, by the terms of the assignment, was reserved the interest in any overplus after the purposes proposed by the instrument had been accomplished. In the statement of facts furnished by the brief, it appears that on November 7, 1866, Associate Justice Wardlaw made an order for the sale of the lands, which resulted in their being knocked off to Mr. Thomson for $2,800, but in December, 1866, (the precise day is not mentioned,) the sale was set aside on the action of one Welch. On June 12, 1867, the order for the sale under both cases was again made, terms cash, and on October 7, 1867, the sale took place, Mr. Thomson being the highest bidder for the Clay tract, $920, the Wells tract, $900. The bid for the last named piece was paid, but, in the language of the Referee, "the proceeds of the sale of the Clay tract having to await the further order of the Court, the Commissioner (Mr. Parker,) though he charged himself with the amount of the sale, did not collect from Mr. Thomson until a future time." No report of the sale was ever made to the Court. The bid for the Clay tract ($920) was not paid until the 19th of November, 1868, when the title was executed to Mr. Thomson, and he, on the same day, transferred by deed a one-half interest in both places to Mr. Parker, and the two on the same day,

*199

in consideration of $3,060, sold and *conveyed the whole to Brown and Reed on certain trusts. Thomson, it will be remembered, purchased on October 7, 1867. When he agreed to sell the one-half interest to Parker does not appear, but it is in the proof that they jointly rented it to one Carter for the year 1868. It is proper not to omit a statement by the Referee in his report, to wit: "The profit made by these defendants in their joint sale is accounted for by the fact that they conveyed to Reed and Brown, with warranty against the contingent right of dower in the wife of the plaintiff, and also the claims of title in the lands set up by Welch, which after the purchase by Thomson has been satisfied or arranged." To what extent this claim was asserted, or how arranged, did not appear. It is a matter of satisfaction to the Court that there is nothing in the evidence which can subject these defendants to the charge of actual or positive fraud, with which they have been assailed in the transaction out of which this contest has arisen. There is no testimony to show a combination to obtain a profit or advantage at the sacrifice of the obligation which they relatively owed to the plaintiff, McCelvey, by any direct agreement to that end. They must, nevertheless, be held amenable to the principle of equity, which, while it recognizes the absence of all moral delinquency, yet regards the transaction liable to imputation, because, in the language of Mr. Story, "contrary to some general public policy, or to some fixed artificial policy of the law, or growing out of some special confidential or fiduciary relation between all the parties, or between some of them, which

is watched with special jealousy and solicitude, because it affords the power and means of taking undue advantage, or of exercising undue influence over others."

Mr. Parker was the Commissioner in Equity who made the sale. By the Act of 1791, (7th General Statutes, 263,) he was prohibited from being concerned or interested, directly or indirectly, in the purchase or acquisition of any property sold by him. If his acts here do not bring him within the letter of the prohibition, they certainly include him within its spirit. The terms of the sale were cash, the bid was $1.820, of which $900 was paid at the time, October 7th, 1867, and the balance not until 19th November, 1868, the very day on which the purchaser conveyed a half interest to him. Although the sale was not perfected by the payment of the whole purchase money and the execution of a deed for some time, yet very soon after the lands had been knocked off to Mr.

*200

Thomson, *and so entered on the sale book, Mr. Parker seems to have acquired an interest in them, for he with Mr. Thomson rented them to Carter for the year 1868. The payment of the remaining portion of the bid was made to Mr. Parker on the 19th of November, 1868, and he thus acquired a credit on his own purchase of over a year through the very credit which he had extended to Mr. Thomson. If it had been announced at the sale that a credit of one-half of the purchase money (and that too without interest) would be given for a year, who can say there may not have been a bid overreaching that made by the party who was entered as the purchaser? It is urged that, although Mr. Thomson represents the assignee of the appellant in the case of Mars v. Conner et al., the sale was made not only under that case, but conjointly with the case of Hugh McCelvey v. William McCelvey, in which Mr. Thomson represented the plaintiff, the bill in the last named cause praying specific performance of a contract in relation to one of the very tracts sold. It may be assumed as certain that his position as solicitor in the two suits did not detract from the influence which he might have exercised at the sale had he been but the solicitor in one of them. The ground assumed in his behalf as representing only the assignee, and not William McCelvey, the assignor, cannot be maintained. While it is true that the assignee held the property subject to the provisions of the assignment, they were to be enforced under the terms which the assignor had directed and prescribed for the government of his assignee. The relation which the assignee occupied was one of trust, not only as regards the creditor, but also in relation to the assignor, who, besides his general interest in the proper administration of the trust conferred, had a direct interest in so much of the property conveyed as might remain after its appropriation to the purposes directed by the assignment. When Mr. Thomson therefore represented the assignee, he at the same time was bound to protect the interest of the assignor to any rights to which he may have been entitled under the instrument. His reception of a fee out of the assigned effects is indicative of the connection in which he stood to William McCelvey in the case. A fiduciary relation existed between Thomson and Parker on one hand and McCelvey on the other. The one was the solicitor, the other the officer making the sale, and they must both be regarded as his agents in the course of its conduct. While we see no actual fraud in the circum-

*201

stance attending the sale and *resale, yet the transaction cannot be sustained when subject to and tested by the principles of equity which are so concisely and tersely stated by Judge Story in the language to which we have already referred. They are recognized in the cases in our own Courts, where questions arising out of the rights and obligations of trustees and cestuis que trust have been discussed and determined, and they are so well and plainly expressed by Chancellor Walworth, in Terry v. Bank of Orleans, (9 Paige, 662,) as to render unnecessary a citation of other authorities. He says: "It is a settled principle of equity that no person who is placed in a situation of trust or confidence in reference to the subject of sale can be a purchaser of the property on his own account; and in the recent case (Treenlaw v. Kind) decided in the Court of Chancery in England, in January, 1841, (5 Law Journal, 18,) Lord Cottenham held that the principle was not confined to a particular class of persons, such as guardians, trustees or solicitors, but was a rule of universal application to all persons coming within its principle, which is that no party can be permitted to purchase an interest where he has a duty to perform that is inconsistent with the character of purchaser."

Another point remains to be considered. Although the appellant did not apply within two years from the date of this order for sale for leave to come in and contest its necessity or propriety with the purpose of setting it aside, he is within the proper time for asking that the entry of "ended" in the case of Mars v. Conner et al., should be struck out, and he be permitted to come in and claim whatever rights he may be entitled to under his assignment. The entry was made June 30, 1870, and the petition for leave to appear was filed January 29, 1872. The two years fixed by the statute had not expired.

The sale to Reed and Brown must stand. In addition to the reasons already given, they were bona fide purchasers for valuable consideration, and not affected with notice of any equity on the part of McCelvey sufficient to overreach legal title. Parker and Thomson

must be held liable to account to William McCelvey for $1,240, that difference between the amount at which they purchased the land and the price at which they sold it, with interest from the 19th of November, 1868. The costs under the petition must be paid by William McCelvey, and the costs in William McCelvey v. Thomson and Parker by the respective parties on whose several behalf they were incurred.

*202

*The case is remanded to the Circuit Court for Abbeville County with leave to the parties to move for such orders as may be necessary and proper to give effect to the views and principles herein announced.

MOSES, C. J., and WILLARD, A. J., concurred.

7 S. C. 202

WYLIE v. LYLE.

(Columbia. April Term, 1876.)

[*Mortgages* ⇐563.]

A junior judgment creditor made a party defendant in an action for foreclosure to enable him to redeem, or, failing to do so, that he might be barred of his right, has no equity to require the proceeds of the sale to be applied to his debt, even in a case where his judgment is against the mortgagee as well as the mortgagor, and the mortgagor is insolvent.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1622; Dec. Dig. ⇐563.]

[*Execution* ⇐358.]

A judgment creditor desiring to avail himself of the provisions of Section 318 of the Code, relating to proceedings supplementary to an execution, must proceed according to the directions of that Section.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1091; Dec. Dig. ⇐358.]

Before Mackey, J., at Chester, February, 1875.

This action was commenced by A. P. Wylie on the day of November, 1874, against David Lyle, as administrator of estate of W. H. Gill, deceased, W. Delancy Gill, Jane D. Gill and Susan Gill, children and minor heirs at law of W. H. Gill.; A. E. Wylie, as purchaser and assignee of the rights of Margaret H. Bates, who was the wife of W. H. Gill; and Thomas Shannon, J. R. Kennedy and S. W. Mobley, judgment creditors of W. H. Gill, holding liens. The defendant, S. W. Mobley, was, at the time of service of summons, served with notice that no personal claim was made against him.

The original summons and complaint, together with notice of lis pendens, was filed in the Clerk's office on 23d November, 1874. The complaint alleges, among other things, that on 9th January, 1866, W. H. Gill executed and delivered to the plaintiff his obligation for the sum of $4,197.80, with interest from date, in consideration of sundry sums of money before that time loaned by the

*203

*plaintiff to him; and, to secure the payment of said obligation, executed a mortgage to the plaintiff of a lot of land situated in the town of Chester, containing four acres, more or less, bounded by lots of E. T. Atkinson, A. P. Wylie, York street and cross street without name; that W. H. Gill thereafter died intestate, leaving him surviving as his next of kin and heirs at law, his wife, Margaret H. Gill, who has since intermarried with Robert F. Bates, and his children, W. Delancy Gill, Jane D. Gill and Susan Gill, all under age of twenty-one; that thereafter Margaret H. Bates assigned and conveyed all her interest in mortgaged premises to Annie E. Wylie, as trustee of Mrs. Julia A. Wylie; that letters of administration on estate of W. H. Gill were granted to David Lyle; and that Thomas Shannon, J. R. Kennedy and S. W. Mobley were judgment creditors of W. H. Gill, holding liens on the mortgaged premises, with a demand for judgment that the mortgage be foreclosed and equity of redemption barred, and the premises sold and proceeds of sale applied to payment of plaintiff's debt, and if not sufficient for that purpose for leave to issue execution for the balance.

The defendant, S. W. Mobley, answered, stating that he, as administrator, with the will annexed, of W. D. Henry, deceased, was the owner of a judgment duly entered in the Clerk's office, on 6th of March, 1869, against W. H. Gill and A. P. Wylie, for the sum of $2,655.90, with interest thereon from 19th January, 1869, besides dollars for the costs, which was a lien on the mortgaged premises; that the estate of W. H. Gill was insolvent; that said judgment was unpaid, and demanding judgment that the proceeds of sale of the mortgaged premises left after paying costs of action for foreclosure, or so much as might be necessary, be applied to satisfaction of his judgment.

The usual formal answer for the three minor defendants was filed. The other defendants failed to answer.

The case was docketed on the 28th December, 1874, by consent of Mobley's attorneys, endorsed on the record.

On 8th January, 1875, the report of the Referee as to the amount of plaintiff's note and interest was presented, and an order of Court made directing, among other things, the sale of the mortgaged premises; that the Clerk of the Court retain the proceeds of said sale in his hands, subject to the further order

*204

of the *Court; that the defendants and all persons be forever barred and foreclosed of all right, title, interest and equity of redemption in said mortgaged premises, with a clause therein inserted in the words as follows, to wit: "The rights, legal or equitable, of Samuel W. Mobley, as set out in his answer, being reserved against the fund to be

derived from the sale of these premises, as fully as they existed before the order of sale and judgment herein."

On the 15th February, 1875, the case came up before the Court for a further hearing of the issue between A. P. Wylie, as mortgagee, and Samuel W. Mobley, as administrator of Dixon Henry, defendant, as judgment creditor with lien.

The plaintiff offered in evidence records of two judgments against himself—one for $11,949.50 in favor of W. H. Gill, entered on 6th December, 1866; and one for $10,969.77 in favor of Annie G. Wylie, entered on 7th December, 1866; and one against W. H. Gill and himself in favor of Margaret Moffatt for $4,240.32, entered on 6th March, 1869.

The defendant, S. W. Mobley, as administrator, offered in evidence the record of a judgment entitled James Hemphill, executor for S. W. Mobley, administrator, against W. H. Gill and A. P. Wylie; verdict $2,655.90; interest from 19th January, 1869.

The debt was contracted 5th May, 1857, upon a claim in favor of the estate of Dixon Henry, and judgment entered up and execution thereon issued on 6th March, 1869.

It was admitted by the plaintiff that the estate of W. H. Gill is insolvent.

His Honor made the following decree:

Mackey, J. After hearing the testimony herein and the argument of J. & J. Hemphill, attorneys for plaintiff, and the argument of Patterson & Gaston, attorneys for S. W. Mobley, administrator of W. D. Henry, and on motion of said attorneys for the plaintiff, it is ordered that the funds to be derived from the sale of the property described in the pleadings herein be paid to the plaintiff, A. P. Wylie, by the Clerk of this Court, whenever the same shall come into his hands.

The defendant, Mobley, excepted to the decree, and appealed therefrom on the ground:

*205

*Because the said order directs the funds to be derived from the sale of the property described in the pleadings herein be paid to the plaintiff, A. P. Wylie; whereas the said order should have directed the said fund (or so much as might be necessary) to be applied to the satisfaction of this defendant's claim, it being a judgment against both W. H. Gill, the deceased mortgagor, and A. P. Wylie, the mortgagee.

Patterson & Gaston, for appellant.
J. & J. Hemphill, contra.

May 18, 1876. The opinion of the Court was delivered by

WILLARD, A. J. The complaint demanded the foreclosure of a mortgage by Gill to the plaintiff, Wylie. The mortgagor being dead, his representatives were made parties, also certain judgment creditors of the mortgagor, among whom was S. W. Mobley, the present appellant.

S. W. Mobley answered and set up a judgment against both the mortgagor and the mortgagee as a lien on the mortgaged premises alleging the estate of Gill, the mortgagor, to be insolvent, and demanding judgment "that the proceeds of the sale of the mortgaged premises left after paying the costs of action for foreclosure, or so much as might be necessary, be applied to the satisfaction of this judgment."

A decree of sale and foreclosure was taken, reserving the rights of S. W. Mobley. On the hearing of the matters thus reserved, it appeared that there were unsatisfied judgments against both mortgagor and mortgagee older than the judgment of the appellant, Mobley.

Thereupon the Circuit Judge made an order entitling the plaintiff Wylie, to receive the whole proceeds of the sale of the mortgaged premises. From this order S. W. Mobley appeals. Subsequently to the making of this order, the mortgaged premises were sold and brought an amount less than what was required to pay the mortgage debt.

It is not clear how the order appealed from could have been made before it could be certainly known whether the proceeds of the sale would discharge the mortgage debt, but

*206

only question before us *is, whether S. W. Mobley, the appellant, is prejudiced by it. We do not see that he is in any respect prejudiced. There was no surplus, and accordingly the plaintiff, as mortgagee, was entitled to the whole proceeds of the sale. S. W. Mobley now claims that the moneys applicable to the payment of the mortgage debt ought to be paid to him. He places this demand on two grounds, first, that he is an unsatisfied judgment creditor of plaintiff, and, second, that, in addition to this fact, he was a judgment creditor of the mortgagor, with a lien on the mortgaged premises.

The reasonings by which he seeks to establish these demands will be very briefly noticed, as the want of a proper answer is in itself fatal to him.

He claims that as he was made a defendant to the foreclosure suit, he has a right to come in with any matter of defense or counter-claim, and that, in virtue of this right, he now claims to stand in the same position as if he had commenced an action against the plaintiff in the nature of a creditor's bill on his unsatisfied judgment. In other words, he claims that he has a right of action against the plaintiff in the nature of a creditor's bill to compel a discovery and application of assets to the payment of his judgment; that his position as defendant authorizes him to interpose by way of counter-claim such cause of action.

It will be hardly necessary to consider whether a judgment creditor can, at this time, resort to an action in the nature of a creditor's bill in cases where the remedy af-

forded by Section 318 of the Code is appropriate and sufficient; for even if such a right exists, as we shall see, the appellant is not in a position to exercise it. It may, however, be said that the Section of the Code just referred to, in giving a summary remedy by a statutory proceeding in the nature of a creditor's bill, has afforded a legal remedy so full and inexpensive that no good reason exists for resorting to a remedy for the same purpose by complaint, attended as this latter remedy is with greatly increased delay and expense.

Had the appellant the right at the time of interposing his answer to commence an action against the plaintiff in the nature of a creditor's bill, still it is clear that he could not avail himself of that right by way of counter-claim or cross-proceeding in this action. He was made a party for a single purpose only, namely, that as a judgment creditor of the mortgagor, having an equity to re-

*207

*deem the mortgaged premises from the mortgage debt, he might have an opportunity to exercise such power of redemption, and, failing to do so in time, that he might be barred and foreclosed of such right of redemption.

The plaintiff made no demand for any judgment or decree except as to the matter of his right to redeem the mortgaged premises, and gave him notice accordingly. It was not necessary that appellant should answer the complaint. Without an answer he could come in and prove his judgment as against any surplus, after payment of the mortgage debt. An answer could not by any possibility prevent his equity of redemption from being barred if he did not come forward and redeem. The appellant in answering must therefore be regarded as a volunteer. Under the circumstances the answer must be regarded as formal merely, and as setting up no new or specific equities.—See Code, § 154. The answer did not contain the averments that are essential to a creditor's bill, namely, that execution had been issued on his judgment and returned unsatisfied. Nor did it demand any of the remedial means characteristic of a creditor's bill.

There is no ground whatever for the claim of the appellant that he is entitled to reach the proceeds of the sale of the mortgaged premises in the hands of the mortgagee on the idea that he has the rights of a judgment creditor who has exhausted his remedies at law.

It was claimed in behalf of the appellant that the remedy given by Section 318 might be taken in the present form, namely, by way of defense to an action, by averments in the nature of a creditor's bill. This is an entire misconception of the remedy afforded by Section 318. The chapter in which that Section occurs is entitled "Proceedings supplementary to execution." The object of the Section was to give a summary remedy based directly on the judgment and supplementary to the proceedings terminating in the judgment. This is a special statute remedy, and must be taken in the form in which it is given. To allow by way of defense a counterclaim to legal and equitable demands, and in favor of defendants only incidentally and collaterally brought in, the interposition of a defense in the nature of a creditor's bill, would be inconsistent with the intentions of the Code and introduce intricacies in pleading and procedure productive of the greatest inconvenience.

*208

*The remaining ground on which appellant seeks to sustain his demand for the mortgage money is that he had a lien on the mortgaged premises that precluded plaintiff from getting the benefit of his mortgage without demanding and obtaining against the appellant equitable relief in the form of a decree foreclosing his equity of redemption; that plaintiff cannot have such relief except upon the condition of doing equity; and as appellant is a judgment creditor of plaintiff, the equity that was due to him as the condition of the plaintiff's receiving the relief that he claims was that the whole proceeds of the mortgaged premises should be turned over to him as payment on his judgment. In making this demand the appellant considers that it is altogether unimportant that there are other older and unsatisfied judgments against both the mortgagor and the mortgagee.

The foundation of this theory is altogether wanting. Plaintiff asks no positive, equitable relief against the appellant. He makes him a party simply to afford him an opportunity to exercise his power of redemption, and demands nothing but the formal decree, barring his equity of redemption if he does not choose to redeem. There is no reason for attaching any condition to the customary relief demanded by the plaintiff, nor does appellant show any equity entitled to the peculiar protection of the Court of Equity. He is simply a legal creditor, not even alleging the inadequacy of the legal remedies to satisfy his judgment. The only equity that his answer sets forth is his demand upon the surplus, if any there should be.

The answer of the appellant does not warrant the relief sought by him, and his motion must be denied.

MOSES, C. J., and WRIGHT, A. J., concurred.

7 S. C. *209

*SMITH & MELTON v. MOORE.

(Columbia. Nov. Term, 1875.)

[*Judgment* ⇐707.]

A judgment against a vendee of chattels for breach of an implied warranty of soundness is not evidence of an alleged breach of a similar warranty in an action by such vendee against his vendor—and this although the vendor had notice of the pendency of the action against the vendee.

[Ed. Note.—Cited in State ex rel. Coleman v. Cason, 11 S. C. 395; Thomson v. Joplin, 12 S. C. 581; Parish v. Smith, 66 S. C. 431, 45 S. E. 16; Logan v. Atlanta & C. A. L. R. Co., 82 S. C. 523, 64 S. E. 515; Rookard v. Atlanta & C. A. L. R. Co., 84 S. C. 192, 65 S. E. 1047, 27 L. R. A. (N. S.) 435.

For other cases, see Judgment, Cent. Dig. § 1230; Dec. Dig. ⇐707; Sales, Cent. Dig. § 1279.]

[This case is also cited in State ex rel. Coleman v. Cason, 11 S. C. 392, and distinguished therefrom.]

Before Carpenter, J., at Richland, May Term, 1875.

This was an action by Smith & Melton, against Alfred Moore to recover damages for an alleged breach of an implied warranty, in a sale of thirty-two bales of cotton by the defendant to the plaintiffs, that such cotton was good merchantable cotton.

The plaintiffs gave evidence tending to show that on the 15th day of June, 1866, they purchased from the defendant, at a full price, which they paid, thirty-four bales of cotton; that the purchase was by samples furnished by the defendant, and that the samples were of good merchantable cotton; that on the next day they sold the cotton, by the same samples, to Robert E. and Charles McDonald, of North Carolina; that in March, 1870, the plaintiffs were sued by the McDonalds in the Circuit Court of the United States for the District of South Carolina, to recover damages for an alleged breach of an implied warranty that the said cotton, when sold by them to the McDonalds, was good merchantable cotton; that in February, 1871, pending said action, the plaintiffs caused to be served upon Moore a written notice of the pendency of said action, calling upon him to defend the same, and giving him notice that in the event of a recovery therein they would hold him liable for the amount of the recovery and for all costs and expenses incurred by them; that the plaintiffs, Smith & Melton, were entirely guided in their defense of the action by the representations of Moore; that he furnished all the information as to the condition of the cotton sold by him to them, and also procured the attendance of the witnesses upon which the defense was maintained; and that he appeared at the trial as a witness, in obedience to a subpœna served upon him, —the plaintiffs, Smith & Melton, paying his expenses,—and testified in their behalf.

The action of the McDonalds against Smith & Melton was tried at Columbia in March, 1871. The jury found for the plaintiffs therein damages to the amount of $803. Judgment was entered thereon and execution issued.

*210

The amount of the recovery and *all costs were paid by Smith & Melton before they commenced this action.

The plaintiffs gave in evidence the said judgment against them. It was objected to by the defendant, but the objection was overruled, and the defendant excepted.

The plaintiffs having closed, the defendant moved for a nonsuit, on the ground that there was no evidence tending to show that the cotton was not good and merchantable cotton at the time it was sold by the defendant to the plaintiffs. His Honor granted the motion, and the plaintiffs appealed.

Hamilton, with whom was Brice, for appellants, contended that the judgment in McDonalds v. Smith & Melton was evidence to show that the cotton was not merchantable when sold to the plaintiffs by the defendant, and said:

The questions presented to this Court at the outset are:

1st. Did the notice to Moore in the suit in the Circuit Court of the United States make him a party to the record so as to bind him conclusively as a solemn admission of record?

2d. If not, was it not sufficient evidence, coupled with the other testimony, to go to the jury?

I have no doubt that at least upon this last proposition the nonsuit must be set aside, because the testimony of the plaintiffs is uncontradicted that it was the identical cotton the subject of the suit in the Circuit Court of the United States. If, as His Honor said, it was not "clearly proved that the cotton which was the subject of the suit was the same as that sold by Moore to the plaintiffs," that was a question for the jury and not for the Court. If I understand the rulings of all the Courts in this country and in this State, they will not take a case away from the jury if there is any evidence of the facts upon which a verdict can be founded. The proof was conclusive and uncontradicted that it was the same cotton; that Moore conducted the whole defense so far as furnishing the testimony. He testified himself in the United States Court, and surely these facts coupled with the record were evidence to justify a finding by the jury. "Although a record is not admissible as evidence against others than parties or privies, it may yet be offered against strangers to show the fact of recovery and the quantum of damages, but

*211

it does not conclude them as to any mat*ters which were in issue between the parties."—Middleton v. Thompson, 1 Speer, 70; Allen v. Roundtree, 1 Speer, 79.

In the present case, if the jury were satis-

fied from the testimony that the cotton was the same, might they not properly conclude that the recovery was had for the damage which the record shows was the issue in the case, and ascertain thereby the damage which the plaintiffs were obliged to pay? Certainly the Court had no right to take it from the jury and say that it was "no evidence." Upon this branch of the case, I do not believe this Court will hesitate to set aside the nonsuit.

But it is more important for the Court, in the interest of the business community and of fair dealing, to decide that the notice to Moore made him a party to the record, and he is concluded by it as to the matters in issue and the amount of the recovery.

The doctrine of voucher was no doubt in England confined to real actions; but in this State the practice of calling in a vendor to defend his title has been by notice, and it has been applied as well to personal property as in suits upon a covenant of warranty of title to real estate.—Davis v. Wilbourne, 1 Hill, 28; Brown v. McMullen, ibid. 29.

But it is contended that it is confined to matters involving title.

The only case in our own books which I can find is Legare & O'Hear v. Fraser, (3 Strob., 379,) which was an entirely similar case to this, where notice was given. The Court says: "The only question would seem to be whether the verdict against Legare & O'Hear must not be regarded as a verdict against this defendant, and conclude him from any anterior defense. I should (if it were necessary) be very much inclined to say it would." In the case of Middleton v. Thompson, (1 Speer, page 70,) the practice in this State is clearly set forth: "By analogy to such cases, and in imitation of the voucher under the ancient warranty, the modern practice of giving notice to one who is bound in a covenant running with the land seems to have grown up and to have been gradually extended to all cases of covenants to warrant, either land or personalty, and to all cases where recovery over will be sought by one who has been sued in the event of a recovery against him."

The practice has been long since established in New York. The case of Kip v. Brigham (6 Johns. Rep., 168,) is an illustration, where a Sheriff was sued for an escape, and gave notice to the sureties of the prisoner, to whom jail liberties were granted, who, with

*212

*the Sheriff, defended the action. The Court decided that the notice made them parties to the action, and they were bound by the judgment as conclusive of the fact of the escape. This was no case of title, but it was one where a recovery over would be expected against the sureties; and the wisdom and convenience of the practice has grown up from that fact; and I know no class of cases to which this practice can be more beneficially extended than those involving fraud in the sale of cotton. Cotton in bale passes from hand to hand with every possible speed, and always sold by sample, which is a warranty by the vendor that the bulk of the article corresponds in quality with the sample. Not to have so convenient a practice fixed, and to make one trial conclusive as to the fraud in the sale of a bale of cotton and as to the amount of damages, would be to cause an infinite multiplicity of actions to try the same question. And I do not think this Court can hesitate to say that the practice is well established in this State and elsewhere, and that it is a just, wise and convenient practice, and will lay it down directly as their rule, that in cases of warranty of personal property, whether of title or of quality, where a vendor has notice to come in and defend a suit given him by his vendee, that he becomes a party to the action, and the judgment is conclusive against him as to all matters which were in issue.

The matter in issue in the case of R. E. & Charles McDonald v. Smith & Melton, in the Circuit Court of the United States, was whether the thirty-two bales of cotton there mentioned was merchantable or not. The notice to Moore, the respondent, was full and explicit, and we say that by the judgment in that case he was concluded—

1. That the cotton there mentioned was not merchantable, but was bad and unsaleable.

2. That a recovery was had against the appellants as therein set forth.

And, coupled with the other testimony in the case, that it was the identical cotton.

The cases other than those referred to may be found as follows: Duffield v. Scott, 3 T. R., 374; Clark v. Carrington, 7 Cranch, 322; Bender v. Fromberger, 4 Dall., 436; Leuther v. Pulteney, 4 Bin., 352; Hamilton v. Cutts, 4 Mass., 352; Blasdale v. Babcock, 1 John., 517; Waldo v. Long, 7 John., 174; Saunders v. Hamilton, 2 Hay, 226, 282.

*213

*Brawley & Moore, contra:

Was the record in the case of the McDonalds v. Smith & Melton admissible as evidence to show that there had been a breach of warranty in the contract of sale to Smith & Melton by the defendant?

It was certainly not admissible, unless rendered so by the notice given to the defendant by Smith & Melton, requiring him to come in and defend them against the action of the McDonalds. Had they the right to require him to do so?

The ancient English doctrine of "voucher," as applied to real estate, has been extended in this country to title relating to personal property. But no precedent can be found to show that it has ever been extended so far as to embrace breaches of warranty by a previous vendor as to quality in cases where the vendee has been sued for a similar breach. The reason of this is obvious—title being ideal must remain the same in the vendee

that it was in the vendor. But the thing sold, being generally material, is subject to incessant change, if not deterioration; so that an article of property which, to-day, may be safely warranted as sound, may, to-morrow, from accident or other cause, be affected with unsoundness. It would, therefore, be a monstrous hardship on the vendor to be compelled to defend his vendee, when sued by a third person, for any breach of warranty he might see proper to make in the resale of the article.

Another obvious reason is, that where a third person brings suit for the article sold, the immediate vendor's title necessarily comes into question and creates that sort of privity which renders it not only proper, but due to the vendor, that he should be notified, and thus afforded the opportunity of vindicating the title conferred on his vendee. And this is the foundation of the whole doctrine relating to voucher.—Middleton v. Thompson, 2 Speer, 67.

Every sale of an article must be the result of a separate and independent contract, the terms of which may vary from those of any precedent sale of the same article. It follows, hence, that there is no privity whatever, if the title is not called into question, between the first and second vendor of the same article, and that the second vendor has no right to call upon the first to defend him against an alleged breach of his own warranty in relation to the quality of the thing sold.

*214

*The inadmissibility of this record to show that the cotton sold by Moore was not good and merchantable appears also from still another point of view.

The theory of the defense of Smith & Melton against the action of the McDonalds was plainly this: "We bought the cotton from Alfred Moore, and we will prove that the cotton which he sold to us was good and merchantable." But the plaintiffs may have replied (as was actually done): "No; you did not buy the cotton from Alfred Moore. His cotton may have been sound, but that you sold to us was not." The jury, for aught that appears from the record, may have adopted the latter view in making up their verdict. Hence the judgment concludes nothing as to the soundness of the cotton sold by Moore.

March 22, 1876. The opinion of the Court was delivered by

WILLARD, A. J. The plaintiffs were nonsuited in the Circuit Court. The action was a breach of warranty of merchantable quality on a sale of cotton. The plaintiffs proved the sale and delivery to them by the defendant of cotton in bales sold by sample. No evidence was offered showing at the time it was sold and delivered to plaintiffs whether it was according to the samples or otherwise.

Plaintiffs rested, as to proof of a breach of the implied warranty, upon the record of a judgment recovered in the United States Circuit Court against the plaintiffs in an action brought by McDonald, a third person, to whom the plaintiffs had sold the same cotton, for damages by reason of the cotton being unmerchantable and not fit for sale in the New York market at the time of the sale and delivery by the present plaintiffs to the plaintiff in such action. The sale to the present plaintiffs was June 15th, 1866. The sale to McDonald is fixed by plaintiff's testimony on the next day, the 16th. The day of the delivery to McDonald is not in proof, but is laid in the declaration in the action in which the judgment was recovered as the 18th of the same month.

The question presented by the judgment of nonsuit is whether the recovery against the plaintiffs is sufficient in point of law to warrant the jury in finding a verdict for the plaintiffs. It appears that defendant had notice of the pendency of the action and opportunity to assist the plaintiffs in their defense; but it does not appear that he actually defended the action.

*215

*Defendant cannot be regarded as a privy to the judgment offered in evidence, and is not barred or estopped by it, although such judgment is competent evidence to show the extent to which the plaintiffs have been damnified, provided a breach of the implied warranty is established by competent evidence.

The general rule is, that a verdict or judgment in a former action upon the same matter directly in issue is evidence, not only for or against the parties to the suit, but for or against privies in blood, privies in estate and privies in law. But, in general, notice of the suit and an opportunity to be heard appears to be indispensable to make the judgment conclusive evidence.—Burrill v. West, 2 N. H., 190; Phillip's Ev., (Cowen, Hill & Edward's Notes,) vol. 2, p. 12.

If the defendant is a privy, as it regards the operation of the judgment, it must be as "privy in estate." Are they so to be regarded? Privies in estate are where there is a "mutual or successive relationship as to rights," as in the case of joint tenants, donor and donee, lessor and lessee, and successors in office.—Phillip's Ev., (C., H. & E. Notes,) ante.

Privity resulting from mutuality of right is not involved in the present case, for that depends upon the power of one person to represent another as to transactions in which they have a mutual interest. We are dealing with the relationships of vendor and vendee, and the privity involved in that relation depends necessarily on the idea of succession.

The direct object of the rule establishing privity for certain purposes between the different persons necessarily holding the same title to some definite subject of property is to give one and the same character to such rights,

however often they may change hands. A subject of property having received in the hands of an owner a durable physical impression, all persons succeeding to its ownership are affected by the act causing such impression. The rights and obligations that constitute the idea of property stand for the material property, and the law seeks to perpetuate impressions made upon these rights and obligations into the hands of those succeeding to the parties causing such impressions. Not only the direct act and deed of a party holding property are capable of affecting the nature of his title to it, but a judgment or verdict in personam recorded against him works by operation of law similar changes. Inasmuch as the effect of such a judg-

*216

ment may be *only indirect upon such title, the direct effect being to bind the person, rather than the estate, the law causes the person who succeeds to the property to succeed also to the rights and obligations affecting it, as established by the judgment.

The naked fact that some subject of property is in the hands of one to-day and of another to-morrow does not of itself make the rights and duties of such persons, as it regards the property, identical. It appears to be the successive possession of the title, the legal idea of property, to which the rule has relation, and the state of the title the subject of the rule. This is illustrated by the fact that recovery in an action affecting part only of the subject of property works a change upon the title by which the whole is held.—Doty v. Brown, 4 N. Y., 71.

The direct application of the rule as to privity of estate between parties succeeding to the same property presupposes a case of the acquisition of property from one bound by a judgment affecting his title to such property, and aims to transmit that effect to such successor.

The principle of this rule has been applied to a class of cases arising between a warrantor of title, express or implied, and a vendee of such warrantor. A recovery against the vendee, under title paramount to that warranty, when the warrantor has had notice of the action and opportunity to defend, binds the warrantor as conclusive proof of the breach of the warranty.—Middleton v. Thompson, 1 Speers, 67; Allen v. Roundtree, 1 idem, 80.

This rule is applicable to personal property as well as real.—Allen v. Roundtree; Brewster v. Countryman, 12 Wen., 446.

The rule, as thus applied, derives its main force from the fact that the warranty of title to land was not merely an obligation of the covenantor to indemnify the covenantee if the title warranted failed, but to defend that title in his grantee's hands. This idea was a direct outgrowth of the feudal notion of property, and in England gave rise to the remedy by voucher in case the covenantee was sued upon a claim of title paramount. In this State the obligation to defend is still recognized, but the practice is changed by the substitution of a notice for the mere formal proceeding.—O'Neall, J., in Middleton v. Thompson, 1 Speers, 67.

The effect of the notice would then be to place the warrantor in the same position as if he had been made a party to the action.

*217

*This principle has become still more enlarged in its application and extended from the case of a warrantor of title to land to cases of both express and implied warranty as affecting both real and personal property.

Allen v. Roundtree (1 Speers, 80,) was an action upon a warranty on the sale of a slave, and it was held that the warrantor, after notice of the pendency of the action, was a privy to the judgment recovered.

In Brewster v. Countryman, (12 Wen., 446,) the principle was applied where there was a parol promise to indemnify against paramount title to personalty.

In the class of cases above referred to the relation of vendor and vendee existed between the parties, and the matter of dispute was a question of title, either to real or personal property. In them, the principle of privity of estate became associated with another principle, growing originally out of the nature of a covenant to warrant and defend, viz.: That the covenantor was bound not merely to indemnify, but to defend actively, and in time extended in its application to cases of implied warranty, both of real and personal estate.

It is clear that the right claimed by the plaintiffs to bind the defendant by the judgment recovered against them, although with notice of suit brought, cannot be supported by the principles on which the cases referred to were decided; for although the relation of vendor and vendee existed between them, yet the question was not one of title.

There is another class of cases to be examined, where the binding force of a judgment has been extended to collateral warrantors and indemnitors not necessarily sustaining the relation of vendors to the party seeking to bind them by the judgment against him. Prominent among the cases of this class are covenants and promises to indemnify persons performing certain acts of authority over property, either as agents or otherwise, for the benefit of the indemnitor. The most numerous cases of this class are under bonds indemnifying officers charged with process against property, for the levy and sale of particular property, claimed adversely to such process. These cases, although not necessarily between privies in estate, possess substantially the same elements; for there is a conflicting claim of authority as it regards property, real and personal, involving a question of title and an obligation

*218

to indemnify in the *nature of a warrant of

title and of the sufficiency of the authority which the party indemnified is called upon to exercise.

Burrill v. West, (2 N. H., 190,) belongs to this class. Judgment was recovered against a Constable for the sale of property on execution. He then sued the defendant, who had indemnified him for selling, and offered the judgment against himself as evidence to bind his indemnitor. The action failed for want of notice to the defendant of the pendency of such suit and an opportunity to defend: but the opinion recognizes the general doctrine, and traces the analogy between this class of cases and those that depend directly on covenants of warranty in the following language: "The amount of the defendant's undertaking was to save the plaintiff harmless from the claims of all persons having a better title to the chattel than the title of W. West, the debtor."

The cases of this class are numerous and need not be particularly referred to.

Train v. Gold (5 Pick. [Mass.] 380,) was a case of this class, arising under a parol agreement to indemnify. Lovejoy v. Murray (3 Wall., 1 [18 L. Ed. 129],) belongs to this class, but will be noticed hereafter in connection with another branch of the general subject.

In Castle v. Noyes, (14 N. Y. 329,) a principal claimed the benefit of a judgment recovered by his agent as a privy thereto. Castle and Noyes both claimed title to certain lumber. Castle's servant, by his direction, took a portion of this lumber out of Noyes' possession. Noyes sued the servant but was defeated. Castle assumed the defense of his servant, and the question was the title as between Castle and Noyes to the lumber. The Court held not only that the judgment was conclusive between the parties as to the particular lot of lumber immediately involved, but that it was conclusive of the title to the whole quantity of lumber held by the same title. Here this was a question of title paramount and an agreement to indemnify, implied from the relation of master and servant, and the additional fact that Castle actually defended the suit as the substantial party in interest. The last mentioned circumstance will be noticed in another connection. The Court say: "The implied obligation, growing out of the relation of master and servant, is, I conceive, the ground of estoppel of the judgment in actions of this class," and as illustrating the similarity of such an implied covenant of warranty. As it regards the duty of actively defending, the Court says that it was the master's duty to

*219

*"appear and assume his defense, grounded upon an implied obligation to save him harmless in the commission of the trespass."

In the class of cases just noticed, we find the question to be one of title, and the reason for holding third persons privies to the judgment to be the fact that such third persons were under an obligation, either express or implied, to assume the position of parties in such suits. In the one case, this obligation arises out of contracts assimilated to covenants of warranty, and in the other case out of the relation of master and servant.

Whether the master could be bound by a judgment for or against his servant, independently of the fact of his taking part in the action, and merely under the operation of notice, is left in doubt by the cases examined. Certainly if a master approves and adopts the act of his servant, and seeks to derive benefit therefor, there is reason to charge him with all the consequences of that act. But to hold that wherever the servant is sued, whether for acts rightfully or wrongfully performed, as it regards his master, the agent may by notice bind his master to the consequence, as affecting third persons, of whatever may have been done by him, would appear to be inconsistent with the right of the master to limit his liability to that which is called for by his relation to his servant.

At all events, when the master undertakes to control the suit of his servant, and thus becomes a substantial party, it may be considered that he is brought into a relation of privity with the judgment, and is both bound by it and may use it for his advantage. Under this view of the subject the identity in principle of such cases with these assimilated to a covenant of warranty is evident, for a master, upholding the action of his servant for his own benefit, stands in a relation closely similar in principle to that involved in the feudal idea of the relation of the occupant of the soil to him under whose title such occupation ought to be defended.

The present case is clearly excluded from the last mentioned class, as from others in which the principle of privity of estate and warranty of title were directly involved and applied.

The next class of cases to be noticed does not involve questions of title, but depends on the construction and force of contracts, express or implied, to indemnify against certain events. These cases must be distinguished from the class in which the recovery of judgment is in itself a breach of the condition of the contract, in which cases it appears that the indemnitor is bound by the

*220

judg*ment without regard to notice, the recovery of the judgment being the very inquiry sustained by the covenantee that was indemnified against. These cases can hardly be said to depend at all upon privity with the judgment, for the ground on which the record is admitted is that it is primary evidence of the fact of a breach, and not a mere estoppel arising from a former recovery, while the class now under consideration depends upon the fact of privity.

In Tyler v. Ulmer, (12 Mass., 163,) the action was against the Sheriff for the default of his deputy in executing process. It was held that the action, although in form against the Sheriff, is substantially against the deputy, who is immediately answerable to the Sheriff upon his bond, and against whom the verdict may be used as evidence to establish the claim of the Sheriff against him. The question before the Court was as to the competency, as evidence against the Sheriff, of unsworn statements made by the deputy. The competency of the evidence appears to rest on the peculiarity of the action in question. The Court says: "The form of the plea in these cases is that the deputy, not the Sheriff, is not guilty or does not owe, and the verdict pursues the plea. This case must be regarded as depending on a peculiar practice, placing the Sheriff and his deputy in unusual legal relations in reference to such action. It, in effect, holds that the deputy is, by operation of law, to be regarded as an actual party, although in name against the Sheriff. The character of both the pleadings and the evidence is conformed to that assumption."

In Kipp v. Bingham (6 Johns. R., 157,) a judgment recovered against the Sheriff for an escape was held to conclude the obligors on a bond to the limits. The decision was put upon the ground that the obligors had "assumed upon themselves the defense of the suit and had become essentially parties." This case supports the proposition, that where an indemnitor assumes the defense of the person indemnified, in an action against such person, he makes himself a privy to the judgment. It is not authority in itself for the proposition that in all such cases the indemnitor is held, as a privy, merely because he is under an obligation to defend, and fails to do so, after opportunity for that purpose has been afforded.

Lovejoy v. Murray (3 Wall., 1 [18 L. Ed. 129].) holds that an actual defense made by an indemnitor, in an action relating to the subject matter of indemnity, makes the judgment in such action conclusive against him. Independently of an actual defense, frequent-

*221

ly adverted to in *the cases as forming ground of privity, the cases do not appear to establish, directly, the proposition that an indemnitor with notice and opportunity to defend is bound as a privy to a judgment recovered against the party indemnified in respect of the subject of indemnity, where a question of title is not involved. On the other hand, they appear, indirectly, to exclude the idea that any such unqualified rule exists. Some of these will be noticed. At the same time reference will be made to a class of cases, already referred to, arising on agreements to indemnify where the question is not one of privity, but of an inherent force in the judgment as primary evidence to establish the fact of a breach.

In Duffield v. Scott, (3 T. R., 374,) there was an indemnity against debts, and it was held that a judgment recovered on a debt of the class indemnified was conclusive evidence of a breach. A covenant against debts, properly construed, is not merely a covenant that no such debts exist at the time, but a covenant to repay any amount that the party may be compelled to pay under legal proceedings to enforce such debts. So the judgment did not merely measure the amount of damage, but occasioned the damage against which the party has been indemnified. Hence the judgment would be primary evidence of a breach of the contract to indemnify.

Wild v. Nichols, (17 Pick., 538,) is similar in principle to the last. In Waldo v. Levy, (7 Johns. R., 173,) the action was on a covenant against encumbrances. A mortgage was proved to be outstanding at the time this covenant was made. To prove an eviction under the mortgage, it was held competent to show a judgment in ejectment recovered upon the mortgage. This was not a case of privity, for the judgment was in itself evidence of the eviction and the best evidence. No attempt was made to bind the covenantor to the judgment as a privy by any proof of notice.

Henderson v. Levey, (2 Greenl., 139,) arose out of the relations of principal and agent. Defendant shipped for plaintiff, a shipmaster, lime. Plaintiff sold the lime as defendant's agent. It proved worthless. The purchaser from plaintiff sued him and recovered judgment. Plaintiff proved that defendant had notice of that suit and an opportunity to defend, and offered the record of recovery against him in evidence. The Court held that "it was only admissible proof to show that a judgment had been obtained against the plaintiff by Conner on the facts appearing in that record and the amount which had

*222

been recovered." As the plaintiff *had only offered the record for this limited purpose, proving by other means the bad quality of the lime, this case ought not to be considered as fully deciding the question of conclusiveness as it regards the character of the lime shipped, but it discloses the mind of the Court as averse to allowing such effect to the judgment.

Lee v. Clark (1 Hill, N. Y., 56,) was a covenant to indemnify against claims. It was held that a judgment recovered upon such a claim was competent without proof of notice, showing that the case turned upon the construction of the contract, making the judgment in itself a breach of the covenant, and not upon the idea of privity with it.

It remains to consider the case of Chicago v. Robbins, reported on its first hearing in

2 Black, 418 [17 L. Ed. 298], and on its second hearing in [Robbins v. Chicago] 4 Wall., 657 [18 L. Ed. 427]. The report of the case in 2 Black shows distinctly the nature of the question before the Court. The city of Chicago licensed Robbins, an owner of a house and lot fronting on a public street, to make an area in the street in front of his house. In consequence of negligence in covering this area while under construction, Woodbury received injury, for which he recovered judgment against the city. The city sued Robbins as ultimately liable for the damage. The fact of negligence of Robbins was established by proof, and independent of the record of recovery against the city, and, after proving notice to Robbins of the pendency of such suit, and that he had an opportunity to defend it, it was offered solely for the purpose of showing the amount of damage, it was held that it was conclusive proof of that fact. On the hearing reported in 4 Wall., the same facts and question appeared, and no greater weight was demanded by the plaintiff for the record than that just stated. The Court say, in the report in 2 Black: "If it was through the fault of Robbins that Woodbury was injured, he is concluded by the judgment recovered if he knew that the suit was pending and he could have defended it." This implies that proof of Robbins' fault must be made independently of the judgment. Justice Clifford says, in 4 Wall., in reference to the rule as to who are to be considered parties and who are not: "Parties in that connection include all who are directly interested in the same subject matter and who had a right to make a defense, control the proceedings and examine and cross-examine witnesses and appeal from the judgment. Persons not having these rights substantially are regarded as strangers to the cause, but all who are directly interested

*223

*in the suit and have knowledge of its pendency, and who refuse or neglect to appear and avail themselves of these rights, are equally concluded by the proceedings."

This certainly was not intended as laying down the rule that whenever a party is sued, and he may have recourse to a third person, in case of recovery against him, he may, by notice of such person, bind him to the record as a substantial party. The case called for no such general statement, nor could Greenleaf on Ev., (12 ed., 1, 559,) cited as authority, sustain it.

The proper understanding of the view of the Court is, in the first place, to confine that remark to that class of cases in which it is competent for a party to bind another to the record, by affording notice and an opportunity to defend; and, in the second place, to regard it as a limitation of the right to call in such persons in cases in which it is competent so to call them in. Before passing from the consideration of the class of cases in which the judgment is primary evidence of the breach of an agreement, it is proper to notice the bearing of this subject in cases arising on lands indemnifying against the consequences of some act to be performed or omitted, either on the part of the indemnitor, the indemnified, or a third party, where a question of title is involved. It would seem that to indemnify against the consequences of an act would be to indemnify against a judgment recovered in consequence of such act. In all these cases, whether the security is taken to prevent wrongful acts, as in case of official bonds, or to secure the performance of voluntary acts, claimed as beneficial to the indemnitor or a third person, it would seem that the force of the judgment ought not to be considered as depending on the idea of privity, but as having such force, greater or less, absolute or conditional, depending on the true construction of the contract of the party. This would cover a numerous class of cases between the Sheriff and his deputies and indemnitors, and refer the question of the force of the judgment in such cases to the contract of the parties, giving it force as primary evidence.

It is evident from a review of the cases that the rule in question has not been extended so far as to make a judgment recovered by a vendee against his vendor for a defect in the quality of goods sold evidence of the want of the required qualities in an action brought by the latter against his vendor. Such a rule would be of doubtful convenience, if established, for the condition of

*224

the goods *at the time of delivery being the test of liability, to make a record of the condition of the goods on one day conclusive or even prima facie proof of what that condition was on some previous day would lead to greater inconvenience than to refuse the application of the rule altogether.

Suppose in the present case that the cotton had been rendered unmerchantable by something that had occurred intervening the day of the first delivery and before the last delivery, that fact could not have been given as evidence, properly, in the issue against the present plaintiffs by the present defendant, for it united to establish the liability of the present plaintiffs in that case, and yet ought to appear to discharge the present defendant from liability. In a word, the interests of the plaintiffs and defendant were not the same as to the issue tried in that suit, and each ought to be permitted to make his own defense, in accordance with his own interest.

The motion must be denied.

MOSES, C. J., and WRIGHT, A. J., concurred.

7 S. C. 224

CHERRY v. McCANTS.

(Columbia. Nov. Term, 1874.)

[*Evidence* ⇐183, 340.]

In an action for malicious prosecution before a Trial Justice, the contents of the record cannot be given in evidence without proof of the loss of the original.

[Ed. Note.—Cited in Cothran v. Knight, 47 S. C. 251, 252, 25 S. E. 142.

For other cases, see Evidence, Cent. Dig. §§ 536, 605–637, 1294; Dec. Dig. ⇐183, 340.]

[*Evidence* ⇐157.]

The book of a Trial Justice, which he is required by law to keep, is the highest and best evidence of proceedings had before him, either in criminal or civil cases.

[Ed. Note.—Cited in Barron v. Dent, 17 S. C. 80; Caulfield v. Charleston County, 19 S. C. 601; State v. Rice, 49 S. C. 419, 420, 27 S. E. 452, 61 Am. St. Rep. 816.

For other cases, see Evidence, Cent. Dig. § 464; Dec. Dig. ⇐157.]

[*Malicious Prosecution* ⇐39.]

A Judge's order allowing a copy of the record before an action for malicious prosecution can be maintained is not necessary where the proceeding was for petty larceny, which is a misdemeanor.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 87; Dec. Dig. ⇐39.]

Before Graham, J., at Charleston, February Term, 1874.

This was an action by Francis Cherry for malicious prosecution in a trial for "petty larceny" before a Trial Justice, in which the plaintiff had been acquitted.

*225

*At the trial, the Trial Justice before whom the prosecution for petty larceny had been had, one Bolger and the plaintiff himself were examined as witnesses for the plaintiff. Bolger testified that a paper which he produced was a copy of the affidavit on which the prosecution before the Trial Justice was commenced, and was made by him in the office of plaintiff's attorney from the original which had been loaned to the plaintiff's attorney by the Trial Justice. The Trial Justice testified that he had issued a warrant for the arrest of the plaintiff, founded on the affidavit of the defendant; that the plaintiff was arrested and brought before him on a charge of stealing "five watermelons from the defendant," and that he was tried before him and a jury and acquitted. This testimony was objected to by the defendant on the ground that it was secondary evidence; that the record itself should have been produced, or its loss accounted for, which had not been done; and, also, on the ground that no order of the Trial Justice allowing a copy of the record had been produced. His Honor overruled the objection, and the defendants excepted.

The defendant then moved for a "nonsuit" on the ground;

1st. Because the record had not been proved; and, 2d. Because the plaintiff had failed to shew a "prima facie" want of probable cause.

The motion was overruled, and, the case having been submitted to the jury, they found a verdict for the plaintiff for $2,000.

The defendant appealed.

McCrady & Son, for appellant.

Duryea & Cohen, contra.

April 20, 1875. The opinion of the Court was delivered by

WRIGHT, A. J. To sustain an action for malicious prosecution, it is necessary that the proceedings of the Court in which the prosecution was had should be proved on the trial, either by the production of them or by a copy in a properly authenticated form. In the case in hand there was no such proof, and it was proposed to substitute it by evidence of the loss of the original papers by a a copy of the affidavit made by a clerk in the office of the attorneys for the plaintiff. This was objected to on the part of the defense, but allowed by the presiding Judge, and is

*226

brought to this *Court as one of the grounds of error on which the motion before us is made. It is properly taken, and a new trial must be granted. There was no proof of the loss. As far as we can gather from the brief, not a particle of testimony was offered to show that any search was made for the original or that a single step had been taken with a view to their recovery. Their production is necessary in a case of this character to show not only that such a prosecution as is charged in the complaint had legally existed, but that it had been determined, and the manner of its determination. In the second place, if the proof of the loss had been sufficient, there was higher evidence than the recollection of the Trial Justice, and this should have been resorted to. By Section 41 of Chapter XXV of the General Statutes, each Trial Justice is required to keep two books, one for civil and the other for criminal cases, in which he shall insert all his proceedings in each by its title, and at the expiration of his term he shall deposit the same in the office of the Clerk of the Court for the County in which he was appointed. As the "commencement, progress and termination" of every criminal case must be entered in the book to be kept for that purpose, its production would have been higher evidence than the mere memory of the Trial Justice, who, as far as it appeared, had not even refreshed it by a reference to his book. As the Court of a Trial Justice has no clerk, and as he himself is the keeper of the papers connected with his office not required to be turned over to the Solicitor for the Circuit in which he resides for further action, to put at rest all doubts as to the mode in which the proceedings in his Court may be of-

fered in evidence in any of the Courts where proof of such proceedings may be competent, we are prepared to say that his book so required by law to be kept, either relating to criminal or civil business had before him, as the case may be, shall be sufficient. The provision requiring that such book shall be kept is in language identical with Section 5 of the Act of 1839.—11 Stat., 14. In the case of Etters v. Etters, (11 Rich., 415,) it was held that "the Magistrate's book and judgment therein is a quasi record, and must be adduced and proved to authorize the execution." If competent to prove a judgment, it should be adequate to prove any judicial proceeding before him. The objection "that the plaintiff should not have been allowed to proceed without producing the order of the Judge who tried the prosecution granting a copy of the record," cannot prevail. This is

*227

taken in *the view submitted by the counsel for the appellant, "that petit larceny is a felony in this State." This is clearly a misapprehension, as will be readily perceived by reference to Section 12 of Chapter CXXIX of the General Statutes, p. 416. Nor have Trial Justices any jurisdiction in cases of felony, except to "examine into them, and bind over or commit for trial in the General Sessions those who appear to be guilty of offenses not within their jurisdiction."—Gen. Stat., Chap. XXV, § 15. By Section 12 of the same Chapter, he has no jurisdiction in matters of larceny where the value of the article charged to be stolen exceeds twenty dollars in value. The rule in regard to the order of the Judge for a copy of the indictment has no application to a trial before a Trial Justice.

The prosecution there is commenced, not by an indictment, but an information under oath, setting forth the offense charged. Besides it does not apply even in the Court of Sessions to cases of misdemeanor.—Mims v. Burts, 2 Mill, Const. 308; Burton v. Watkins, 2 Hill, 674. We cannot say "that the plaintiff on the trial introduced no evidence sufficient to entitle him to go to the jury," as is submitted by the sixth ground. In Lipford and wife v. McCollum, (1 Hill, 82,) it is said: "What is probable cause is a question of law for the Court. If there is any evidence of it, the case should go to the jury; otherwise it is the duty of the Court to order a nonsuit."

Where a matter is so much in the legal discretion of the presiding Judge, we would not feel justified in interfering, unless there was manifest error. What effect the warrant may have on the case by the use in it of the phrase "feloniously," we are not called on now to determine. No such objection was made in the Court below, either in the pleadings or on the trial. As the motion for a new trial must be granted on the ground herein referred to, a consideration of the grounds not noticed is not necessary.

New trial ordered.

MOSES, C. J., and WILLARD, A. J., concurred.

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7 S. C. *228

*McELWEE v. JEFFREYS.

(Columbia. Nov. Term, 1875.)

[*Judgment* ⇐890.]

A levy, if sufficient to satisfy the execution, is prima facie evidence of satisfaction: but this is a mere presumption of fact, which may be rebutted by proof.

[Ed. Note.—Cited in Dilling, Baker & Co. v. Foster, 21 S. C. 338.

For other cases, see Judgment, Cent. Dig. § 1689; Dec. Dig. ⇐890.]

[*Judgment* ⇐890.]

A levy in 1860 on two negroes, which were afterwards emancipated before sale made: *Held*, under the circumstances, not to amount to satisfaction. So also a levy on land which had not been sold and conveyed: *Held* to be no satisfaction. A receipt is a subject of explanation by parol and may be shewn to be erroneous.

[Ed. Note.—Cited in Daniels v. Moses, 12 S. C. 139.

For other cases, see Judgment, Cent. Dig. § 1690; Dec. Dig. ⇐890.]

[*Evidence* ⇐409.]

[A bank holding a judgment against a debtor advanced money to him to settle other judgments. On the sheriff's returning an unpaid balance of this money to the bank, the bank's attorneys, by mistake, gave a receipt therefor as a satisfaction of the bank's own judgment. *Held*, that the receipt could be contradicted by parol evidence showing the facts.]

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1843; Dec. Dig. ⇐409.]

Before Mackey, J., at York, ——— Term, 1874.

This was an action by John H. McElwee against Thomas F. Jeffreys.

The questions of law involved in the case sufficiently appear from the facts stated in the decree of the Circuit Court and the opinion of this Court. The decree of the Circuit Court is as follows:

Mackey, J. The facts in this case appear to be as follows:

On the 10th October, 1857, W. B. Dunlap, being insolvent, executed and delivered to L. H. Massey an assignment of his estate, consisting principally of slaves and land, in trust, to sell the same and apply the proceeds of sale to the payment of his debts, in classes, and in a certain order of priority therein prescribed. In specifying the order of payment of his debts, after first providing for the payment of the costs and expenses of the assignment, he directed as follows: "Second, to satisfy and pay all judgments and executions now in force against me, (I mean judgments that have been filed and entered in the Clerk's office before the second Monday in October of the present year)." The assignee

proceeded to sell the property of Dunlap and collect the proceeds of sale. Afterwards, by consent of the assignee and other parties interested, T. S. Jeffreys, the defendant, was appointed the agent to take possession of the funds and distribute the same under the assignment, and it was admitted by the parties to this action that the amount received as yet by this agent for that purpose was $4,227. Under the terms of the assignment, the plaintiff claims to have the assets of said assigned estate applied to the payment of certain judgments assigned to him. The defendant resists the claim on the ground that said judgments are satisfied.

*229

*On 4th November, 1856, W. G. Erwin entered up judgment and lodged execution against J. N. McElwee, Jr., and W. B. Dunlap for $1,053.70 and interest thereon from 28th December, 1855.

On 18th March, 1857, W. G. Erwin assigned $1,077.23 of the debt in this case to the Bank of the State of South Carolina. On the execution, also, appears the following endorsement: "April 7th, 1857, applied from receipt of $613.85 given to J. N. McElwee, to this fi. fa., ninety-five dollars and thirty-three cents, in full of balance of debt, interest and costs on this case. Signed, S. C. Youngblood, S. Y. D." There also appears on the execution a levy, on 21st March, 1860, by the Sheriff of Lancaster, on two negroes, Henry and Mack, levied on as the property of W. B. Dunlap, but in the possession of J. Foster.

On 22d September, 1856, the President and Directors of the Bank of the State of South Carolina entered up judgment and lodged execution against the said J. N. McElwee, Jr., and W. B. Dunlap, for $2,106.49, with interest thereon from 30th November, 1854. The execution in this case has been lost, but the loss accounted for.

On 18th January, 1860, the bank assigned the last mentioned judgment, and its interest in the first mentioned judgment, to the present plaintiff.

On these judgments J. N. McElwee, Jr., was the principal debtor and W. B. Dunlap the surety. The latter, however, was heavily indebted to the former. The debt had passed into judgment, and Dunlap agreed that the executions against him as surety should be enforced against him, and that the same, when collected, should be a pro tanto satisfaction of the debt owing by him to J. N. McElwee, Jr. In the early part of the year 1857, J. N. McElwee, Jr., was in embarrassed circumstances; his property had been levied upon; some of his slaves had been sold, and the proceeds of sale applied in satisfaction of a portion of the judgments against him; his real estate had also been exposed to public sale by the Sheriff, but no sale of the same had been completed, no entry of the same had been made in the sale book, nor any purchase money paid therefor. At this time J. N. McElwee, Jr., went to the bank and made an arrangement whereby the bank advanced money to pay the creditors and to have the executions assigned to itself. About five thousand dollars was advanced for that purpose, McElwee giving his note with sure-

*230

ties for the amount, and he and *W. B. Dunlap consenting that the judgment should be assigned to the bank and stand open as an additional security to the bank.

Under this arrangement the judgments were not pressed against the defendants.

On 18th January, 1860, John H. McElwee, the plaintiff in this action, purchased the aforesaid two judgments against J. N. McElwee, Jr., and W. B. Dunlap, and the said judgments were assigned to him, he giving to the bank his own note therefor with a number of sureties. Under this state of facts the defendant claims that the judgments are satisfied.

The plaintiff has satisfactorily explained away the presumption of payment arising from the levy under the first mentioned judgment. It appears that the slaves then levied upon were claimed by one J. Foster, and that, pending the litigation in reference to the same, the slaves were emancipated. The levy is only prima facie evidence of satisfaction, and proof that, without fault of the plaintiff, the property levied upon was not sold and applied in satisfaction of the debt repels the presumption.—May v. Hancock, (MS. Decision 1,) Rice Dig., 303; Mazyck and Bell v. Coil, 2 Bailey, 101.

In regard to the alleged sale of lands, there was no compliance with the usual terms of sale; no titles were made or money paid; no entry of sale was made in the sale book, and all parties in interest treated it as no sale. There was, properly speaking, no sale of the lands.—Herbemont v. Sharp, 2 McC., 264; Lewis v. Brown, 4 Strob., 293.

From the testimony, it is apparent that the credit of $95.33 endorsed on the first mentioned execution was not a satisfaction of the whole execution, but only of the balance due W. G. Erwin. The evidence is satisfactory that neither the bank or J. N. McElwee, Jr., or W. B. Dunlap intended the proceedings had or the arrangements made to be in satisfaction of the judgments, and hence there could be no satisfaction.—Carson v. Richardson, 3 McC., 528; Wilson v. Wright, 7 Rich., 404; Moore v. Edwards, 1 Bailey, 23; Kirkpatrick v. Ford and Aiken, 2 Speers, 112.

The evidence of one witness is to the effect that, at the very time Dunlap was preparing his assignment, he expressed an intention to defeat a debt due to one Edwards, but said that he intended in the assignment to provide for the payment of these judgments.

*231

*As to the judgments of junior date which

were paid, amounting to $554.87, the counsel of the plaintiff admitted that this should be credited on the oldest judgment on the day it was paid into the Sheriff's office, to wit, 2d March, 1857.

The other judgment mentioned in the complaint, that obtained by Daniel Wallace, and subsequently assigned to the bank, and by the bank assigned to the plaintiff, it was admitted in the argument not to come within the terms of the assignment, as it was obtained after the date of the assignment, and the claim as to it was abandoned.

It appears to the Court that the plaintiff has satisfactorily established his right to the relief demanded in his complaint, with the exceptions just above mentioned. The claim that these judgments were paid off and satisfied appears to be a new one. After the time at which the defendant claims that these judgments were paid the assignment thereof was made to the bank, and still longer afterwards the assignment was made by the bank to the plaintiff.

The weight of the testimony, in the opinion of the Court, is clearly to the effect that the judgments were never intended to be satisfied under the arrangements made between the parties, and that as a matter of fact they never were satisfied.

In the opinion of the Court, the balance of the judgment of $2,106.49, with interest thereon from 30th November, 1854, less a credit of $554.87 on 2d March, 1857, and the balance of the judgment of $1,053.75, with interest thereon from 28th December, 1855, less a credit of $95.33 on 7th April, 1857, are still unpaid.

The defendant, after paying the necessary costs and expenses provided for in the assignment, should next apply the assets of the assigned estate to the payment of the balances due on the aforesaid two judgments, and it is so ordered.

To the foregoing order and decree defendant appealed on the following grounds:

1. That the executions in the case of the President and Directors of the Bank of the State v. J. N. McElwee, Jr., W. B. Dunlap et al., and in the case of W. G. Erwin v. J. N. McElwee, Jr., and W. B. Dunlap, were, by operation of law and in fact, paid.

2. That in February and March, 1857, personal and real estate of J. N. McElwee, Jr., was levied upon and sold by the Sheriff to an amount sufficient to pay the above execu-

*232

tions and those of same *and of older date, and that said executions were in fact paid from the proceeds of said sale and receipted in full, and were not in force against W. B. Dunlap at the date of his deed of assignment, 10th October, 1857.

3. That no agreement made afterwards by W. B. Dunlap could affect the vested rights of creditors under said deed of assignment.

4. That from said levy and sale the sum of $8,980 was actually realized and paid to the Sheriff, and that the surety, W. B. Dunlap, was thereby, in law, released from all further liability under said executions, and that it was not in the power of the said W. B. Dunlap to revive the same against himself to the prejudice and defrauding of creditors.

5. That the entry of sale of land in the Sheriff's book is merely directory, and the omission did not invalidate sale, and that the statement in the decree that no purchase money was paid on account of said sale is an error.

6. That the decree omits any notice of the fact that the bank case was, according to the evidence of the Sheriff, satisfied in full by payment to the attorneys of the bank, and a receipt in full given, and that there was no instruction to him from the bank to leave said fi. fa. open.

7. That had not the execution of W. G. Erwin v. J. N. McElwee, Jr., and W. B. Dunlap been previously satisfied, the subsequent levy upon two slaves of W. B. Dunlap and actual possession and control of them until emancipated operated in law as a satisfaction of said execution.

8. That the decree ordering alleged balances on said judgments to be paid is contrary to law and the evidence.

Wilson, for appellant.
Clawson & Thomson, contra.

April 20, 1875. The opinion of the Court was delivered by

WRIGHT, A. J. The single question involved in the issue made by the pleadings is to be determined by the weight of the evidence in regard to the satisfaction of the judgment obtained by the respondent, to be paid out of the proceeds of the assignment of W. B. Dunlap to appellant for the benefit of his creditors. We see no error on the part of the Circuit Judge in applying the law

*233

to *the conclusion which he reached on the facts. A levy, if sufficient to cover the amount of the execution, is prima facie evidence of satisfaction; but the presumption may be rebutted by proof that without fault on the part of the plaintiff it failed to produce it. The Sheriff would be liable if the property levied under the execution had been lost through his neglect, yet he would be allowed to discharge himself by showing that the property did not belong to the defendant, or that it was lost notwithstanding all the care that human foresight could provide for its security. Nor does it follow that a levy is to be regarded as satisfaction because the Sheriff allows it to remain in the possession of the defendant, even though the result of it may be loss, if, by authority of law, he or his bailee is not permitted to enforce it. The execution against Dunlap cannot be held satisfied to any amount by the levy of the two slaves when their sale was prevented by

emancipation. This would throw the loss not on the debtor but the creditor, which would be in direct conflict with the principle on which the ruling in Calhoun v. Calhoun (2 S. C., 283.) proceeded.

On the facts proved the presiding Judge held that neither of the executions claimed through the assignment of the bank to plaintiff had been satisfied. We perceive nothing in the evidence to convince us that there is error in the conclusions which he drew from it. The sale of the land of J. W. McElwee, Jr., under the execution of Steele, was never perfected. No bid was paid, no title executed, and to say that a mere barren ceremony from which no money followed could amount to a satisfaction of it would be a proposition too unjust and unreasonable even for consideration. There is one ground presented by the appellant which, although it may not have escaped the observation of the presiding Judge, has not been noticed in his decree. It, however, deserves consideration. It relies upon the receipt referred to in the testimony of Sheriff Youngblood, executed to him by Messrs. Dawkins and Melton, the attorneys of the bank, for the amount of the execution against J. W. McElwee, Jr., in its favor. Standing by itself it might be conclusive against the bank. A receipt, however, may be explained, and the other circumstances in proof clearly admit of a construction which must necessarily destroy its effect as an acknowledgment of payment. The same witness said that the bank had transmitted a check to meet the executions in the office against the same defendant, which were to

*234

be left open for its *benefit. In the statement prepared by him he included the execution which the bank itself held, amounting to $2,449.91. After paying to the plaintiffs in the other cases the sums due on their executions, which were then either assigned to the bank or left open for its use, the Sheriff found remaining in his hands the amount called for by the execution of the bank. Instead of returning it to the attorneys who represented the bank, and specifying in the receipt which they were to give on its acceptance the proper account on which it was paid, the receipt was written as if in payment by the Sheriff of the amount due on the bank judgment. If this receipt can be set up as a bar to the claim of the bank, it would actually lose its whole debt, for the money returned by the Sheriff was its own, and, according to his testimony, was of the proceeds of the check or draft which it had remitted. The witness admits his mistake including the bank case among the cases which he had marked "assigned" to it. There is no dispute that the bank did recover this judgment, and the explanation so conclusively shows error in the terms of the receipt that it cannot be resisted. In aid of the explanation, this fact is not without significance: That the Sheriff, following the instructions which had been given to him, made no entries on this execution either of payment or other action. The whole purpose intended to be accomplished by the bank, through the loan for the purchase of the other judgments, would have been defeated by the satisfaction of its own execution. If it proposed to do this, it could have been accomplished by a mere entry to that effect. It is not reasonable to suppose that it would have gone through the idle form of paying with one hand and taking it back with the other. After the transaction to which the Sheriff refers, it was assigned to the plaintiff, and to say that the bank transferred to him a judgment for valuable consideration which, in fact, had been previously paid, is to charge it with an act of dishonesty without the least testimony to sustain such an allegation.

The motion is dismissed.

MOSES, C. J., and WILLARD, A. J., concurred.

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7 S. C. *235

*THE STATE v. PARKER.

(Columbia. Nov. Term, 1875.)

The principles decided in Ex Parte Parker (6 S. C., 472,) reaffirmed.

[*Arrest* ⇐44; *Motions* ⇐59.]

An order made on the motion of the Court itself, and without notice to the party prejudiced by it, will be set aside.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 99–111; Dec. Dig. ⇐44; Motions, Cent. Dig. § 73; Dec. Dig. ⇐59; Judgment, Cent. Dig. § 747.]

[*Motions* ⇐19.]

An order cannot be made in a cause without notice to the party prejudiced by it.

[Ed. Note.—Cited in McCall v. Cohen, 16 S. C. 448. 42 Am. Rep. 641; State v. Port Royal & Augusta R. R. Co., 45 S. C. 468, 23 S. E. 880; Goodlett v. Goodlett, 88 S. C. 462, 70 S. E. 439.

For other cases, see Motions, Cent. Dig. § 14; Dec. Dig. ⇐19.]

[*Motions* ⇐7.]

A Judge has no power of his own mere motion to make an order in a cause affecting the rights of a party.

[Ed. Note.—For other cases, see Motions, Cent. Dig. § 5; Dec. Dig. ⇐7.]

Before Mackey, J., at Richland, August, 1875.

This was an action by the State of South Carolina and S. W. Melton, Attorney General of said State, against Niles G. Parker, late State Treasurer, the object of which was to recover the sum of $25,000 of the fund of the State alleged to have been embezzled and fraudulently applied and converted by the defendant to his own use.

The complaint stated the facts upon which the claim was founded, and it was verified by the affidavit of the plaintiff, S. W. Melton.

An affidavit for the arrest of the defendant

was made by T. C. Dunn, the Comptroller General of the State. It was in the usual form, stating that a cause of action exists in favor of the plaintiffs against the defendant, and setting forth the grounds of his belief. It further stated: "That this deponent has been informed and believes that the said defendant is about to depart from this State with intent to defraud his creditors, and that the plaintiff has commenced an action in the Court against him upon the cause of action above stated."

An undertaking for arrest, as required by the Code, was filed on behalf of the plaintiff, and an order for arrest, directed to the Sheriff, requiring him to arrest the defendant and hold him to bail in the sum of $30,000, was made by the Clerk of the Court.

The summons and complaint in the action, and the other papers above mentioned, were lodged with the Sheriff of Richland County on 16th August, 1875, and on the 17th August, 1875, he filed the following certificate:

"I hereby certify that on the 16th day of August, A. D. 1875, at 9 o'clock P. M., at the Court House, in Columbia, S. C., I served on the above named Niles G. Parker the summons and complaint in this action, by delivering copies thereof to him personally, and leaving the same with him, and was restrain-

*236

ed from arresting the *body of the said Niles G. Parker by an order of Judge T. J. Mackey, a copy of which is hereto annexed.

"J. E. Dent, S. R. C."

A copy of the following order made by T. J. Mackey, Judge of the Sixth Circuit, and dated August 16, 1875, was annexed to the Sheriff's certificate:

"On inspection of the record in this case, the affidavit of Thomas C. Dunn, and the order of D. B. Miller, Clerk of the Court of Common Pleas and General Sessions for said County, requiring Jesse E. Dent, Esq., Sheriff of Richland County, forthwith to arrest Niles G. Parker in this action and hold him to bail in the sum of $30,000, and it appearing that said Sheriff is about to execute said order in the presence of the Court, and that said order is illegal and unauthorized:

"Ordered, That the said Sheriff, Jesse E. Dent, be prohibited from executing said order, and that said order be vacated and set aside, in accordance with the decision of this Court, rendered this day, in the case of The State v. Niles G. Parker, in proceedings under a writ of habeas corpus, issued therein, the said defendant having been discharged from custody because, in the judgment of this Court, the order of arrest, of like purport with that now under consideration, was without authority of law and repugnant to the Constitution of the State."

To the above order the plaintiffs, on the 25th August, 1875, filed the following exceptions:

1. In that His Honor Judge Thomas J. Mackey made any order in the action, he having no jurisdiction of the case.

2. In that His Honor Judge Thomas J. Mackey made any order in the action, the same not being regularly before him for consideration.

3. In that His Honor Judge Thomas J. Mackey made any order in the action without notice to the Attorney General.

4. In that His Honor Judge Thomas J. Mackey made any order in the action without notice having been given to the Attorney General that proceedings would be had in the action.

5. In that His Honor Judge Thomas J. Mackey prohibited the Sheriff of Richland County from executing the order of the Clerk of the Court for Richland County, made in this action.

*237

*6. In that His Honor Judge Thomas J. Mackey held that the order of the Court for Richland County, made in this action, was without authority of law and repugnant to the Constitution of this State.

On the 3d September, 1875, His Honor Judge Mackey made the following order in this case:

"On reading the affidavits of Leroy F. Youmans, Maurice S. Parker and R. B. Elliott, ordered that cause be shown before me at the Court House, Columbia, South Carolina, at 5 o'clock P. M. Monday, 5th September, 1875, why the service of summons and complaint and the return thereof, and all subsequent proceedings herein, should not be set aside; and that copies hereof, and of said affidavits, be served on plaintiff's attorney, and on Jesse E. Dent, Sheriff of Richland County."

To the above order the plaintiffs made the following return, verified by the oath of one of the plaintiff's attorneys:

"To the Honorable T. J. Mackey,
Judge of the Sixth Judicial Circuit of
South Carolina:

"The plaintiffs above named, upon one of whose counsel has been served, on the fourth day of September, 1875, a rule requiring that cause be shown before your Honor at the Court House, Columbia, South Carolina, at 5 o'clock P. M., why the service of summons and complaint, and the return thereof, and all subsequent proceedings herein, should not be set aside,

"For cause why the said rule should not be granted, respectfully show:

"1. That your Honor has no jurisdiction of the said action, the same having been commenced in the County of Richland, in the Fifth Judicial Circuit of the said State.

"2. Because the return of the Sheriff of Richland County shows that the said defendant was served with a copy of the summons and complaint in this action in accordance with law, and the plaintiffs crave leave to refer to the affidavits of Jesse E. Dent,

James D. Evans, Thomas J. LaMotte, Thomas Dent and John Wingate, hereto annexed, for further corroboration of the said service.

"3. Because no notice has been given, in accordance with law, of this rule to the attorneys of the plaintiffs.

*238

*"The plaintiffs therefore pray that the rule herein may be dismissed with costs."

The return was supported by the following affidavit, made by the Sheriff, and dated September 6, 1875:

"Personally appeared Jesse E. Dent, Sheriff of Richland County, who makes oath that on the 16th day of August, past, he delivered to and served upon Niles G. Parker copies of the summons and complaint in the above entitled case, and that the said Parker received the same into his hands from the hands of deponent. Deponent further says that the said service was made at the Court House in Columbia, during the pendency of the habeas corpus case of Niles G. Parker, before His Honor Judge T. J. Mackey, just after Judge Mackey had announced his decision in the case, and before the order for discharge had been signed by him. Deponent further says that, in accordance with the foregoing facts, he endorsed the return of said service on the original process, as required by law.

"(Signed) J. E. Dent, S. R. C."

Other affidavits in support of the rule, to the same effect as the above, were submitted by the plaintiffs.

On September 7th, 1875, His Honor Judge Mackey made the following order:

"On hearing the return to the rule issued September 4th, 1875, and the affidavits submitted in support thereof and against, and it appearing that the Judge of the Fifth Circuit is absent, and argument by Mr. Wingate against the motion, and by Mr. Youmans for the same:

"Ordered, That the service of the summons and complaint herein, and the return thereof made by the Sheriff, Jesse E. Dent, be set aside."

From the above order the plaintiffs appealed, on the following grounds:

I. Because the defendant herein made no affidavit in support of the said motion.

*239

*II. Because the return of the Sheriff and affidavits of J. E. Dent, Sheriff, J. D. Evans, Thomas J. LaMotte and Thomas Dent show that the summons and complaint in the action were duly served.

III. Because the said Circuit Judge had no jurisdiction of said action.

IV. Because no notice of said motion was given in accordance with law, and the affidavits submitted on behalf of defendant have no averment required to bring the cause within the provisions of Section 418 of the Code of Procedure, wherein it is provided that a Court or Judge may, by order to show cause, prescribe a shorter period than four days.

V. Because it appears, by endorsement on the notice of appeal in this action, that the defendant's counsel accepted service thereof on 26th day of August, 1875.

Melton, Rion and Wingate, for appellants.

Melton & Clark, Bachman & Youmans, Hoge & Wilkes, R. B. Elliott, contra.

February 1, 1876. The opinion of the Court was delivered by

WILLARD, A. J. Two separate appeals are brought before us in the above entitled case, both taken by the State from orders made by the Circuit Judge of the Sixth Circuit, at Columbia, in August, 1875, in an action pending in the Fifth Circuit. One of these orders vacates an order of arrest issued by the Clerk of the Court, and the other dismisses the summons and complaint in that action. The same question is raised as to the authority of the Circuit Judge of the Sixth Circuit to make orders within the Fifth Circuit which we have just passed upon in the case of Ex Parte N. G. Parker v. The State of South Carolina (6 S. C., 472). The point there ruled determines the question of authority against the power of the Circuit Judge who made the orders, and they must accordingly be set aside. The reasons assigned in the opinion of the case of Ex Parte Parker for not considering the various questions passed upon by the Judge who made the orders in question is ground for confining the present decision to the question of judicial authority alone.

One feature of the appeal from the order vacating the order of arrest may properly be noticed, as involving general considerations, not entering into the merits of the case as

*240

it stands before the Cir*cuit Court of the Fifth Circuit. It is the fact that the order appealed from was made on the motion of the Court itself, and without notice to the party prejudiced by it. On the argument counsel declined to support this order by argument.

The fact that the order was made without notice is sufficient ground for setting aside, as a direct violation of the statute requiring notice to be given in such cases. The circumstance that it was not asked for on behalf of the party for whose benefit it was made cannot properly be passed without notice. It is a dangerous innovation, subversive of the conception of the proper limits of judicial authority entertained by our laws. As the idea of a government of laws emanating from a legislative representation distinct from the judicial body has obtained clearness and force, a concurrent tendency has developed to separate entirely the functions of the Judge and those of the advocate. Whatever may have been the practice at

times when the liberty of the subject stood on no higher ground than a concession, either voluntary or extorted, of the dynastic head of government, at this day the judicial office has been so far simplified and purified, in theory at least, that the idea of a Judge initiating any proceeding for the vindication of any right, either public or private, is anomalous. The case of punishment for actual contempt, especially that committed in the presence of the Court, is exceptional, and authorizes the Court to notice violations of order and decorum committed in its presence and to initiate and apply a summary remedy. This power, although liable to abuse, is the result of the necessities of the case.

The sound theory of judicial action, based upon experience and reason, requires that the Judge shall remain passive until moved in the right of those interested in invoking the action of the Court. Remedies of all kinds, while granted by the Court in recognition of the right of the parties demanding them, are selected or sought for by the parties themselves as means of promoting their personal interests. So a Judge cannot properly initiate a remedy in behalf of any party, because he cannot properly represent the interests of the party for whose benefit such remedy is intended. It is a mistaken idea that the Court has any personal or official interest in the mode in which its process is employed, or in the results attained through it. It is the party alone who is interested in the process issued in his behalf, and he is at liberty to take or decline all that the law intends for him by issuing in his behalf the

*241

process of the *Court. If that process is defeated or abated as to its proper effect, it is for the party prejudiced to determine, according to his notions of his interest in the matter, whether he will appeal to the Court for aid or be content with that which he can obtain without such application. The ministerial officer who holds the process of the Court only acts under the eye of the Court when that eye is turned upon him in deference to the demands of parties alleging that they are prejudiced by the action of such ministerial officer.

The orders appealed from in each of the appeals in the above entitled action must be set aside and wholly vacated.

MOSES, C. J., and WRIGHT, A. J., concurred.

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7 S. C. 241

THE STATE v. NERLAND.

(Columbia. Nov. Term, 1875.)

[*Elections* ⇐262.]

Where the law relating to a special election to determine the location of a County seat provided that the result of the election should be ascertained by the certificate of the County Board of Canvassers, consisting of three Commissioners of Election, and such Board adjourned without canvassing the votes or giving the certificate: *Held*, That the election remained undetermined, although after the Board had adjourned a single member thereof had given a certificate of the result from secondary evidence, stating in his certificate that the ballot boxes, ballots and all papers relating to the election had been destroyed—a fact which was not controverted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 238; Dec. Dig. ⇐262.]

[*Elections* ⇐265½.]

A certificate of the State Board of Canvassers: *Held* also to be void.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 240; Dec. Dig. ⇐265½.]

[*Elections* ⇐259.]

The ballot boxes, ballots, poll lists and statements of the Managers of Election having been destroyed after they were sent to the Commissioners of Election, that body, as a County Board of Canvassers, had authority to receive secondary evidence and grant therefrom a certificate of the result of the election.

[Ed. Note.—Cited in Ex parte Mackey, 15 S. C. 332; State ex rel. Davis v. State Board of Canvassers, 86 S. C. 458, 68 S. E. 679.

For other cases, see Elections, Cent. Dig. § 235; Dec. Dig. ⇐259.]

Before Maher, J., at Barnwell, July, 1875.

This was an application to the Circuit Court for a writ of mandamus, and was entitled The State of South Carolina, ex relatione James C. Buckingham and James J. Ingram, v. William A. Nerland, Clerk of the Court of Common Pleas and General Sessions for the County of Barnwell. The object of the application was to compel the Clerk to keep his office at Barnwell, he having removed the same to Blackville.

*242

*His Honor granted the writ and afterwards filed an opinion in which the facts of the case are fully stated. The opinion is as follows:

Maher, J. This was an application for the writ of mandamus to compel the respondent as Clerk of Courts of General Sessions and Common Pleas for Barnwell County to keep his office at Barnwell.

Pursuant to an Act entitled "An Act to provide for a certain election in Barnwell County," approved March 19, 1875, an election was held on the 12th of May "to determine the will of the people as to the location of the County seat of said County." Section 2 of the Act declares "that in all respects the said election shall be held, conducted and determined as is now provided by law for the holding of elections for State and County officers," and by Section 3 it is provided: "That upon the canvassing of the votes given at such election, the Commissioners of Election shall certify to the Board of County Commissioners for said County the number of votes given for each locality, and the locality receiving the greater number of votes shall thenceforth be the County seat of said Coun-

ty, at which place the public offices shall be established and the Courts thenceforth be held."

The election was in all respects regularly held and conducted, and within three days thereafter the ballot boxes containing the ballots, the poll lists and the official statements of the managers of the various precincts were duly delivered to the Commissioners of Election, and were deposited in the office of the County Clerk to await the meeting of the County Board of Canvassers on the following Tuesday. Before that day these election papers and documents were abstracted and destroyed by some person or persons unknown. On Tuesday, 18th, May, two of the Commissioners of Election, namely, Henry H. Easterling, the Chairman, and Joseph R. Chisolm, met and organized as the County Board of Canvassers, George A. All, the third Commissioner, not attending. Embarrassed as to the course to be pursued, they concluded to communicate with the Governor and Secretary of State, and to seek advice from the Attorney General, and with this view adjourned until the 22d of May. On that day the Board convened, the same two members being present, and All again not attending. Certain affidavits purporting to emanate from managers of the various

*243

*precincts and to set forth the result of the election at such precincts respectively, as certified in the original statements, were offered in evidence. Upon the question of the competency of the Board to receive and consider such testimony, argument was heard from counsel in attendance. On consultation, the canvassers disagreed, and, upon Chisolm's motion, adjourned. The proceedings of the meeting were reduced to writing, at the Chairman's dictation, and subscribed by himself and the Secretary. Being read by the latter, Chisolm expressed his assent, but stated that he did not agree to adjourn indefinitely, "Mr. All being absent," and a note to this effect was made by the Secretary at the foot of the minutes. Easterling then withdrew, taking with him the minutes, a copy of which he embodied in an explanatory statement, which he caused to be forwarded to the Governor and Secretary of State. Chisolm remained at the place of meeting, and forthwith upon the adjournment, and even before Easterling had left the room, proceeded to receive the affidavits which had previously been tendered to the Board. Upon these he assumed to make certain statements of the result of the election. One of these statements was filed on the same day with the Board of County Commissioners, and this was introduced in evidence on the part of the respondent. From this statement the purport and character of any other statements made and filed or forwarded by Chisolm may be inferred. Its caption is as follows: "Evidence taken before Joseph Chisolm, one of the Commissioners of Election, to determine the location of the County seat of Barnwell County, the ballot boxes, poll lists and returns of managers having been destroyed, showing result—Affidavits from managers of various precincts." Then follows a list of the precincts, with the number of votes in figures for Barnwell and Blackville respectively, at each precinct, footing up 2,271 for Barnwell and 3,247 for Blackville, showing a majority of 976 for Blackville and concluding thus: "I certify the correctness of the above. Signed, Joseph R. Chisolm, Commissioner. J. P. Strobel, Secretary."

The only evidence before the Court as to the action of the State Board of Canvassers is their original certificate of determination. This bears date 2d June, 1875; refers to the Act by its title and to the election held under it; states that it appears upon examination of the returns that Blackville has received a majority of the votes cast at such election, and then proceeds as follows: "We do, there-

*244

*fore, by virtue of the authority vested in us, certify and declare that the town of Blackville, in the said County of Barnwell, has been duly chosen by a majority of the voters voting at said election to be the County seat of said County." This certificate having been forwarded to the Board of County Commissioners, the Chairman of that Board caused the same to be notified to County officers holding their offices at Barnwell, and required them to remove their books and records to Blackville.

The respondent obeyed this requisition, and now keeps his office at Blackville. The position of the relators is that the election was not determined as is provided by law for the holding of elections for State and County officers, and hence that Barnwell remains the County seat. The respondent relies upon the certificates in evidence, claiming that these are final and conclusive; that the Court cannot go behind them in a collateral proceeding, like the present, and inquire into the correctness of the decision expressed on their face; and that this decision being in favor of Blackville, the Act has operated to establish that locality as the County seat, and hence the place where the respondent is bound to keep his office.

The case of the relators calls for no investigation by the Court into the result of the election, nor do they controvert the proposition that the determination of Canvassing Boards is, in general, conclusive when sought to be collaterally drawn in question. They do not claim that Barnwell received the greater number of votes, nor have they adduced testimony tending to establish that fact. They concede that if, under the peculiar circumstances connected with the election, the Boards of Canvassers, or the person or persons who assumed to represent such

Boards, or either of them, were authorized by law to act in the manner they did, the result certified by them cannot be questioned. But they maintain that the certificates did not emanate from persons having lawful authority to determine this election, and that this appears from the conceded facts in the case and from the certificates themselves. The question, therefore, is as to the authority of the Board of Canvassers to make and certify a valid determination of an election in a case where all the papers appertaining to such an election had been destroyed before the organization of either Board. And assuming the existence of such authority, a further question arises as to the validity of Joseph R. Chisolm's acts and certificates in view of the circumstances under which he

*245

acted. It would *hardly be contended that the certificate of determination issued by a Canvassing Board, even though such Board may be vested with powers of final decision, is entitled to a higher degree of consideration and respect than the judgment of a Superior Court of general jurisdiction. When a judgment of such a Court is relied on and brought before another tribunal in any proceeding pending before the latter, while mere errors of judgment and irregularities of procedure on the part of the Court rendering such judgment cannot be examined into, it is always competent to inquire into the jurisdiction of such Court; and when the want of authority appears, whether it be in respect to the persons or the subject, the judgment is to be regarded as nullity. The rule is concisely stated by Trimble, J., in Elliott v. Peirsol, 1 Pet., 328 [7 L. Ed. 164]: "The jurisdiction of any Court exercising authority over a subject may be inquired into in every Court where the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings."

In James v. Smith, (2 S. C., 183,) where the subject was thoroughly discussed and the authorities collected, it was held that where a Court is without jurisdiction its judgment is void and must be so regarded whenever it comes before another Court. See also Cooley Con. Lim., 466 and 467.

1. I will proceed, then, to consider whether the County Board of Canvassers had authority to receive and act upon secondary evidence, the original papers having been destroyed before the organization of the Board. The duties of the County Board of Canvassers are defined in Chapter VIII of the General Statutes, as modified by the amendatory Act of 1875, (15 Stat., 170,) stated with reference to the election in question. The duties are substantially as follows: To count the votes of the County; within ten days after their first meeting, make three statements thereof, in which shall be set forth the names of the localities voted for and the number of votes given for each, written out in words at full length, each statement to be certified as correct by the signatures of the Canvassers subscribed thereto; and, of these, one to be filed in the office of the County Clerk, or, if there be none such duly qualified, in the office of the Secretary of State, and the other two, together with the returns, poll lists and all other papers appertaining to the election, including any protest, to be forwarded by the Chairman of the Board, after a final

*246

adjournment, by a special *messenger, to the Governor and Secretary of State. It has been already stated that, by Section 3 of the Act under which the election was held, the Commissioners of Election were further required to file a certified statement of the same character with the Board of County Commissioners. These duties are all of a purely ministerial nature. To count votes, aggregate results, embody the same in written statements, and certify, file and forward such statements, are functions which call for the exercise of neither judgment nor discretion. Created by statute for a single occasion, to do certain things specifically enumerated, in relation to certain designated material provided to their hands, there is not a single duty enjoined upon this Board the performance of which could not be compelled by a writ of mandamus. In the regular progress of the business assigned to them, no occasion could arise for a resort to extrinsic proof as a necessary means of accomplishing the end of their creation.

They are not clothed with any general authority or jurisdiction in relation to the election, or in respect to rights dependent thereon. They are simply the appointed instruments through which results are ascertained from certain papers set before them for examination. The regulations of the statute are singularly clear and explicit, and there is not to be found therein a single expression to suggest that, under any circumstances, these officials would be authorized and required to act upon any other data than that which is expressly provided, or to exercise the function of reproducing lost material through the agency of secondary evidence. Their first duty is to count the votes of the County.

The law in this particular remains as it was before the Act of 1872. Whatever view the Court might entertain as to the expediency of a second count of the votes, and even conceding that complication and confusion would be likely to result in many instances from such regulation, there is no inconsistency in the two provisions so irreconcilable in its character as to work an implied repeal of the first. In strictness, therefore, it was a matter of sheer impossibility for the Board of County Canvassers to take the first step in the discharge of their duty,

for it was not practicable to establish the contents of lost ballots, even if such a scrutiny would be permitted. But I am of opinion that if the certified statements of the managers had been preserved it would have

*247

been competent *to the Board to canvass the votes upon the footing of those statements and certify the result.

An essential part of their business is to ascertain the aggregate vote of the County, and although the destruction of the ballots put it out of their power to make the count, they would have had before them, in the case supposed, official statements showing the result of a count made in public, at the close of the polls, by sworn officials. There would still have been original evidence of the result, upon which, without any violation of the spirit of the law, they could, with reasonable certainty, have ascertained and certified the aggregate vote of the County. To this extent the Court would be justified in departing from the strict letter of the statute, by well-established rules of law, which, in a matter of public concern, encourage liberal construction ut res magis valeat quam pereat. But the case is that there was a total destruction of the evidences of the election: and the question to be determined is whether the County Canvassers had authority to receive secondary proof and act upon it. That the words of the statutes do not convey this authority is too clear to admit of dispute. It is equally clear that the implication of such authority is not necessary to the fulfillment of the duties with which the Board were specifically charged, for these presuppose the existence and presence of original documents.

The language of the law is plain and unambiguous, and, as literally interpreted, leads to no absurd results or injurious consequences. If in this particular instance serious hardship or inconvenience has ensued upon the destruction of the election papers, it is attributable not to the provisions of the statute law, but rather to the failure of the Legislature to provide for the extraordinary, if not unprecedented, event which has happened. Is the Court authorized to extend by construction the authority of the Board of County Canvassers to a case which the Legislature has not provided for, whether through design, inadvertence or the failure to give expression to their purpose? This question will be the best answered by a few citations from standard authorities, selected for the apt and concise terms in which they express doctrines which, at this day, may with propriety be termed axiomatic.

Dwarris, in considering the rule that effect cannot be given to an intention not expressed, says: "Of this rule there seems to be two branches. The first instance that may be stated is where the Legislature may have intended to provide for a particular case

*248

*and yet not have carried its intention into effect. 'We can only say of the Legislature,' said Lord Ellenborough, in Rex V: 'Shorequod volnit non dixit.' 'If the Legislature intended more,' said Lord Dunnan, in Haworth v. Ormerod, 'we can only say that, according to our opinion, they have not expressed it.' Again, the subject may have been overlooked by the Legislature. A casus omissus can in no case be supplied by a Court of law. Judges are bound to take the Act of Parliament as the Legislature have made it."—Potter's Dwarris, 215. After citing cases in further illustration of the rule, the learned author thus sums up the authorities: "The result is, that to bring a case within the statute it should be not only within the mischief contemplated by the Legislature, but also within the fair, intelligible import of the words of the Act of Parliament."—Ibid, 216. Further on he remarks as follows: "If the words of a statute do not reach to an inconvenience rarely happening, they shall not be extended by an equitable construction; for the object of statutes are mischief quae frequentius accidunt. It is good reason in such a case, and therefore sound construction, not to strain the words further than they reach; but the case is to be considered casus omissus."—Ibid, 240. Discussing the question how far the consequences of a particular exposition are to be considered, he observes that heed should be given to them during the period of gestation of interpretation for the sake of avoiding absurdity, but that considerations of this kind should be disregarded when a determinate conclusion has been reached as to the meaning of the statute. He then proceeds to cite the following observations of eminent jurists: "In Reg. v. Justices of Lancashire, Patterson, J., said: 'I cannot tell what consequences may result from the construction which we must put upon the statute, but if mischievous they must be remedied by the Legislature.' In Rhodes v. Surrethurst, Lord Abinger said: 'A Court of law ought not to be influenced or governed by any notions of hardship; cases may require legislative interference, but Judges cannot modify the rules of law.'"

In Hall v. Franklin, Lord Abinger said: "We have been strongly pressed with the inconveniences that may result from the construction of the statute. We are not insensible to them; but the only proper effect of that argument is to make the Court cautious in forming its judgment. We cannot on that account put a forced construction upon the Act of Parliament."—Ibid, 213. See also

*249

Sedg*wick, St. and Con., 261, 266; Broom's Leg. Max., 36, 60. "When the general intention of the statute," said Chancellor Johnston, in Hull v. Hull, (2 Strob. Eq., 188,)

"embraces the specific case, though it be not denominated, the statute may, nevertheless, be applied to it by an equitable construction in promotion of the evident design of the Legislature. But where this is done it is always presupposed that such a case was within their general contemplation or purview when the statute was enacted by them; for if the case be omitted in the statute because not foreseen or contemplated, it is a casus omissus, and the Court, having no legislative power, cannot supply the defects of the enactment. If a Judge of this State should in any instance be tempted to break through these restraining rules and to supplement defective legislation by moulding the plain provisions of a statute in conformity to his notions of right, justice or expediency, he would find an insurmountable obstacle in Section 26 of Article I of the Constitution, which he is sworn to support. In the government of this Commonwealth, the legislative, executive and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other."

The Court is pressed to extend the authority of a Board clothed with strictly ministerial functions, upon the ground that the implication of judicial power is necessary to effectuate the end of their appointment. It is the duty of this respondent, as Clerk, to furnish an exemplification or office copy of a judgment or record in his keeping to any one applying therefor and tendering the proper fees. Would it be contended that in the case of a lost record the Clerk would be authorized to take evidence of its existence, loss and contents, and upon this to prepare and deliver the exemplification or copy? The cases seem to me to be parallel. To the end that ministerial duties may be performed, judicial authority to reproduce lost material must be implied. Such is the argument in behalf of the respondent.

If established rules are laid aside and the Constitution ignored, still there should be at least a firm persuasion in the mind of the Court that if the emergency had been foreseen the Legislature would have provided for it in the manner now proposed; that if the ballots and other election papers should be destroyed, the Board of County Canvassers would be at liberty to take proof of their

*250

contents. *It will be borne in mind, that until the passage of the Act of 1872 the only count of votes was made by this Board. Of course, no provision could be made to supply the loss or destruction of the ballots previously to the count. The case would be remediless, and, of necessity, the sole reliance must be on the vigilance of the Managers and Commissioners of Election while the ballots remained in their respective custody. But most careful provision was made against the hazard of loss or miscarriage of the official statement of the count. This is seen in the requirement that several statements be made and that those be distributed among several officials; one to be filed in the office of the County Clerk, or, in case there should be no such officer duly qualified, in the office of Secretary of State, and others to be forwarded to the Governor and Secretary of State, and, until the Act of 1872, to the Comptroller General also.

The design of these provisions is obvious. It is to preserve original evidence by multiplying its sources and depositaries. If but a single statement should be preserved the loss of the others would cause no embarrassment, and the action of the State Board of Canvassers would still be based not upon secondary evidence, but upon an original statement made immediately after the count of the votes. If so extraordinary an event should happen as the loss or destruction of all these statements, the case would be left unprovided for a casus omissus. But could it possibly be supposed to have been in the contemplation of the Legislature that in such an event secondary evidence would be admissible, and that, having this in view, it was, nevertheless, considered unnecessary even to mention it? Besides the provisions of the election law have reference principally to general elections, and Section 10, Chapter VIII, of General Statutes declares that there should be one general election ticket on which shall be the names of the persons voted for as representatives in Congress and State, Circuit and County offices. How unreasonable the notion that the precise figures borne upon a statement setting forth the result of a general election could, in case of the loss of the statement, be recalled to memory, and that the testimony of witnesses would be adequate to fix with accuracy the final result; on the other hand, how wise the provision which, by increasing the number of original statements, avoids the necessity of extrinsic proof and at once closes the door against fraud and perjury, and maintains the policy of keeping ministerial boards strictly within the bounds of a limited authority.

*251

*But unfortunately when, by the Act of 1872, the managers of precincts were required to count the votes and make statements thereof, no provision was made for the execution and preservation of duplicate originals. It was no doubt owing to inadvertence that this was not done. If such provision had been made, the calamity which has occurred in this election could not have worked any disastrous results. But the point is, if the Court, yielding to the pressure of the argument in behalf of the respondent, should undertake to supply this casus omissus in the way it may be presumed the Legislature

would have provided if their mind had been directed to it, the inevitable conclusion must be that the County Board of Canvassers could act only upon duplicate original statements delivered to the Election Commissioners. It is manifest from the provisions actually made with respect to the official statements of the County Canvassers that similar regulation would have been prescribed in relation to the statements of the managers. There could be no sensible reason for leaving the proof of lost statements to depend on the perishable memory of witnesses in one instance, while in the other it was deemed so important to secure original evidence against the danger of loss or destruction.

My conclusion is, that the County Board of Canvassers were not authorized to receive and act upon secondary evidence of the contents of the election papers, which had been destroyed before the organization of the Board; and that in the absence of the ballots and the statements of the managers, the Board could not legitimately exercise their functions in this election.

II. Assuming, however, that the Board had such authority, were Chisolm's acts the acts of the Board? Upon this question I have never entertained the slightest doubt. Where a judicial authority is conferred by statute upon a specific number of persons, the law intends joint conference and concurrent action.

Considerations of convenience have availed to establish the rule that a majority may act when all, being notified of the time and place of meeting, have opportunity to attend. But in no instance where judgment or discretion is to be exercised can a less number than a majority perform the functions of the body.—3 Term, 38, 380; 6 Term, 388; Sedgwick Com. and St., 331; [Cooley v. O'Connor] 12 Wallace, 398, and cases cited in note; 3 N. Y., 396. It may be otherwise where the employment is of a merely ministerial or mechanical nature. It might well be that a canvass by a single member of the County

*252

*Board of Canvassers, where the election papers are present, would be supported and in any collateral proceeding would be regarded as a mere irregularity not affecting the validity of the final certificate.—Cooley Con. Lim., 617, 618. But to take evidence of lost papers and to determine upon the weight and sufficiency of that evidence is to exercise judicial functions; and assuming that the Board had such authority, I hold that a single member could not exercise it, and hence that Chisolm's acts were mere nullities. There was, besides, no necessity to justify his action, if, indeed, any stress of circumstances could give validity to such proceeding. Easterling was accessible and could have been compelled by mandamus to take his place in the Board and proceed to hear and determine if such was his clear legal duty. Thus a quorum could have been obtained and the functions of the Board set in motion. Moreover, Chisolm moved the adjournment, and, although not sine die in his apprehension, still it was an adjournment. Without any effort to obtain the attendance of All, the absent member, he at once proceeded to do the business of the Board of his own head, and without the co-operation of either of his associates. It is said the time limited by law had nearly expired, and immediate action was indispensable to prevent a defeat of the election. I hold that time was not essential, since the public had an interest in the duty to be performed, and the language of the statute does not indicate that the designation of time was intended as a limitation of the power of the Board.—Sedgwick Con. and Stats., 320. Under any view which may be taken of the case, the acts of Chisolm were without even the semblance of lawful authority, and I conclude that the statements which he assumed to make and file or forward were absolutely void to all intents and purposes. From these views it follows that the County Board of Canvassers did no official act in relation to this election.

3. Next to be considered is the action of the State Board of Canvassers, and the force and effect of the certificate issued by that Board.

The duties of the State Board of Canvassers are laid down in Chapter VIII of the General Statutes, Sections 24 to 28, inclusive. After organization they are, "upon the certified copies of the statement made by the County Board of Canvassers," to proceed to make a statement of the whole number of votes given for the localities, and each of them voted for, certify such state-

*253

ment to be *correct, and subscribe the same with their proper names. Upon such statement they then proceed to determine what locality shall have received the greater number of votes, deciding in this connection any protest or contest that may have arisen. Finally, they make and subscribe on the proper statement a certificate of their determination, and deliver the same to the Secretary of State. Except in cases under protest or contest, the functions of this Board are as exclusively ministerial in their nature as those of the Boards of County Canvassers and precinct managers. They have the simple mechanical duty to perform of examining the certified statements transmitted from the lower Boards, and of making up from this a statement exhibiting the whole number of votes given for the respective localities; and this final determination expresses the results as regularly deduced from the face of the returns. Before entering upon the consideration of any protest or contest, they are required to ascertain the result of the election as exhibited by

those returns, and to certify to the correctness of the statements in which that result is shown. If, upon the hearing of any protest or contest, a conclusion should be reached different from that indicated in such statement, it is set forth in the certificate of determination, which, of course, controls the certified statement and operates as a final judgment upon all questions of right growing out of the election.—High Ex. Rem., 48, § 57; Grier v. Shackleford, 2 Tread. Const., 642; Cooley Con. Lim., 623. And there is no doubt that in any case which comes regularly before the Board the determination would be equally final, at least in all collateral inquiries, although there may have been no protest or contest.—State v. Cockrell, 2 Rich., 6. In this case there was no protest or contest. The idea that the difference of opinion between Easterling and Chisolm presented a contest within the meaning of the law is wholly inadmissible. And it is deemed sufficient to say that in no point of view in which I have been able to consider this position has it commended itself to my mind as even plausible.

The State Board of Canvassers had before them no certified statement emanating from the County Board of Canvassers, nor any return from the managers of precincts. Like the County Board, they were without a single election paper upon which they were authorized by the statute to canvass the votes and make up the general statement upon which their determination was required to be based. They had before them only the

*254

affidavits upon which *Chisolm acted and the statement which he made up from those affidavits. This statement showed upon its face that the ballots, poll lists and official returns of the managers had been destroyed before the organization of the County Board, and that the results exhibited thereon were deduced solely from the affidavits.

For reasons already stated in considering the question of the authority of the County Canvassers, I hold that the State Canvassers were not at liberty to proceed upon the papers before them; that in respect to their ministerial functions they were as rigidly restricted as the lower Board to the precise limits of the authority conferred on them by the statute; that they could not by their action impart validity to Chisolm's papers, which were absolute nullities in their inception, and, consequently, that any statement founded upon such papers must necessarily be tainted with the illegality which vitiated them.

Applying to the action of the State Canvassers the rule already adverted to in relation to the finality of judgments, their determination of this election must be regarded as null and void, because the want of authority or jurisdiction appears on the face of the record.

The judicial powers of the Board were not invoked, since there was no protest or contest, and for the further reason that there were no official papers before them to lay the foundation for the exercise of any functions whatever, whether ministerial or judicial.

And, moreover, the recitals in their certificate of determination show unmistakably that they acted exclusively upon the papers forwarded by Chisolm, and not upon any original evidence submitted to them in their character as a judicial body or Court.

They say in that certificate that "it appears on examination of the returns" that Blackville had received a majority of the votes, and they proceeded to declare that, "therefore," Blackville was duly chosen as the County seat, etc. The only returns to which they could by any possibility have had reference were the affidavits and statement sent up by Chisolm, and these were impressed on their face with the stamp of invalidity. If, then, it be conceded that in a case circumstanced like this the Board of State Canvassers, without any election papers duly transmitted to them, might proceed as a Court to determine this election upon extrinsic testimony adduced before them, it is, nevertheless, patent upon the face of their certificate that they did not assume to act in this

*255

extraordinary capacity, *but on the contrary, treating Chisolm's papers as if they were official statements of the County Canvassers, based upon an actual count of the votes, they certified and declared this result as exhibited thereon. They professed to have exercised judicial functions as upon a case presented to them in the character of a substantive tribunal acting independently of the lower Board, nor indeed even to have considered and passed upon the authenticity, weight and sufficiency of the affidavits transmitted by Chisolm. They simply affirm his conclusions, and give, so far as it was in their power to give, their official sanction to his proceedings by adopting them as the basis of their determination. The Supreme Court, in the cases of the State, ex rel. the Attorney General, v. Walker, Sheriff, and Nerland, Clerk, (May, 1874,) had occasion to define the functions of these Boards of Canvassers, in an election similar to the one now under consideration. Mr. Justice Willard, in delivering the opinion of the Court, made the following observations: "Under our laws there are two bodies entrusted with the power to ascertain and fix the fact of an election for State and County purposes—the one acting as a primary tribunal, the other as a revising body. The Board of County Canvassers is the primary body, and the Board of State Canvassers is the revising body. To say that the election fails unless a proper declaration is made by the Board of State Canvassers is to destroy entirely the functions of the County Board. On the other hand, to

allow the Board of County Canvassers to make a declaration and determination valid and conclusive unless revised and modified by the revising body is to give to each body a distinct, important and entirely consistent function, in harmony with the method by which we are accustomed to fix the existence of facts on which legal rights are based."

In these cases the State Canvassers having declined to act upon the returns of an election to determine the location of the County seat of Barnwell County, the question was whether the election had been legally determined. The Court held that the determination by the Board of County Canvassers, not having been reversed or modified by the Board of State Canvassers, was final and conclusive. In the present case there has been no determination by the Board of County Canvassers, and, according to the opinion of the Court already expressed, no such determination was possible under the circumstances. Yet it is gravely contended that a revising body, without any subject for revision before them, had authority to make a

*256

valid *determination, and that their certificate is final and conclusive. The proposition seems to me to be irreconcilable with the views and decision of the Supreme Court in the case just cited. To my apprehension it is perfectly clear that a determination by the County Canvassers is, in all cases, indispensable to ground the jurisdiction of the State Board Canvassers. And it is especially so in view of the provisions of the Act under which the election was held. It is there expressly directed that the Commissioners of Election shall, upon the canvassing of the votes, certify to the Board of County Commissioners the number of votes given for each locality, and the Act declares that the locality receiving the greater number of votes shall thenceforth be the County seat. The importance of this certificate is obvious. To do away with it by construction would be grossly unwarrantable. It emanates from the Commissioners of Election, a body distinct from the State Board of Canvassers, and even from the County Board of Canvassers, though the latter is composed of the same individuals. [See Sections 2 and 15, Chapter VIII, General Statutes, as to the repetition of the statutory oath.] That certificate has not been filed, and, under the circumstances, no valid certificate could have been filed. The certificate of the State Board of Canvassers cannot supply the place of the certificate required by the Act, because it neither emanates from the proper source nor sets forth the number of votes given for each locality.

The general conclusion is, that the Act has not taken effect to establish the County seat elsewhere than Barnwell.

There has been no determination of the election duly certified in the manner imperatively required by the Act as the condition upon which it should go into operation and effect. Barnwell therefore remains the County seat of Barnwell County, and, consequently, it is the duty of the respondent to keep his office at that place. In the view taken by the Court, it has not become necessary to pass upon the constitutionality of the Act of March 19th, and, therefore, it is considered that any expression of opinion on that question would not be proper.—Cooley Con. Lim., 163.

The Court is entirely free from doubt as to its jurisdiction in this case. By Section 15 of Article IV of the Constitution, power is expressly conferred upon Courts of Common Pleas to issue writs of mandamus, and in McIver v. The State (2 S. C., 1,) it was held that the jurisdiction formerly vested in

*257

Courts of Sessions in the *proceeding by mandamus had been transferred by the Constitution to Courts of Common Pleas. The order directing the writ to issue in pursuance of the prayer of the petition has already been filed.

The respondent appealed.

Bellinger, Thomson, Elliott, Dunbar & Stewart for appellant:

This is an appeal from an order of His Honor Judge Maher, setting aside the certificate of the State Board of Canvassers declaring the result of the election for the location of the County seat of Barnwell County, held under and by virtue of Act of Assembly, approved March 19th, 1875, entitled "An Act to provide for a certain election in Barnwell County."

1. The Circuit Court cannot review the action of the State Board of Canvassers by mandamus. The Court of Common Pleas has only a limited jurisdiction in mandamus.—Constitution, Art. IV, § 15; High on Ex. Legal Remedies, pp. 98, 581, 582, and notes.

A new jurisdiction has been conferred on Common Pleas.—McIver v. The State, 2 S. C., 1. Must be strictly construed.—McNamee v. Waterberry, 4 S. C., 167-8, opinion of C. J. Supreme Court alone has right of review. —Const., Art. IV, § 4.

2. Even if such power in Common Pleas, it is vested in the Court alone, and ultra vires of a Circuit Judge at Chambers to exercise it.—Const., ibid.

3. If Circuit Court cannot review the action of State Board directly, neither can it collaterally.—High, 57, 75, 77.

Decision of State Board final.—Revised Statutes, p. 32, § 26; Grier v. Shackleford, 3 Brevard, 491.

4. Duty of party against whom writ is sought must be plain.—High, 79, 32, 41. Nor granted where it would place parties in conflict with order of another Court.—High, 23.

5. It is immaterial in what way the choice at an election is discovered.—Day v. Kent, 1

Oregon. If votes of the citizens are deposited, the intent and design of an election are accomplished.—Andrews v. Sancier, 13 La. Ann., 301.

6. If the manner in which the popular will is determined be immaterial, the media through which that will is announced is still less material. Any other view would be unwise and impolitic.—Commonwealth v. Reed, Brightley's Election Cases, 126; 2 Ashmead, 261; Howard v. Shields, Ohio Leading Cases

*258

on Elections, *378; State v. Bancroft et al., 2 Wis. 579; State v. Ferguson, 2 Vroom (N. J..) 107.

Statutory rules for holding elections directory.—McKinney v. O'Connor, 26 Texas, 5; Brit v. Cook, 14 Barb., 230; People v. Shunerhorn, 19 Barb., 558; Cooley Lim., 75.

7. The absence of jurisdiction in State Board not apparent on face of certificate or other proceeding herein. The ratio decidendi and material thereof never before Circuit Court, but on file in Secretary of State's office. The case was decided by State Board upon contest.

8. Express jurisdiction given by the Act in question, and interpreted by the medium of The State v. Chairman of County Commissioners.—4 S. C., 485.

General tendency to construe Art. II, Sec. 20, liberally.

The evil designed to be remedied or avoided by this provision was hotch-potch or log-rolling legislation.—Cooley, 143-4.

Generality of title no objection, so long as not a cover to legislation incongruous in itself.—Ibid, and cases there cited. See also Morton, Bliss & Co. v. Comptroller General, 4 S. C., 430.

A. P. & R. Aldrich, Hutson, Hoge & Wilkes, contra.

February 16, 1876. The opinion of the Court was delivered by

MOSES, C. J. We concur with his Honor the Circuit Judge in holding that the determination of the Board of State Canvassers in regard to the election referred to in the pleadings was without authority of law. It proceeded entirely upon the papers transmitted to that body by Chisolm, one of the Commissioners. They were not, in any respect, official in their character, and afforded no competent testimony upon which the State Board could act. While we are, therefore, obliged to refuse the motion to set aside the order from which the respondents have appealed, we are not to be considered as concurring with the Judge in his conclusion against the right of the Commissioners of Election, on the abstraction and destruction of the boxes, together with the ballots, the poll lists and the official statement of the managers of the various precincts, to ascertain and certify the result from secondary evidence of the lost statements, through the medium of which action the State Board could render "a valid determination."

*259

*The object of the Act was to fix the County seat for Barnwell County through the will of the people, to be ascertained by an election to "be held, conducted and determined as now provided by law for the holding of elections for State and County officers." By the third Section, "upon the canvassing of the votes given at such election, the Commissioners of Election shall certify to the Board of County Commissioners for said County the number of votes given for each locality, and the locality receiving the greatest number of votes shall thenceforth be the County seat of said County, at which place the public offices shall be established and the Courts thenceforth held." The duty of the Commissioners of Election was to ascertain the will of the people as expressed through their ballots. All that is necessary to effect the purpose proposed by their appointment must be implied from the character of the duty required of them and the end which the Legislature proposed to attain through the Act. The third Section imposes upon the Commissioners the duty of canvassing the votes and certifying to the Board of County Commissioners for said County the number given for each locality. The existing law required the Chairman of the Board of Managers at each precinct to deliver to the Commissioners of election the poll list, box containing the ballots and a written statement of the result of the election in his precinct.

The term employed to designate the duty to be performed by the Commissioners would seem to impose an obligation beyond that of merely counting the ballots and comparing the statements of the managers. Canvassing implies "search," "scrutiny," "investigation," "examination." But whatever may be the duty of the Commissioners, they were imposed with a view by the Legislature to the fulfillment of the object intended by the Act, to wit, the ascertainment of the election from the ballots and statements returned to them by the several managers. If the intention of the maker can be clearly inferred from a general view of the whole statute, without doing violence to the particular words he has employed, it is the duty of the Court to give it effect, for otherwise his will would be disappointed and defeated. "Such construction should be put upon a statute as may best answer the intention which the maker had in view, for 'qui hæret in litera, hæret in cortice.'"—Plowd., 232; William v. Barkley, 11 Rep., 73. "A thing which is in the intention of the maker of a statute is as much within the statute as if it were within the letter."

*260

Zouch v. *Stowell, 10 Rep., 101. So, on the other hand, "things which are within the words of statutes are not within the purview

of them, which extends no further than the intent of the makers, the principal thing to be considered."—Dwarris on Stat., 726.

Such a construction, too, shall be put upon a statute "as does not suffer it to be eluded." —3 Rep., 7; Magdalen College Case, 11 Rep., 72; 2 Rol., 127. "In the construction of statutes the ends contemplated are to be considered."—Curlin v. Chalken, 3 M. and S., 510; Andre v. Fletcher, 2 T. R., 161. "So the ground and cause of the making of a statute explain the intent."—Pl. Com., 173, 204. And "a statute which concerns the public good ought to be liberally construed."—Strange, 517, 518, 519.

Applying these principles, which must be recognized and respected by reason of the high authority from which they emanate, is there anything in the Act which necessarily restricts the Commissioners to a mere determination of the election by counting the votes and comparing the statements, and thus prevent them from carrying out its design, if after the votes have been counted at the respective precincts they with the poll lists and statements should be entirely destroyed? If, consistently with the rules of law, an attempt thus to outrage the will of the people, expressed in conformity with an Act of the Legislature, can be counteracted, it is the duty of the Court to interfere by the application of such legal principles as will authorize the introduction of secondary proof in substitution of that which, by its wanton destruction, cannot be resorted to.

The appointment of the Commissioners was not with a view to the conduct of the election, which was to be held and managed by persons named for that purpose, who were required to count the votes at the several precincts and make a written statement of the polls. The result of the whole vote was to be ascertained by the Commissioners and certified to the Board of County Commissioners, and the locality having the greater number of votes was thenceforth to be the County seat. The votes for each locality were to be determined by an actual count by the Commissioners of Election; but if this became impossible, not because of the default or neglect of the managers, but of the willful destruction of the ballots, we cannot see how the Commissioners, whose special duty it was to ascertain the result of the election, could not resort to secondary proof to reach the only end the Act had in view. Although the

*261

*opinion of the learned Circuit Judge is strongly opposed to such action on the part of the Commissioners, yet it admits the right by holding "that if the certified statement of the managers had been preserved it would have been competent to the Board to canvass the votes upon the footing of these statements and certify the result." If the action of the Commissioners was confined only to the actual count of the votes, in the absence of this would not any proof be only of a secondary character? The statements of the managers, if the votes could be counted by the managers, who by their own "canvassing" could discover the exact number for each locality, and thus from such count have primary and positive knowledge, would only be secondary evidence of the fact, first coming to their certain knowledge from the count itself. If "a statute which concerns the public" is to be so strictly construed as to give effect to the form of the proceedings by which the purpose of the Legislature is to be attained at the sacrifice of the only object they proposed to accomplish by their enactment, it may well be said that the Court conceded greater consequence to the shadow than the substance. The policy of a statute should be respected by the Courts, and strictly enforced if it can be done conformably to law.

In a government founded on the will of the people, their voice is not to be stifled by fraud, or their high behests frustrated by wrong and violence. If the purpose of the State, expressed in constitutional form, to provide a County seat through an election of qualified voters is to be set at naught by the destruction of the ballots, those charged with the ascertainment of the result of such election must resort to secondary evidence to enable them to determine it. The right follows, as an implication so necessary to the execution of the duty imposed, that, unless it is utterly inconsistent and irreconcilable with the words of the Act, it must be resorted to, so that full and complete effect may be given to the design of the Legislature, and its defeat prevented by fraud and violence.

For the reason herein already stated, the motion, however, must be dismissed, and it is so ordered.

WRIGHT, A. J. I concur in the judgment as pronounced by the CHIEF JUSTICE; also with the views expressed by him in reaching such judgment.

This being a case of vital importance to the people of the whole State, if the record contains sufficient to warrant this Court to so

*262

*largely and fully express its views concerning the mode of procedure after an election held, I deem it highly proper that it should be done, that all persons who may be interested in the event of any election hereafter may take heed and act in such a manner as not to obstruct or throw any obstacle in the way of obtaining a fair and true expression of the will of the people.

The points discussed in the opinion of the CHIEF JUSTICE are expressly raised in the judgment of the Court below; and, according to the Constitution, I regard it as being the duty of this Court, whenever it reverses or affirms a judgment, to consider and decide every point made and distinctly stated in the cause, and to give in writing the reasons therefor.

WILLARD, A. J. I concur in the judgment just pronounced by the CHIEF JUSTICE, but upon the ground alone that the action of the State Canvassers was unauthorized for want of precedent action on the part of the County Canvassers. I do not think that we can with propriety examine the question as to what evidence of the results of the election is competent to control the action of the County Board. Had they met and acted in form, but neglected some substantial duty imposed upon them in virtue of their office, a case would have been presented calling upon this Court for its judgment. But they wholly failed to exercise their legal functions in the case under consideration. The question before us does not directly involve the legality of their action but that of the State Canvassers, who assumed to disregard the want of action on the part of the local Board and to make an independent declaration of the results of the election. We are all agreed that this cannot be done consistently with the laws fixing the duties of the State Canvassers.

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7 S. C. *263

*SAMUEL McGEE et al. v. THE PIEDMONT MANUFACTURING COMPANY.

(Columbia. Nov. Term, 1875.)

[*Mechanics' Liens* ⇐276.]

A petition under the statute to enforce payment of a mechanic's lien is subject to the liberal rules of amendment prescribed by the Code of Procedure.

[Ed. Note.—Cited in Waring v. Miller Batting, etc., Co., 36 S. C. 321, 15 S. E. 132.

For other cases, see Mechanics' Liens, Cent. Dig. § 539; Dec. Dig. ⇐276.]

Before Cooke, J., at Greenville, March Term. 1875.

This was a petition by Samuel McGee and a number of other laborers against the Piedmont Manufacturing Company to enforce payment of a mechanic's lien.

The petition alleged that the petitioners, within ninety days after the termination of the contract under which their labor was performed, filed a notice of their lien as required by the statute; the petition also referred to a schedule annexed thereto in which the respective claims of the petitioners were stated.

The case for this Court stated that after the petition and the reply thereto had been read the respondent's counsel then made a motion to dismiss the petition upon the ground that the same did not state facts sufficient to constitute a cause of action against the company under the mechanic's lien law, and that the petitioners had not, within the time limited by law, filed in the office of the Clerk of the Court of Common Pleas for Greenville County a statement of a just and true account of the amounts due them, with all just credits given. After argument of counsel, the petition was dismissed as set forth in the order therefor.

The petitioners, by their counsel, made a motion to amend the petition, which motion the Court did not refuse, but stated that an amendment could avail nothing, as there was a fatal defect in the account which had been filed in the Clerk's office, and that could not be amended, as more than ninety days had expired since the filing of the same.

The petitioners appealed on the following grounds:

First. Because His Honor erred in holding that the petition did not state facts sufficient to constitute a cause of action under the law giving mechanic's lien against the owner of the property by laborers employed by the contractor.

Second. Because His Honor erred in declining to allow the petitioners to amend their pleadings at the hearing of the cause.

***264**

*Third. Because His Honor erred in deciding what would be the effect of any amendments which the petitioners might make to their pleadings before the same had been made and argument had thereon.

Fourth. Because His Honor erred in deciding that the petitioners did not file in the office of the Clerk of the Court of Common Pleas, within the time prescribed by law, such a just and true account of the amounts due them respectively, with all just credits given, as required by law, to entitle them to set up a mechanic's lien as to the company, with whom they had not contracted, because:

1. The notice of lien or statement, required by law to be filed in the Clerk's office, by the petitioners was not before the Court, and the Court had no right to know its contents without it being in evidence.

2. There was no evidence as to whether there were credits due the respondent.

3. Even had there been evidence as to credits, it was a question of fact, and should have been submitted to the jury sworn to try the cause.

Fifth. Because His Honor erred in deciding that there must be a privity of contract between the laborer and the owner of the property, in order to give the laborer a lien.

Sixth. Because the decision is contrary to law.

Bryan, Whitner & Symmes, for appellants.

Earle & Wells, McGowan & Donaldson, contra.

April 5, 1876. The opinion of the **Court** was delivered by

WILLARD, A. J. The Circuit Judge was clearly in error in refusing to allow an amendment of the petition. Statute proceedings are not an exception to the liberal rules

established by the Code in regard to the amendment of proceedings. While rights created by the statute can only be established by showing compliance with all the conditions requisite to their existence, yet parties pursuing remedies for the enforcement of such rights should be treated with the same liberality that is accorded to those prosecuting rights resting on a different foundation.

*265

The statute itself *places the proceeding on the same footing as ordinary actions in this respect.—Gen. Stat., p. 551, § 18.

The allowance of amendments to pleadings in actions is not a matter of discretion under the Code. It is the duty of the Courts to allow parties to perfect their pleadings when affected by unintentional error; and, that the opposite parties may not be prejudicially affected by the allowance of such amendments, the Courts may impose reasonable terms as the condition of amendment.

It would appear, however, in the present case, that the amendment was refused upon the ground that it would be ineffectual, the Court having concluded that there was a fatal defect in the notice of lien filed by the claimants.

The conclusion in this respect was "that the petitioners had not within the time limited by law filed in the office of the Clerk of the Court of Common Pleas for Greenville County a statement of a just and true account of the amounts due them, with all just credits." The objection appears to have been made upon the petition and return. If the petitioners had been allowed to amend their petition so as to aver the filing of their claim in thirty days instead of ninety, no ground would have appeared on the face of the petition and return for dismissing the petition.

It is not clear how the Court could have decided, as matter of law, that the account filed was not true or just, if there was an intention so to decide. It would seem that the verdict alone could ascertain such fact, under proper instructions from the Court.

Inaccuracies of statements, relating to the amounts due, could not, according to the express provisions of the statute, (General Statutes, p. 551, § 12,) vitiate the proceedings, "unless it appears that the person filing the certificate had willfully and knowingly claimed more than his due."

The existence of such a fact should be ascertained by the jury under proper instructions.

An objection to the certificate was made upon the argument, on the ground that it was not properly verified, but no such ground of objection appears in the order or decision of the Circuit Court, and we cannot assume that the Circuit Judge has reached any such conclusion. The order dismissing the petition must be set aside and the cause remanded, with liberty to the petitioners to amend

*266

their *petition within such reasonable time as the Circuit Court shall direct.

MOSES, C. J., and WRIGHT, A. J., concurred.

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7 S. C. 266

GARVIN v. THE STATE BANK.

(Columbia. Nov. Term, 1875.)

[*Banks and Banking* ⇐80.]

"A," a bank in Charleston, South Carolina, wishing to obtain credit for its over drafts on its correspondent, "B," a bank in Liverpool, made an agreement with the agent of "B," by which it pledged a certain amount of bonds of the State as security for any of its over drafts on "B." In 1861 bills were drawn by "A" on "B," on the faith of its entire credit, cash and marginal, with "B," which were not presented for acceptance till 1864.

In 1863 "B" closed its business relations with "A," and made out its account against "A," showing a balance due by it to "B," "A" having become insolvent: *Held*, That "B" was entitled to be paid such balance out of the bonds in preference to the holders of the bills drawn in 1861, but that such holders had a lien on the bonds in preference to the general creditors of "A."

[Ed. Note.—Cited in Livingstain v. Columbian Banking & Trust Co., 77 S. C. 310, 57 S. E. 182, 22 L. R. A. (N. S.) 442, 122 Am. St. Rep. 568.

For other cases, see Banks and Banking, Cent. Dig. § 187; Dec. Dig. ⇐80.]

[This case is also cited in Livingstain v. Columbian Banking & Trust Co., 77 S. C. 305, 57 S. E. 182, 22 L. R. A. (N. S.) 442, 122 Am. St. Rep. 568, and distinguished therefrom.]

Before Graham, J., at Charleston, September, 1874.

This was an action by George Garvin against the President and Directors of the State Bank, an insolvent corporation, and others, to settle the affairs of the bank.

Chichester & Co. and Hastie & Co., A. McLoy and H. M. Banner, and other liquidators of the Royal Bank of Liverpool, filed their petitions in the cause; they were referred to M. P. O'Connor, Esq., who, on the 22d June, 1874, made his report as follows:

These petitions in the aforementioned main cause were respectively referred to me, to inquire and report upon the matters of law and fact raised therein. From the statements contained in the petitions, which have not been contradicted, and the evidence taken before me, it appears that some time prior to the 15th August, 1861, the State Bank, of Charleston, which then and theretofore conducted with the Royal Bank of Liverpool a business correspondence, opened with the latter a credit for the purpose of dealing in and drawing upon them foreign bills of exchange, according to the custom of merchants.

*267

*The State Bank at this time being desirous of securing the privilege to over draw

upon the said Royal Bank of Liverpool beyond any existing cash credit with it, entered into an agreement with Mr. Molyneaux, the agent of the Royal Bank on this side, whereby, as a pledge or security for any over drafts, the State Bank were to deposit with Mr. Molyneaux $100,000 State of South Carolina six per cent. bonds. In pursuance of the agreement, the State Bank did deliver to Mr. Molyneaux the $100,000 State bonds, which he first lodged with the Southwestern Railroad Bank, and subsequently had transferred to the vaults and custody of the State Bank. These bonds remained in the custody of the State Bank from the day they were turned over until their seizure and asportation by Federal soldiers, in February, 1865, at Lynch's Creek, near Camden, S. C., to which point they were removed for safety with the other treasure of the bank by its Cashier, Mr. B. A. Lee. Of these bonds, seventeen in number, of the par value of $1,000 each, were recovered by the bank, sold, and the proceeds disbursed by the bank, leaving eighty three, $1,000 each, still unrecovered.

The draft which is the subject of the petition of Chichester & Co., and of Hastie & Co., was drawn by B. A. Lee, Cashier, on the 15th August, 1861, for £500, ninety days after date, without advice; and the draft which is the subject of A. McLoy's petition was drawn on the 11th November, 1861, sixty days after sight, for £600, without advice.

The first of these mentioned drafts was not presented for acceptance until about the 24th July, 1864, and the latter was protested for non-acceptance on the 5th of August, 1864.

The Royal Bank of Liverpool presented their accounts with the State Bank, made up to June 30th, 1863, showing at the date a balance to the debit of the State Bank, on account of over drafts and interest and minor charges, one thousand ninety-three pounds, two shillings and eight pence.

Chichester & Co. and Alexander McLoy have petitioned on behalf of themselves, and all others having like claims who will contribute to the expense and seek to be joined, to have the amounts of their bills out of the one hundred thousand ($100,000) dollars of State bonds pledged to the Royal Bank, or any part of the proceeds of them, in preference to the Royal Bank of Liverpool and the other creditors of the State Bank.

*268

*The Royal Bank of Liverpool claims to be first entitled to payment of their account against the State Bank, for its over drafts, in preference of all other claimants; and the general creditors of the State Bank resist, generally, the allowance of any priority to either of the said creditors out of the said bonds, and insist that whatever rights these creditors may at any time have set up to this fund have been now forfeited by their laches.

In order to determine what rights the petitioning creditors have, it is necessary first to ascertain what was the true nature of the agreement made between the State Bank and the Royal Bank of Liverpool, in August, 1861.

The only evidence we have to make out a proper interpretation of the agreement is contained in the testimony given by Mr. Sebring, in conjunction with Mr. Sebring's letter of the 30th August, 1863, and the letter of H. H. Withers, Manager of the Royal Bank of Liverpool, dated the 4th of July, 1863. In harmony with these proofs, I regard the deposit made by the State Bank of the $100,000 of bonds as no more than the pledge of so much collateral to protect any advances made by the Royal Bank, in honor of the bills of the State Bank, in over draft of the cash credit.

The Royal Bank never meant to open an absolute, irrevocable credit in favor of the State Bank for twenty thousand pounds, for this would be equivalent to the purchase of the Royal Bank of $100,000 of State South Carolina bonds of £20,000, or a loan of this amount upon the faith of these bonds as security. Mr. Withers's (the Manager) letter precludes this idea, and indicates exactly what the Royal Bank agreed and felt bound to do. If these bond collaterals had been transmitted to England and lodged with the Royal Bank, for its own safety, upon reasonable notice it might at any time have put a stop to the open credit, secured itself for any advances out of the collaterals pledged and returned the balance to the State Bank. It is a transaction of frequent occurrence with commercial and banking correspondents, of granting and using marginal credits upon a pledge of security, but such credit is never deemed absolute and irrevocable, but is restrained by the ordinary rules for the security of a creditor. In this case no time was fixed within which the bills should be drawn, so that if the open or original credit was absolute, the over drafts might be drawn at an

*269

unlimited distance, *and after the collaterals, by depreciation, had become almost, if not entirely, worthless.

The Royal Bank of Liverpool had no understanding with any party but the State Bank, and there was no privity between it and any of the purchasers of bills from the State Bank. It stood in no binding relation with holders of bills drawn upon it until presentation, nor is it to be presumed to have had notice of what the State Bank had drawn against until such notice is brought home to it, and certainly could not have been advised of the bill for £500 held by Chichester, and that for £600 held by McLoy, since, as stated upon the face of them, they were drawn without advice; nor was the arrangement between the State Bank and the Royal Bank of Liverpool, as to

marginal credit, declared and made known to the purchasers of these bills at the time of purchase.

The collaterals lodged were designed as security for no other creditor of the State Bank than the Royal Bank; and these purchasers, in no way known to the Royal Bank, cannot claim to be subrogated to its especial securities, and most assuredly not in exclusion of or in priority to the Royal Bank's indemnity. The Royal Bank was neither a debtor to the State Bank for these bills nor to the holder of them, nor in any way a surety for them in the hands of the holders before acceptance; and the doctrine in Maure v. Harrison, (1 Eq. Cas. Abr., 93,) does not apply, nor does Fogarties v. Bank, to be found in 12 Rich., 518 [78 Am. Dec. 468], admitting it to be law in spite of the overruling of the doctrine in Christmas v. Russell, (14 Wallace, 69 [20 L. Ed. 762].) apply; for in this last case the holder of the check presented it to the Bank and claimed the right to have it paid.

In case of Chichester & Co. and McLoy no demand was made upon the Bank in Liverpool until in the Summer of 1864, long after the bank had closed its accounts and struck the balance due it from the State Bank for over draft.

On the 30th of June, 1863, the Royal Bank closed its account and brought the State Bank their debtor for £953 14s. 6d. If the $100,000 State bonds at the time were in the possession of the Royal Bank, it might have applied enough of them to discharge the balance, and the remaining bonds would have stood to the credit of the State Bank as its property.

I must, therefore, hold that the balance due the Royal Bank, for which these bonds were an original pledge, must be first dis-

*270

charged, *and then arises the next question: What becomes of the balance? Were it not for Mr. Sebring's testimony that he was the bailee of these bonds, for the security of the Royal Bank and all his over drafts, I would feel bound to decide that the two other bill creditors who have petitioned would have no lien upon the special deposit for their payment and would rank them among the general creditors of the bank.

But by Mr. Sebring's own admission, when he drew these bills he drew them upon the faith of his entire credit, cash and marginal, with the Royal Bank, and considered the one hundred thousand dollars ($100,000) deposited with him as collaterals, as well for these as for the acceptances of the Royal Bank; and in equity, I think, the holders of these bills have a prior claim to the general creditors upon these bonds.

I, therefore, in conclusion, report and recommend that out of any proceeds of these bonds in the hands of the Receiver, after the payment of all the costs and expenses of these proceedings, he do pay first the debt due the Royal Bank of Liverpool, then the bills of the two other petitioning creditors equally with the other holders of bills of a similar kind who may come in and establish their claims, and the balance he shall apply equally among all the other creditors of the State Bank.

Chichester & Co. and Hastie & Co. excepted to the report.

The decree of His Honor the Circuit Judge is as follows:

Graham, J. This is a petition of Chichester & Co. and Hastie & Co., in behalf of themselves and others in like condition, in re George Garvin against The State Bank, and the following is a statement of the petitioners' case:

The State Bank during the war entered into an agreement with the Royal Bank of Liverpool, by which, upon the deposit by the State Bank with the agent of the Royal Bank here of $100,000 State bonds as collaterals, the Royal Bank agreed to allow the State Bank a marginal credit to the amount of £20,000.

The $100,000 State bonds were delivered to Mr. Molyneaux, the agent of the Royal Bank, and were at first deposited by him in the Southwestern Railroad Bank, but afterwards, for his convenience, were placed, as a special deposit by him, in the vaults of the State Bank, where they remained until re-

*271

moved in consequence of the *exigencies of the war, and many of them lost with its treasures near Camden, in 1865. Some of them have been recovered.

Having effected this arrangement, the State Bank continued to draw sterling bills, then in great demand, upon the Royal Bank, and, among others, drew and sold to Hastie, Calhoun & Co., the assignees of the petitioners, the bills they now present.

This bill, it is said, was not intended to be drawn upon the marginal credit, but upon the money in the Royal Bank. But there was no ear mark to distinguish such bills from those drawn on the credit except priority of numbers and dates; and it so happened, in the disorganized condition of communication with Europe, and from other causes arising from the war then going on, some of the after drawn bills reached Liverpool before that held by the petitioners and were paid. Thus the actual money to the credit of the State Bank was exhausted, and bills were paid upon the marginal credit to the amount of £954. —s. —d.

It appears by the testimony of Mr. Sebring, the President of the State Bank, that in his view and intentions only one bill was drawn on the marginal credit, and that, for ten thousand pounds, was sold to the agents of the Confederate government. It was the last drawn, and was paid, being presented before others prior in date and numbers. In

short, the Royal Bank paid bills drawn on the credit, out of the actual funds, and then, disregarding the agreement, refused to pay on the marginal credit other bills drawn on funds in bank. But there was no difference in the bills as between the holders, whatever may have been the understanding, if any, between the two banks, and it makes no difference whether the bills were intended to be drawn on money or credit, the Royal Bank was equally bound to pay. The holders had a right to be paid. Both banks are insolvent.

Under the case made by the statements of facts, the question is presented: What application should be made by the State Bank of the bonds which have been recovered or which may come into its possession?

Are they to be regarded as general assets, as the State claims, or are they to be held as a special fund to meet and discharge, in the first place, the trust upon which they were set apart and dedicated?

The petitioners insist upon the latter. They say that when the Royal Bank refused the bills of the State Bank, not exceeding but within the limits of the marginal credit,

*272

from that moment the *holders of such dishonored bills had a perfect claim to protection out of the bonds, and if the bonds had been in the actual possession of the Royal Bank it would have been a fraudulent misappropriation to apply them to any other purpose. And, further, that the State Bank, being in possession in the double character as bailee and drawer of the bills, was equally bound to apply these securities to the payment of the dishonored bills if unable to pay them otherwise.

They also say that there is no doctrine better established than that the creditor has a right to the benefit of all indemnity or counter security held by the insolvent debtor. The early case of Maure v. Harrison (1 Eq. Cas. Abr., 93,) and an unvarying line of authorities from that time, sustain the doctrine. This case clearly comes within that principle.

The State Bank put up indemnity securities for its over draft upon the Royal Bank and the latter agreed to pay them. It did not pay them and became insolvent. The holders of these bills claim the benefit of the securities dedicated for their protection before the bills were drawn.

In the judgment of the Court the petitioners and others in the same plight, holding sterling unpaid bills of the State Bank within the amount of the marginal credit, whether accepted by the Royal Bank or not, are entitled to the relief they seek. They have an undoubted equity to be paid out of the bonds deposited for the security of the Royal Bank if it had paid, which it was bound to do; and the application of these bonds by the State Bank to any other purpose would be a misapplication of them; and if they had been so misapplied, then they must be replaced by or out of other funds of the bank.

The unpaid bills must be paid before the amount due the Royal Bank, and this must be done. It was the duty of the Royal Bank to pay all, and then it would have been entitled first to the collateral securities.

It is ordered and decreed that the exceptions to the report of the Referee filed by the petitioners in this case be sustained, and that the petitioners and others in the like plight are entitled to priority in the payment of their bills out of the proceeds of the said bonds; and it is ordered that they be so paid. And to that end it is ordered that the Referee do call in the holders of the unpaid bills drawn by the State Bank on the

*273

Royal Bank of Liverpool, to prove the *respective amounts outstanding, and that he do report the same. That he also inquire and report how many and what amount of said bonds have been recovered by the State Bank, and when and how disposed of, and for how much, and how the proceeds of sale have been applied; and in the event that the said bonds or the proceeds thereof have been applied to other purposes than the use upon which the banks held them in trust, then that he do also report fully all the property and assets of the State Bank in the hands of the Receiver and elsewhere, to the end that the same, or so much thereof as may be necessary, be applied to the restoration of the trust bonds or the money received for them.

H. M. Banner and others, official liquidators of the Royal Bank of Liverpool, excepted to the decree on the following grounds:

1. That the other petitioners have no lien by way of subrogation on the State bonds, because their bills were not accepted by the Royal Bank; and that if any such lien existed, it is subordinate to that of the Royal Bank.

2. That there was no proof of any dedication, assignment nor setting apart of any fund to the payment of the bills of exchange; and that if there were any such dedication there was no proof of notice of it to the Royal Bank, and that any dedication, assignment or setting apart of the State bonds for such purpose could only be in subordination to the rights of the Royal Bank.

3. That the Royal Bank did no wrong in paying bills presented in the order of their presentation.

4. That the Royal Bank was not bound to accept and pay the petitioner's bills when presented; that even if it was, it is only liable to the State Bank for not doing so, and that in no event is it liable to the forfeiture of its lien in the State bonds, which is the result of the decree.

Lowndes, for appellants.

————, contra.

April 5, 1876. The opinion of the Court was delivered by

WILLARD, A. J. The only question before us comes up on the appeal in behalf of the Royal Bank of Liverpool from the Circuit decree, and involves the right of the petition-

*274

ers to have their drafts *paid out of the proceeds of the securities in question in preference to the claims of the Royal Bank to such securities. On this question we are satisfied with the conclusions stated and reasons assigned by the Referee in his report, and hold the decree of the Circuit Court reversing such conclusions erroneous.

The securities were taken exclusively for the benefit of the Royal Bank. The deposit in the State Bank was a mere bailment, not inconsistent with a special property in the Royal Bank under the agreement by which they were put in pledge. The place of deposit was optional with the Royal Bank. The proceeds of that portion of the securities recovered must be regarded as standing in the same position as the securities themselves previous to the removal from the place of original deposit. Holders of drafts drawn upon the Royal Bank, at least previous to acceptance, had neither a legal nor equitable claim against nor lien upon this specific fund, nor privity with the agreement between the banks. They could not claim that their drafts were to be regarded as drawn on the faith of such securities under the agreement with the Royal Bank, for that contract did not contemplate transactions of that nature. Even if it had been shown that, as between the drawer and payee, such an understanding existed, it would not affect the rights of the Royal Bank, whose claim to securities was unaffected by any authority in the State Bank to make any such transactions. The right of the State Bank to draw was not absolute, but dependent upon the assent of the Royal Bank. The holders have no better claims, legal or equitable, than the State Bank, and that institution had no authority under the agreement with the Royal Bank to impose any charge or lien on the securities.

It follows that the Royal Bank is entitled to the proceeds of the securities to the extent that may be necessary to satisfy its claim under the original agreement.

MOSES, C. J., and WRIGHT, A. J., concurred.

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7 S. C. *275

*STATE ex rel. SCOTT v. SMITH.

(Columbia. April Term, 1876.)

[*Mandamus* ⊂⊃152.]

The only proper parties to mandamus are the relator or relators claiming to be interested in the performance of the duty and the party upon whom the duty is imposed by law, and it is inconsistent with the nature of the remedy to bring in as defendants parties only collaterally or incidentally interested in the subject of the controversy.

[Ed. Note.—Cited in Sanders v. County Com'rs, 7 S. C. 363; State ex rel. Snelling v. Turner, 32 S. C. 350, 11 S. E. 99.

For other cases, see Mandamus, Cent. Dig. § 293; Dec. Dig. ⊂⊃152.]

Before Moses, J., at Newberry, August, 1875.

This was a petition for a writ of mandamus. The case is stated in the following opinion of His Honor the Circuit Judge:

Moses, J. The relator, Harry B. Scott, as School Commissioner for the County of Newberry, exhibited his petition in this Court on the 8th day of April, 1875, verified by his oath, setting forth as follows:

That he is the School Commissioner for Newberry County.

That Jesse C. Smith, as County Treasurer for said County, has collected by poll tax for educational purposes for the present fiscal year twenty-one hundred and forty-eight (2,148) dollars, besides a surplus arising from the fund likewise raised by taxation for the present year, for the support of widows and orphans of persons killed for their political opinions, not yet exactly ascertained, but considerable in amount.

That both these funds should be applied exclusively to the payment of debts for educational purposes for the present fiscal year, in opposition to the claims of those creditors for educational purposes anterior to the present fiscal year, who insist that both these funds should be exclusively applied to the satisfaction of their debts.

The relator prayed for a writ of mandamus to require Jesse C. Smith, as County Treasurer for Newberry County, to pay the funds in his hands for educational purposes, as set forth in the petition, exclusively to debts contracted for such purposes for the present fiscal year.

Thereupon an order was granted, requiring Jesse C. Smith, as County Treasurer, to shew cause, at a day therein fixed, why mandamus should not issue in accordance with the prayer of the petition; also enjoining him from paying out any of the said funds until the further order of this Court.

*276

*It was further ordered that the relator, looking to a full hearing in the premises, should have leave to make one or more of the holders of past due school claims, with Jesse C. Smith, parties defendant by service of a copy of the petition and order.

Such service was made upon Jesse C. Smith, County Treasurer, and upon Cynthia Mower and Tabitha E. Andrews, claiming to hold past due school claims, and therefore parties interested in this suit and representatives of the class to which they belong.

Jesse C. Smith put in his formal answer,

submitting to such order as the Court might pass upon the hearing; but the other defendants claim that the fund now in controversy should be applied exclusively to school claims now past due, and not in any part to the school claims for the present fiscal year, and they deny the right of the relator to institute the present proceedings.

These are the points raised for adjudication, which the Court will now briefly consider.

As to the status of the relator in this suit and his right to institute the same, this Court has no doubt. As a taxpayer it is his right, and as School Commissioner his official duty, to look to the proper application of all moneys raised by taxation for educational purposes.

As to the application of the fund in controversy, the defendants rely upon the Act of the General Assembly, (No. 465, p. 565,) approved March 3, 1874, which in its terms is clear and explicit, and if standing alone would be conclusive; but by the relator reference is made to a later Act of the General Assembly, (No. 604, p. 692,) approved March 17, 1874, Sections 2 and 3, wherein, under most severe penalties, public officers (State or County) are forbidden to divert or appropriate the funds arising from any tax levied and collected for any one fiscal year to the payment of any indebtedness contracted or incurred for any previous fiscal year.

The relator also cited Sections 2 and 3 of Article IX of the Constitution, in the light of which these conflicting Acts have to be construed.

The Court is of opinion that the Act (No. 604) approved March 17, 1874, renders the Act (No. 465) approved March 3, 1874, inoperative, and that under the authority of the Act No. 604 and the second and third Sections of Article IX of the Constitution the relator's position must be sustained.

*277

*Since the hearing the Acts of the last session of the Legislature have been published, and the attention of the Court has been directed to one of the Acts of that session, to wit, No. 762.

The Court has heard no argument on the construction and applicability of that Act to the present controversy, but is, upon careful consideration, of the opinion that the Legislature never intended that Act to apply to the funds for educational purposes, and that by proper construction it cannot be so applied.

It is therefore ordered and adjudged that the proceeds of the poll tax, as set forth in the relator's petition, be held exclusively liable for educational purposes for the present fiscal year, except so much thereof as may be required to meet the expenses of the relator incurred herein on behalf of said fund, including a proper counsel fee to Messrs. Baxter & Johnstone, his attorneys, whereof reference is made to H. C. Moses, Esquire, Clerk of the Court, to inquire and report at the earliest practicable day.

It is also ordered and adjudged that the net amount of said fund, when ascertained be apportioned by the School Commissioner for the County of Newberry to the different school districts, and that the same be paid out by the County Treasurer for Newberry County, upon the "orders of the Board of School Trustees," countersigned by the School Commissioner, except the claims of Trustees for enumerating school children, which are to be paid on the order of the School Commissioner.

It is further ordered and adjudged that the surplus of the funds raised for the support of the widows and orphans of persons killed for their political opinions be disposed of in like manner, when the same is exactly ascertained.

William M. Brooks and Cynthia Mower appealed, and moved this Court for a reversal of the same and a dismissal of the petition herein.

Jones, Jones & Mower, for appellants:

This case came up on a petition filed by Harry B. Scott, as School Commissioner for Newberry County, for a mandamus against Jesse C. Smith, as County Treasurer, to compel him to pay over to the said H. B. Scott, as School Commissioner, the funds raised the present fiscal year for educational purposes by poll tax and the surplus remaining from the funds raised for the support of the wid-

*278

ows *and orphans of persons killed on account of political opinions, to be applied by him to the payments of debts contracted the present fiscal year for educational purposes.

The appellants, holding warrants for school claims past due 1st of November, 1873, issued long since by the School Trustees and countersigned by M. M. Long, the then School Commissioner, insist that said fund shall be pro-rated among the school claims past due 1st of November, 1873, as directed by the Act of the Legislature passed 3d of March, 1874, and that the relator has no right to institute this suit.

I. The relator, H. B. Scott, has no legal right to institute this suit:

First. Because he has no legal interest in the matter.

To be entitled to the writ of mandamus the relator must show that the respondent is bound to the performance of some certain specific duty of a ministerial character imposed by law, in the performance of which the relator has a legal interest.—Morton, Bliss & Co. v. Comptroller General, 4 Rich., (N. S.,) 430.

It is essential to the granting of the writ as against public officers, that the relator on whose application the relief is sought should show some personal interest whose protection he seeks to enforce; and it may be stated,

as a general principle, that mandamus will not lie to compel action upon the part of public officers when it is apparent that the relator has no direct interest in the action sought to be coerced and that no benefit can accrue to him from its performance.—High on Ex. Leg. Rem., § 33.

The mandamus should be applied for by the party beneficially interested.—Ex parte Flemming, 2 Wallace, 759.

Second. Because warrants on the said Treasurer have long since been legally issued by the School Trustees and countersigned by the relator's predecessor for the payment of the claims of the appellants, and the matter is now beyond the control of the relator; his duties are functus officio.

When the writ is sought upon the relation of the Board of Education of a city to compel the City Treasurer to pay certain orders, drawn by the Board in favor of a contractor for the erection of school buildings, the Board having parted with their interest in the funds, by drawing and delivering the or-

*279

ders, are not proper *parties to institute proceedings to compel payment when the real party in interest sees fit to acquiesce in the refusal.—High on Ex. Leg. Rem., § 434; State v. Haben, 22 Wis., 660.

Third. Because the School Trustees for the different school districts, upon the orders of whose Board, countersigned by the relator only, can school funds be paid by the Treasurer, were not made parties with the relator. To permit the School Commissioner to act alone in this matter is to declare his right to control the school fund without the consent of the School Trustees, in violation of the Act of 1873, No. 285.

Fourth. Because the relator, as School Commissioner, had no power or right over the fund in question, except to countersign such warrants as the School Trustees might issue and leave their collection to the parties in interest.

II. The poll tax and surplus of taxes raised for the support of widows and orphans of those killed for political opinions should be applied pro rata to the payment of school claims past due 1st November, 1873.—Act 3d March, 1874, No. 465. See Sections 3, 7, 8, of Act 1874, No. 570.

The third Section of said last Act directs a levy of two mills to be applied to the support and maintenance of public schools for the fiscal year commencing November 1st, 1874. The seventh Section directs a levy of 1½ of a mill to pay certain past due claims. The eighth Section authorizes a levy of three mills to be exclusively applied to County purposes for the fiscal year commencing 1st November, 1874, and this fund is directed to be kept separate and apart from all other funds. This Section also authorizes certain Counties to levy a tax to pay past indebtedness.

These Sections, indeed the whole scope of the legislation on this subject, show that the Legislature had two objects in view—one was to provide for the current expenses of each year, and the other was to provide for the payment of past due claims, each by a separate levy.

The Act of 17th March, 1874, No. 604, could not therefore have been intended to annul the Acts last mentioned, which were only passed three and fourteen days before it.

III. The Act of 17th March, 1874, does not repeal the Act of 3d March, 1874, nor is it inconsistent with it.

First. It is not repealed by express words, nor is there any general repealing clause in the Act of 17th March, 1874.

*280

*Second. It is not repealed by implication as being inconsistent with the Act of 17th March, 1874, which only relates, as its wording clearly shows, to funds collected for any fiscal year,—that is, to pay the expenses of that fiscal year,—and not to funds collected in one fiscal year and directed to be applied to the payment of past due indebtedness. The two acts are perfectly consistent.

Repeals by implication are not favored in law, and are never allowed but in cases where inconsistency and repugnancy are plain and unavoidable.—Wallace v. Bassett, 41 Barb., 92; Sedgwick on Con. Law, 127; Dwarris on Stat. and Con., 156; Cool v. Smith, 1 Black, 459; Wood v. U. S., 16 Peters, 342; 10 Barb. R., 448; Hartford v. U. S., 8 Cranch, 1, 9; Brown v. County Coms., 21 Penn., 37; Street v. Commonwealth, 6 Watts & Serj., 299; Brown v. Sease, 5 Hill, 221; Williams v. Potter, 2 Barb., 316; McCool v. Smith, 1 Black U. S. R., 470.

The question resolves itself into the inquiry: What was the intention of the Legislature? Did it mean to repeal?—U. S. v. Cased Hair Pencils, 1 Payne, 400.

Sedgwick says at page 124 that when the intention of the Legislature was apparent that the subsequent Act should not have such an operation, then, even though the words of such statute, taken strictly and grammatically, would repeal the former Act, the Courts of law, judging for the benefit of the subject, have held that they ought not to receive such a construction.

Third. The reason of this rule of construction is more strongly applicable to two Acts passed at the same session, as these two Acts were. The Legislature, by the very act of publishing these Acts, which the relator contends have been repealed, after the passage of the Act of 17th March, 1874, and in the same volume with it, declares its construction that they are not inconsistent and shall stand.

The construction contended for by the relator would repeal the following previous Acts passed at the same session: 15 Stat., 657, § 3; 658, §§ 7, 8; 659, § 8; 614, § 4; 515, 516, §§ 3, 8.

Fourth. If the construction contended for by the relator is correct, the Act of March 17, 1874, is clearly unconstitutional, because it takes away from the Legislature the power of raising money and having it applied to the payment of past indebtedness, which is expressly required of the Legislature by Section 3 of Article IX of the Constitution.

*281

*The expenses incurred by the relator in this cause, including his counsel fee to his attorneys, were improperly ordered by the decree of His Honor M. Moses to be paid out of the fund, because the institution of these proceedings by the relator was officious and without authority of law or of the parties interested in said fund, and has worked great injustice to them by tying up their funds by injunction.

Baxter & Johnstone, contra:

1. The law, both in its letter and spirit, sustains the decision of the Circuit Court.—Sections 2 and 3, Article XIX, of the Constitution; Act of the General Assembly, No. 604, page 692, approved March 17, 1874.

2. That the Act above cited repeals the conflicting Act, No. 465, page 565, approved March 3, 1874.

3. Deficiencies cannot be provided for, according to the provisions of the Constitution above cited, except by an additional tax levy, and not by the diversion of an annual tax from the expenses of the year for which, by law, it was levied.

May 8, 1876. The opinion of the Court was delivered by

WILLARD, A. J. The original application in the Circuit Court was for a mandamus to compel the defendant, the Treasurer of Newberry County, to pay certain moneys to the relator, the School Commissioner, alleged to be in the County treasury, applicable to disbursement by the relator as School Commissioner. The object of the mandamus was to obtain a judicial construction of certain Acts of the Legislature, on which depended a question as to the amount of money in the County treasury applicable to certain specific purposes.

It appears that there was a conflict between two classes of claimants against the County treasury, involving the disputed construction of the statutes. An order was made on the petition for mandamus quite inconsistent with the nature of that remedy. It was ordered "that the relator, looking to a full hearing in the premises, should have leave to make one or more of the holders of past due school claims, with Jesse C. Smith, parties defendant by service of a copy of the petition and order." By the same order the County Treasurer was enjoined from paying out any of the said funds until the further order of the Court.

*282

*The appellants were brought in, as parties defendants with the County Treasurer, as holders of claims of a certain class interested in the question. A hearing took place, which resulted in an order which has none of the characteristics of a peremptory writ of mandamus, but in form and substance is assimilated to a decree in equity in relation to the disposition of assets pending in that Court.

The County Treasurer did not appeal from the order, although, by consenting to be bound by it, it was possible that the obligations it imposed upon him might be inconsistent with his official duty as prescribed by law, and thus become prejudicial to him. We cannot supply the want of an appeal on his part so as to pass upon all the features of the order. So far as the appellants are concerned, we are authorized to examine its propriety.

The appellants are entitled to object to all interlocutory orders entering into the final order, and this would include the order making them parties defendant.

It was inconsistent with the nature of the remedy by mandamus to bring in parties only collaterally or incidentally interested in the subject of the controversy, or at most directly interested in the question involved alone. The only proper parties to mandamus are the relator, or relators, claiming to be interested in the performance of some specific duty imposed by law, and which, after demand, has been wrongfully refused and the party by law bound to perform such act of duty. The only question that the Court could properly have considered was the right presented by the relator in behalf of himself and the legal consequences of the refusal of such right.

An attempt to make an order in the nature of a general adjudication between claimants of different classes having conflicting interests, and calling in for that purpose representatives of the respective classes, was an entire departure from the practice in cases of mandamus, and in fact to employ a petition for mandamus as a substitute for a complaint in the nature of a bill in equity. We have already held, in Jacob v. Winnsboro National Bank, that such an equitable jurisdiction cannot be asserted for the purpose of distributing funds in a public treasury among the respective parties entitled to them by law.

It was, therefore, improper that the appellants should be made parties, and the petition and order must be set aside as affecting their interests.

*283

*We have already pointed out, in the case just referred to, the proper remedy, where parties seek to obtain payments from public officers specifically authorized by law, and it is unnecessary to recur at this time to that subject.

The motion of the appellants must be granted.

MOSES, C. J., and WRIGHT, A. J., concurred.

7 S. C. 283

THE STATE v. JACKSON.

(Columbia. April Term, 1876.)

[*Criminal Law* ⟸302.]

Indictment for conspiracy against "A and B" alone. Both appeared and pleaded to the indictment. "B" was put upon trial and "A" used as a witness for the State. After the jury retired a nol. pros. was entered as to "A," and a verdict of guilty rendered against "B:" *Held*, That judgment could not be pronounced on the verdict, the effect of the nol. pros. being to leave the indictment as if it charged "B" alone with the conspiracy.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 688–697; Dec. Dig. ⟸ 302.]

[*Conspiracy* ⟸43.]

Two or more persons must combine or there can be no conspiracy, and this joint combination must be laid in the indictment or it cannot be sustained.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84–99; Dec. Dig. ⟸43.]

[*Conspiracy* ⟸38.]

Where the indictment alleges the joint combination of two, and nol. pros. is entered as to one, the effect of the entry is to leave the indictment as if it charged one alone; and if this be done before verdict of guilty against the other, judgment cannot be pronounced against him.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 72; Dec. Dig. ⟸38.]

[*Witnesses* ⟸380.]

The State cannot give in evidence declarations made by its own witness out of Court contradictory of his statement on the examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1214; Dec. Dig. ⟸380.]

Before Cooke, J., at Greenville, July, 1875.

This was an indictment against Walter Jackson and Emanuel Fields for conspiracy to cheat and defraud William Smith. The indictment was in the usual form, charging that the defendants "unlawfully did combine, conspire, &c."

The defendants appeared and pleaded "not guilty."

At the trial Fields was used by the Solicitor as a witness for the State. After the jury retired and before a verdict was rendered, a nol. pros. was entered as to Fields, and then a verdict of guilty was rendered against Jackson.

Fields having testified to facts tending to shew that the transaction was an innocent one on the part of the defendants, there being no intention on their part to cheat and defraud, the Solicitor was allowed by the Court to examine other witnesses to shew that Fields had previously made statements

*284

in reference to the transac*tion entirely contradictory of those now made by him, so far they related to the intention of the defendants.

Jackson appealed and moved this Court for a new trial on grounds which sufficiently appear, in the opinion of the Court.

Jones, Jones & Mower, Earle & Wells, for appellant:

This was a joint indictment against the appellant and Emanuel Fields. The Solicitor severed and put the appellant on trial and examined Fields and the prosecutor, and then introduced other witnesses to prove that Fields had made statements out of Court different from those made on the trial.

1. The offense charged was a conspiracy, and only two were implicated or indicted, and the case of one of them, Emanuel Fields, was terminated before judgment pronounced, and the termination of the case against one of two conspirators by nolle prosequi or acquittal before judgment is an acquittal of the other. In riot and conspiracy, where one cannot be indicted for an offense committed by himself alone, the acquittal of those charged in the same indictment with him as co-defendant must of course extend to him.—1 Whart. Cr. L., § 431.

It is clear that if the case be thus (by nolle prosequi) withdrawn when on trial, this now operates as an acquittal.—1 Whart. Cr. L., 513.

The application to sever is more especially the right of the defendant, and is granted only upon strong showing.—1 Bishop on Criminal Procedure, §§ 1018, 1019; State v. McLenden, 5 Strob., 85.

The case from 68 Eng. C. L., 148, shows that the defendant pleaded guilty, and no force, therefore, can be brought to this case from it. In the case of The King v. Cooke, (16 Eng. C. L., 316,) four were indicted, together with divers other persons unknown. The jury found that the defendant was guilty of conspiracy with his brother, Richard Stafford Cooke, who had pleaded over. A motion in arrest of judgment was made, on the ground that the verdict showed a conviction of conspiracy with one not convicted. Abbott, C. J., and Bailey and Holroyd, Justices, overruled the motion on the express ground that the verdict did not show that he "did not conspire with the persons unknown." The necessary inference from this decision is, inevitably, that if the verdict had been

*285

that he *conspired with Richard Stafford Cooke alone, then the judgment would have been arrested. In the case before the Court, one of two alleged conspirators is used as a witness against the other and swears that the act was done to decide a wager merely. Fields cannot be tried. Can the verdict against Jackson be sustained?

2. Emanuel Fields was improperly allowed to testify, because he was a co-defendant with Jackson, and had neither been acquitted nor a nolle prosequi as to him entered until after he had testified and the jury had retired. One of several persons indicted, although he has pleaded and defendant separately, is not a competent witness for his co-

defendant unless immediately acquitted by a jury or a nolle prosequi entered, and the same rule applies to accessories. Whether the trial be joint or separate, the rule is the same.—1 Wharton's Cr. L., § 790.

In an indictment against several, where the offense is such that it may have been committed by several, they are not of right entitled to be tried separately, but are to be tried in that manner. When the indictment includes several defendants, one of them cannot regularly become a witness for the others.—3 Whart. Cr. L., 3196.

Respectable authority has settled that in no case where two or more persons are jointly charged with an offense shall one be a witness for the other, whether jointly or separately tried, at least until the party offered as a witness was either previously acquitted or convicted. And even this last qualification to the general rule has been doubted, and the position to the full extent contended for, that a party to the record cannot, in any event, be received as a witness for his associates in accusation.—3 Whart. Cr. L., 3193. These propositions of law have been somewhat modified by our own statutes, and such witnesses are competent as witnesses for the defense, but they are not compellable to testify.—See also 1 Greenl. on Ev., § 407. Conspirators may be tried alone in two cases—first, where one of two dies; and secondly, where only one appears.—1 Bish. on Cr. Pro., § 1022.

3. The State has no right to impeach her own witness by proving that he has made different statements out of Court, or by urging by argument that he should not be believed.—Quinn v. State, 14 Md., 589; 2 Phil. Ev., Ch. X, § 4; Roscoe Cr. Ev., 67.

The testimony of Emanuel Fields must be taken as a whole or it must be entirely rejected. The Solicitor has no right to elect to take a part of his testimony as true and re-

*286

ject the remainder as *false. If it be taken as entirely true, then there is no criminal offense proven. If it be entirely rejected, then also is no criminal offense proven.

Blythe, Solicitor, contra:

The appellant in this case was indicted, in connection with one Emanuel Fields, for conspiracy to defraud. On motion of the Solicitor, the cases were severed, and appellant only put upon his trial. He was convicted and sentenced to ten years in the Penitentiary.

1. As to the first ground in arrest of judgment: The entering a nolle prosequi does not terminate the case.—State v. Haskell, 3 Hill, 75; State v. Howard, 15 Rich., 274; 1 Chitty's Crim. Law, 479, and cases there cited; 2 Russell on Crimes, 691. One of two conspirators may be convicted without reference to the guilt of the one not on trial.—King v. Cooke, 16 Eng. Com. Law, 816. The defendant has no right to object to discontinuance as to a co-conspirator.—68 Eng. Com. Law, 148.

2. As to the second ground in arrest of judgment, the witness was not on trial; the presiding Judge cautioned him that he was not bound to criminate himself, and, he having testified under such circumstances, appellant has no right to complain.

3. The witness, Emanuel Fields, though called by the State, was unfriendly, and the State had a right to point out discrepancies in his testimony.—Ros. Crim. Ev., pp. —.

4. As to the sufficiency of the indictment: It was the duty of the defendant to show in what particular it was defective. "The Court is not bound to inquire of the errors if the party does not show them."—Back. Abr., 101.

But the indictment was sufficient.—1 Bishop Crim. Procedure, 516; 2 do., 206 to 220, inclusive; 2 Rus. on Crimes, 690, et sequitur.

6. As to the motion for a new trial, the evidence was fairly submitted to the jury, with proper instructions, which found him guilty and the Court will not disturb the verdict.—Lindsey v. Bland, 2 Speer., 33; Butler & Co. v. Carter, 1 Strob., 14; Upson v. Horn, 3 Strob., 110; Parker v. Bryce, 3 Strob., 551; Hyams v. Valentine, 4 Strob., 408.

*287

*May 18, 1876. The opinion of the Court was delivered by

MOSES, C. J. The appellant and Emanuel Fields were indicted for a conspiracy to cheat and defraud one William Smith. They had both plead "not guilty," and appeared. The State severed. Jackson was put on his trial. Fields was the principal witness for the prosecution. After the jury retired a nol. pros. was entered as to him, and a verdict of "guilty" rendered against Jackson. Special grounds are submitted in arrest of judgment, and, principally among them, that the prosecution of one of the two parties against whom the conspiracy was charged having terminated before judgment against the other, it operates per se as an acquittal of the defendant on trial. This proposition cannot be maintained as a general one to the extent thus claimed for it. A nol. pros. does not necessarily end the prosecution nor bar the State from preferring another indictment on the same charge.—State v. Haskett, 3 Hill, 95; State v. Howard, 15 Rich., 274. Much less can it always operate as an acquittal. This conclusion, however, by no means settles the main points involved in the question made by the appellant. We must consider the bearing and effect of the verdict against him. The term "conspiracy," according to the books, implies a combination between two or more to do either an unlawful act or to accomplish by unlawful means a legal end. The concurring will of at least two persons is as necessary to the offense as that of three to the constitution of a riot. The essential prerequisite of a concert between

two or more to establish the charge of a conspiracy has led to changes and modifications in the general rules which attained and prevailed at common law in relation to offenses which might be committed by a single person. In regard to the "conspiracy," Mr. Bishop, in his second volume on Criminal Procedure, § 168, says: "There is no one of the recognized crimes which in matter of law as well as of pleading is more afloat than this." In his first volume, § 960, he says: "The offense of conspiracy being committed only where more persons than one join in the act of wrong-doing, rests upon somewhat different ground in respect to the matter of separate trial than most other offenses. Here may indeed be separate trials for this offense, as, for instance, if only one appears to the indictment he may be tried alone, especially if he so requests. And where one of two conspirators who are jointly indicted dies before

*288

trial, the living one *may be tried alone. But except where some reason of this sort prevails, no separate trial will be allowed in cases of conspiracy." If all the defendants charged in an indictment for conspiracy are acquitted but one, unless the offense is alleged to have been committed with others unknown, from the very nature of the execution the verdict against that one could not be permitted to stand. Where two are charged, and are both present in Court, after plea filed by each, a nol. pros. as to one before verdict rendered leaves the count in the indictment inoperative and without effect as to the other, because in that event no conspiracy is alleged against either; for, to constitute it, there must be the conjoined action of both. The indictment here, according to the usual form, charges that Jackson and Fields "unlawfully did combine, conspire, &c." If the effect of the nol. pros. is to discontinue the charges as to Fields, there can be none against Jackson, for the essential ingredient is the combination. Could it be said in such a case the conspiracy is found as laid? In Rex v. Kinnersly and Moore, (1 Stro., 193,) it was held that one might be convicted of conspiracy before the trial of the other. Here, however, it must be borne in mind that the other had not appeared and plead. The reason given, too, in support of the judgment by Eyre, C. J., would imply that the indictment alleged the conspiracy against the two named defendants cum multis aliis, for he referred in support of his view to Rex v. Ludbury, where four were indicted for a riot, two found guilty and the other two acquitted; and on an examination of the case (12 Mod., 262,) it will be seen this was held a discharge of all, though Holt, C. J., said it would have been otherwise had it been laid cum multis aliis. On this distinction alone, too, did the case of The King v. Cook proceed. 7 Dow. and Ry., 673, and Rex v. Kinnersly and Moore was cited as an authority for the conclusion of the Court. Besides, this point of difference is to be observed in the case last named and the one before us. There all the parties had not appeared and plead. Here both Fields and Jackson had plead to the indictment and could have been tried together. In the former case a verdict might probably have been sustained against one, the allegation being against both, though one only was on trial; but here, before the verdict was rendered, the charge, by the nol. pros., was dismissed as to Fields. The indictment, therefore, alleging a conspiracy by one alone, the effect of the nol. pros. destroys the averment of the "common design,"

*289

*which, Mr. Russell says, is "the root of the charge." In the case of the State v. Calder, (2 McC., 462,) Mr. Justice Nott, delivering the opinion of the Court, said: "The law is too well settled to be questioned at this day, that less than three persons cannot commit a riot. If, therefore, any number of persons are indicted, and all but one or two are acquitted, judgment cannot be rendered against those who are convicted, unless the act be charged to have been committed with other persons unknown."

As the motion to arrest the judgment must prevail, it is only necessary to notice very briefly so much of the grounds for a new trial as alleges error on the part of the Court in allowing the State to prove declarations made by its own witness entirely contradictory of his statement on the stand. While a party is allowed great latitude in examining an unwilling witness, though his own, he is not at liberty either to attack his credibility directly or to prove declarations inconsistent with his evidence in Court. Such a course would, in fact, give greater effect to what a witness might say when not under the obligation of an oath than is to be accorded to him when testifying with all the sanction and responsibility which it imposes.

The motion in arrest of judgment is granted.

WRIGHT, A. J., concurred.

WILLARD, A. J. I am of opinion that the granting of a nol. pros. after the jury were charged with the case ought to have the same effect as an acquittal in arresting judgment.

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7 S. C. *290

*POWERS v. McEACHERN.

(Columbia. Nov. Term, 1876.)

[*Equity* ⇐379.]

Where, in an equity cause, an order is made referring certain issues to the jury, the parties who make no objection to the order at the time it is granted cannot afterwards make it the ground of an exception.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 807; Dec. Dig. ⇐379.]

[*Appeal and Error* ⟸204.]

Where evidence is received without objection at the trial of an equity cause it cannot it seems, be afterward made a ground of exception.

[Ed. Note.—Cited in Bowen v. Atlantic & F. B. V. R. Co., 17 S. C. 578.

For other cases, see Appeal and Error, Cent. Dig. § 1258; Dec. Dig. ⟸204.]

[*Wills* ⟸496.]

A testator who had legitimate children by a wife from whom he had been separated many years, and a family of illegitimate children by a woman with whom he was cohabiting at the time he made his will, devised and bequeathed his estate for the benefit of his wife and children: *Held*, Upon the proof, that by wife and children the testator meant his illegitimate children and their mother, and that they were entitled to the estate of the testator as his devisees and legatees.

[Ed. Note.—Cited in In re Robb's Estate, 37 S. C. 39, 16 S. E. 241.

For other cases, see Wills, Cent. Dig. § 1065; Dec. Dig. ⟸496.]

[*Equity* ⟸427.]

Where a testator having a legitimate and also an illegitimate family devised his estate to the latter, and the former commenced an action against the latter, claiming the estate as the devisees and legatees meant by the testator, and making no claim to three-fourths thereof, under Section 4 of the Act of 1795, but demanding general relief: *Held*, That the plaintiffs by their complaint had made no such election as deprived them of their rights under the Act of 1795, and that under the prayer for general relief such rights could be established.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1009; Dec. Dig. ⟸427.]

Before Townsend, J., at Darlington, November Term, 1874.

This was an action by Charles Powers and others against James A. McEachern and others.

The case on which the appeal was heard is contained in the decree of the Circuit Court, the amendment agreed on by counsel and the will of John G. Powers, below set forth.

The decree of the Circuit Court is as follows:

Townsend, J. John G. Powers died in 1867, leaving a considerable real and personal estate. Soon after his death letters of administration upon his personal estate were duly granted to Sidney F. Cole. Some time in 1869 the last will and testament of John G. Powers was discovered and admitted to probate. The letters granted to Sidney F. Cole were then revoked, and, the executor named in the will having predeceased the testator, letters of administration cum testamento annexo were granted to James A. McEachern. On the twenty-first day of October, 1870, a decree was rendered by the Probate Court for Darlington County partitioning and distributing all the property of the testator left after the payment of his debts, according to the provision of the will, among those claiming at that time to be the heirs and devisees of the testator. Some time in 1872 this complaint was filed by the plaintiffs against the defendants, for the purpose of impeaching

*291

the *decree of the Probate Court for an account from the administrator cum testamento annexo, and a distribution and partition of the property left by the testator among the plaintiffs, as his heirs and devisees. The allegations, substantially, are: That the plaintiffs are the children and lawful heirs of John G. Powers and Sarah Powers, his wife; that John G. Powers and Sarah Turner intermarried on the fourth day of January, A. D. 1813; that Sarah Turner died in May, 1859; that John G. Powers left him surviving as his sole heirs at law and devisees the plaintiffs; that Powers died, leaving a considerable estate; that letters of administration were granted to Sidney F. Cole and afterwards revoked upon discovery of his last will and testament; that the executor therein named predeceased the testator, and letters cum testamento annexo were duly granted to James A. McEachern; that the youngest of the plaintiffs is above the age of twenty-one years, and, according to the provisions of the will partition can be made; that the defendants confederated together to defraud the plaintiffs, and sought in the Probate Court to partition the property left by John G. Powers among his pretended children and wife; that the plaintiffs, being non-residents of the State, had no knowledge of the proceedings instituted for this purpose; that a decree of the Probate Court was rendered partitioning and distributing the estate among the parties claiming to be the heirs at law and devisees of the testator.

The plaintiffs pray that the decree of the Probate Court may be impeached for the fraud, that there be a full accounting by the administrator and his predecessor, and by all the defendants who have in any manner intermeddled with the said property or recovered any share or portion thereof; that they have judgment for the recovery of the real estate and delivery of the assets and personal property, and for judgment against the administrators for any amount that may be upon a full accounting found due, also for partition and distribution according to the terms of the will among the plaintiffs, and for general relief.

The defendants in their answer admit the death of John G. Powers, the grant of administration and administration cum testamento annexo, the distribution and partition of the testator's estate in accordance with the decree of the Probate Court, the provisions of the will as substantially set forth in the complaint, but deny all the other allegations.

*292

*The defendants, Sidney F. Cole and James A. McEachern, also claim that they have been discharged by a proper Court and protected in this way from the demands of the plaintiffs. At the November Term of the Court of Common Pleas for Darlington, of the year

1873, the case was heard. Certain issues of fact raised by the pleadings were submitted to a jury. The first was whether John G. Powers and Sarah Turner were lawfully married; the second, whether Sarah Turner was a free person of color or a white woman; third, whether John G. Powers, when he used the terms in his will of "wife and children," meant Sarah Turner and her children or Sarah Conner and her children. The finding of the jury in the first issue was "that John G. Powers was married to Sarah Turner." On the second, "that Sarah Turner was a free person of color." And on the third, "that John G. Powers, when he used the term 'wife and children' in his will, meant Sarah Conner and her children."

At the November Term, 1874, of the Court of Common Pleas for said County, the case was heard upon its merits, and the question before the Court for decision is whether the plaintiffs are entitled to the relief demanded in their complaint. The plaintiffs, it will be observed, claim to be the heirs at law and devisees of John G. Powers, and pray for a partition of the property of the testator according to the terms of the will. They claim under the will, and not under the Act of 1795.

The fact of the marriage of John G. Powers and Sarah Turner is unquestionably established. This is the finding of the jury, and a review of the testimony satisfies my mind that the verdict is correct.

The status of Sarah Turner at the time of the marriage is likewise established by the verdict of the jury. An examination of the testimony irresistibly conducts my mind to the same conclusion.

The meaning of the testator when he used certain terms in his will, as found by the jury, seems to be substantiated by the evidence. It is asserted by the plaintiff, however, that there was error in allowing parol testimony to go to the jury, because in effect it was a violation of the rule that parol testimony will not be admitted to vary, alter or contradict a written instrument. At the time this issue of fact was submitted to the jury no objection was urged by the plaintiffs either to the submission of the issue or the admission of parol testimony to explain the

*293

terms employed in the *will. It is too late to urge the objection to the competency of the testimony. Assuming that it is not, was the testimony incompetent? The identity of the thing granted or devised can be ascertained by resort to extrinsic testimony. The identity of the person to whom the gift or conveyance is made can be ascertained in the same way. Such evidence is absolutely indispensable to the execution of all testamentary papers.—Greenleaf on Ev., 266; Pell v. Ball, Speers Eq., 83. I think the evidence was admissible. Suppose the testimony was incompetent and the ascertainment of the intention of the testator was a question of law, to be determined by an examination of the terms of the will, the same conclusion as that reached by the jury can be attained. The testator, in the second clause, directs that his property shall be kept together until his youngest child attain the age of twenty-one years. Sarah Conner and her children were living upon the land of testator at the time of the execution of the will. The testator must have alluded to them when he directed that they should continue to live upon it until a certain event happened. Sarah Powers was living in another State with her children. If the marriage with her took place in 1813, the youngest child of that marriage must have attained the age of twenty-one long before the execution of the will, and the testator, therefore, could not have intended her and her children when he used the words "wife and children." In the third clause he directs a partition among his wife and children when his youngest child then living attains the age of twenty-one years. The language employed in this clause indicates that the intention of the testator was to give his property to Sarah Conner and her children, who were living on the land at the time of the execution of the will. Taking all the provisions of the will with its language into consideration, my conclusion is that the testator meant by the words "wife and children" Sarah Conner and her children.

Certain conclusions of law must how be attained to decide this case. Was the marriage between John G. Powers and Sarah Turner valid? It appears that the latter was a free person of color; and the question arises, could a white man contract marriage with a free person of color in 1813 in this State? There was no statute in South Carolina at the date of this marriage inhibiting white persons from marrying free persons of color. In the absence of such a prohibition, was it contrary to the common law or the decisions of the Courts? In the case of the State v. Harden [2 Speers, 152, note] it

*294

*was held that "free negroes, without any of the political rights which belong to a citizen, are still to some extent regarded by the law as possessing both natural and civil rights. The rights of life, liberty and property belong to them, and must be protected by the community in which they are suffered to live. They are regarded in law as persons."

In the case of the State v. Hill, (2 Speers L., 158,) it was held that "free negroes have all the rights of property and protection which white persons possess, with the exception that they cannot with force repel force exhibited by a white man," &c. Justice O'Neall, in his Digest on the Negro Law, in 1848, Section 46, says free persons of color are sui juris. In Section 47, he says: "They may contract and be contracted with. Their marriages with one another and even with white persons are legal." It would seem,

therefore, from the authorities in this State, that a free person of color could contract marriage with a white person, however repugnant it may have been to the public sentiment prevailing upon the subject. There was evidently a distinction drawn by the Courts between free persons of color and slaves, so far as their civil rights were concerned. The one could contract and be contracted with, while the other could not.

If the marriage was merely a civil contract, and the free person of color could contract, what was to hinder him entering into the contract of marriage with whomsoever he chose? Such a contract may have been in contravention of public policy or repugnant to the public sentiment, yet the General Assembly did not prohibit such marriages by statute, and the Courts did not inhibit them by their decisions. The failure of the Legislature to provide a statute on the subject is a presumption of the acquiescence of the State in contracts of this kind thus made. It is my opinion that the marriage of John G. Powers and Sarah Turner in 1813 was legal and valid. The only remaining question for consideration and decision is, are the plaintiffs entitled to the relief demanded in the complaint? The plaintiffs claim under the will of John G. Powers. Is the claim thus formally set up in the complaint an election on the part of the plaintiffs, and is it such an election as can now be retracted? The Act of 1795 declares that any gift to bastard children shall be null and void for so much of the value thereof as shall or may exceed such fourth part, &c.

*295

*In the case of Hull v. Hull, (3 Rich. Eq., 81,) the Court says: The Act does not say in words what disposition is to be made of the portion of the gift to the illegitimate child that is declared void. That is left to implication. But by incidental construction it is not absolutely null and void, but voidable at the instance of the lawful wife and children.

In Owens v. Owens, it was held that the will of the testator was good and valid against all the world, except as against the lawful wife and children; and in Breithaupt v. Bauskett, (1 Rich. Eq., 465,) it was held by Chancellor Harper that their right to vacate the gift for the excess was so entirely a personal privilege to the wife and children that it did not survive to the executor. In the same case it is held that the interest which the wife and children take in the gift is merely a claim entirely personal to them —a claim to call on the illegitimate child for the amount or value of what said child has received over the one-fourth part of the testator's estate. The legal title of the bastard is good and perfect, subject to this purely personal equity created by the Act in favor of the wife and children. The same doctrine held in this case has been enunciated in others.

The gift and devise in the will of John G. Powers was not void, but voidable at the election of the wife or legitimate children of Powers. The right to elect on their part was personal. What is the right of election given to the wife or legitimate children? In the case of Buist v. Dawes, (3 Rich. Eq., 300,) it is held that "whenever two rights are alternately created or given, either in express terms or by construction, the party to whom they are given is entitled to only one of the two, and must elect between them, but after he has made his election he is bound and will not be allowed to elect again unless he can show some equitable circumstance entitling him to retract the choice he has made." In the same case it is held "there is some difference in this matter of election, owing to the quality of the rights among which the election is to be made, i. e., whether they are legal or equitable. But whenever an election has been made, either at law or in equity, it is a satisfaction of an alternative right, and the party will not be allowed to retract unless upon grounds of equity shown to exist by evidence inherent in the circumstances or extrinsic." The plaintiffs in this case, as the legitimate children of the testator, had the alternative right of claiming under the will of the testator, as

*296

his heirs at law and *devisees, or under the Act of 1795, which declared the gifts and devisees voidable as to all the estate except the one-fourth thereof. The alternative rights are legal. The wife in her lifetime made no election. The right does not survive to her legal representatives or heirs. Have the plaintiffs, as the legitimate children, made an election between these alternative rights? In the complaint they positively elect by claiming under the will as the heirs and devisees of the testator, and by praying for a partition of the estate according to the provisions of the will. Their attorney was no doubt acquainted with all the circumstances of the case, as well as conversant with their rights, and, after communication with them, filed the complaint. There is, therefore, a presumed knowledge on their part of all their rights and the circumstances of the case, and the election was made of the alternative rights by them with full knowledge. The election has been in the complaint. Have the plaintiffs a right to retract? This they can do only upon grounds of equity shown to exist by evidence inherent in the circumstances or extrinsic. There is no evidence in the case showing any grounds of equity upon which they should be allowed to retract. If there are none shown to exist by evidence inherent in the circumstances, they should not be allowed to retract; as before observed, they had full knowledge of all the circumstances and of their rights before the election was made. In the circumstances themselves there is

nothing that shows that grounds of equity exist upon which they should be allowed to retract. They are, therefore, bound by the election, and it operates as a legal bar by way of estoppel against the claim of the alternative. If they are bound by the election, they can, therefore, take nothing by the will, as they are not the parties intended to be the devisees of the testator, and they have made an election which renders the will no longer voidable, but valid. But if the plaintiffs can retract, there is no application of the kind made by them to the Court. The election has been made in the complaint, and the rights of the parties must be determined in accordance with the election. In the argument, the counsel representing the plaintiff asserted a right of retraction, but no formal application was made that the plaintiffs be allowed to do so. It is the judgment of the Court that the plaintiffs are not entitled to the relief demanded in their complaint.

It is, therefore, ordered and adjudged that the complaint be dismissed.

*297

*The amendment agreed on by counsel is as follows:

It appeared in evidence that the ceremony of marriage of John G. Powers with Sarah Turner took place in 1812 or 1813, and that they separated in 1818 or 1819; that in 1834 or 1835 Sarah Turner Powers removed with her children to the West; there was no evidence of any intercourse between the two after the separation; that not long after this John G. Powers moved from the County of Marion to the County of Darlington and commenced living with Sarah Conner. There was no evidence for or against the fact of a formal marriage between the two, but there was abundant evidence that he treated and represented her (the said Sarah Conner) as his wife, and that she was so regarded in the community from that time until the death of John G. Powers. It was in evidence that she had renounced her dower to a tract of land sold by him. The defendants, with the exception of those mentioned in the complaint as administrators, guardians or husbands, are the issue of John G. Powers and the said Sarah Conner. The will of John G. Powers being without date, it was proved by a witness to it that it was executed certainly before 1858; that it was drawn by George W. Dargan, the late Chancellor of this State, whilst he was practicing law. Another witness, with whom Powers lived as overseer in 1843, narrates a conversation in which Powers advises with him as to the making of a will, and he advised him to get George W. Dargan to draw it.

In 1843, Powers had natural children by Sarah Conner who were infants. The cause of the separation of John G. Powers and Sarah Turner Powers was, according to one witness, "that he had spent her property and had no further use for her," and, according to another, "that he grossly mistreated her."

The will of John G. Powers is as follows:

I, John G. Powers, of sound and disposing mind, memory and understanding, do make and ordain the following as my last will and testament: First. It is my will and desire that from the debts due me, if that be sufficient all my just debts be paid. Second. After the payment of my debts it is my will and desire that all my estate, both real and personal, be kept together, in the hands and under the control of my executor, until my youngest living child shall attain the age of

*298

twenty-one years; and until this event *shall happen, it is my will and desire that my wife and all my children, adults as well as infants, be permitted to live upon my plantation, and my wife and such of my children as shall desire to live upon my plantation shall participate in the benefits of the labor of the negroes and the crops made upon the land, in the way of a common stock, such as are able contributing their own labor, and the younger children receiving such common education as can be had in the neighborhood. When my youngest living child shall attain the age of twenty-one years, it is my will that all my estate, both real and personal, be divided among my wife and all my then living children equally. The issue of any deceased child (if there be any such) shall, in the division, represent their parents. If my wife should not then be living, her share is to be equally divided among my children, as the rest of my estate is directed to be divided. If she should then be living and receive an equal share with my children, she shall hold and enjoy the same during the period of her natural life, and at her death the same shall be equally divided among my then living children, the issue of any deceased child representing in such division their parents. I nominate, constitute and appoint Julius A. Dargan the executor of this my last will and testament. On the first page the words "benefit of the" and the word "wife" interpolated.

The plaintiffs filed the following exceptions to the Circuit decree:

Plaintiffs except to the decree for the following grounds of alleged error:

1. Because the question whom the testator meant "when he used the words 'wife and children,'" as between a lawfully married wife and legitimate children on one hand, and a mistress and bastard offspring on the other, was not an issue in the case. But if an issue, it was one of law and not of fact, and the verdict of a jury could not decide or affect it. The Court should have construed it in favor of the lawfully married wife and legitimate children, to the exclusion of the mistress and bastards.

2. Evidence de hors the will was inadmissible and the objection in time.

3. The judgment should have been in favor of the claim of the wife and children under the will. But if not under the will, then under the Act in reference to gifts and devises to bastards.

*299

*4. The doctrine of election and estoppel has no application to the case.

The plaintiffs appealed.

Charles, for appellant.
McIver & Boyd, contra.

May 18, 1876. The opinion of the Court was delivered by

MOSES, C. J. If the order directing the issue to the jury to determine the identity of the persons intended by the will of the testator, Powers, to be the objects of his bounty was erroneous, the appellants, by interposing no objection in the Court below, are precluded from submitting any exception here. So, too, as to the grounds, which charges error in receiving evidence de hors the will. The competency of such testimony was not resisted on the trial, and its admission, therefore, cannot be now questioned.—Abrahams & Son v. Kelly, 2 S. C., 235; Shelton v. Maybin, 4 S. C., 541; Fox v. Railroad Company, ibid, 543. The order for the issue, it is alleged, was made by consent. Certainly it was without resistance by either party, and it is not easily perceived how the jury could have ascertained to whom the term "wife and children" was to apply without a resort to parol testimony. Besides all this, the Judge, independent of the verdict, reached the same conclusion by inferring the intention of the testator from the whole language of the will itself and the relation in which he stood at the time of its execution both to Sarah Turner Powers and her children and to Sarah Connor Powers and his issue by her.

It is conceded, if the first marriage was legal, as the Circuit Judge has adjudged, that the provision for Sarah Conner Powers and her children would be voidable at the instance of the lawful wife or children under the fourth Section of the Act of 1795, (General Statutes, 425,) to the extent of all exceeding one-fourth of the clear value of the estate of the testator after the payment of his debts. It is urged, however, that they have lost whatever claim they may have had under the statute by electing to claim under the will. This objection is groundless. The doctrine of election can only apply to inconsistent gifts by one to the same party, where, from the apparent intent of the donor, expressed or implied, the acceptance of either by the donee precludes him from all right to

*300

the other. *Here the respondents insist and the Court has decreed that the wife and children take nothing under the will; and yet it is contended that a mere claim to its provisions deprives them of the benefit which the law has secured by the statute in the very event of a will by a husband or father disposing of his whole estate to a woman with whom he has lived in adultery or his bastard children. The inconsistency is apparent from the mere statement of the proposition. There must be alternative gifts before the parties can be put to their election. As is said in Buist v. Dawes, (3 Rich. Eq., 300,) "wherever two rights are alternatively created or given, either in express terms or by construction, the party to whom they are given is entitled to only one of the two and must elect between them." Even if the case could be regarded as one involving the doctrine of election, as Mr. Adams in his Treatise on Equity, 96, says, "the electing party is entitled to know both interests; and the mere fact that the benefit has been conferred, or even that it has been accepted in ignorance of the conveyance, does not bind his right." To the same effect are the authorities in this State, of which it is only necessary to refer to Gist v. Cattell, 2 DeS., 54; Hall v. Hall, 2 McC. Eq. 269, and Pinckney v. Pinckney, 2 Rich. Eq., 218. To affirm, as is done in the decree, that "the election has been in the complaint" would carry the doctrine to an extent entirely inconsistent with the principles on which it is founded.

While the Court would not be generally disposed to grant relief beyond that which is specifically demanded in the complaint, yet where it contains also a prayer for general relief, and the rights to which the plaintiff may be entitled are affected by the acts of the defendants in the very subject matter in which the plaintiffs assert an interest, it will not dismiss the action and impose the necessity of further litigation and expense provided the proper parties are before it in the pending suits,—more especially when the Circuit Judge, as in the case before us, discusses and reviews the very grounds upon which the plaintiffs are entitled to relief, and only withholds it from his reviews in respect to the election, which in his judgment, debars him from extending it. His error in that regard is made one of the grounds of appeal, and, by the argument on both sides, is recognized as properly submitted to the correction of this Court. While the complaint may not be as comprehensive as it might have been in stating all the grounds upon which relief was sought, its main purpose was to subject the

*301

estate of the testa*tor, in the hands of the defendants, to a full accounting. The mere fact that the plaintiffs claimed a partition and distribution under the will should not deprive them of the relief to which it is found they are by law entitled, especially when the question as to their right in the very particular was discussed in the trial below, is made a point in the decree, and by appeal is brought for revision. In fact, the 190th Section of the Code provides that "no

variance between the allegation in a pleading and the proof shall be deemed material unless it have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits."

While, for the reasons stated, so much of the decree as establishes the identity of the persons referred to in the will must be affirmed, it is ordered and adjudged that the plaintiffs, the children of the said John Powers by Sarah Turner Powers, his wife, are entitled to so much of the real clear value of the whole estate of the said testator, after payment of his debts, as shall exceed the one-fourth amount or value thereof.

The case is remanded to the Circuit Court for such orders as may be necessary to give effect to the judgment of this Court, question as to the costs to be hereafter determined.

WRIGHT, A. J., concurred.

WILLARD, A. J., concurred, and filed the following separate opinion:

The will, I think, must be construed as intending legitimate children and excluding illegitimate. The rule of evidence rests on a legal presumption founded on public policy, and cannot be set aside on merely speculative grounds. The result of the evidence is that the testator at the time of making his will had a lawful wife and children by her, and that he had lived for many years with a woman who was not his wife, and had had children by her. There is nothing in the will to indicate that the testator used the words "wife" and "children" in any enlarged or peculiar sense. The law, on grounds of public policy, declares that a lawful wife and legitimate children are intended alone by these words. The case of one living with one who is not his lawful wife and having children by her is the very case to which the policy in question has reference, and it would be strange, indeed, if this very case contemplated by the law should, without extrinsic aid,

*302

be able to defeat the policy *of the law and destroy this rule of evidence arising from such policy.

I cannot agree in holding that the order referring issues to the jury had the effect of making their verdict conclusive of a question of law. Without denying that parties may stipulate in such a way as to make a trial by jury equivalent to a decision by an arbitrator, I think that such a construction cannot be put on the order in question.

Parties are authorized to select by their consent the tribunal before which their issues may be tried, but it must be assumed until the contrary appears that such consent was made in subordination to the nature of such tribunal and the rules of law prescribed for its action. It would be most dangerous to construe orders of this class as deranging or dispensing with the wholesome machinery of the law on grounds admitting of any dispute as it regards the intention of the parties. One of the advantages of the Code is that it facilitates the trial of issues of fact of an equitable nature by juries, and that advantage would seldom be employed voluntarily if parties were in danger, upon subtle constructions, of having the judgments of unlearned jurors on questions of law substituted for those of the Judges.

I am of opinion that the verdict has no other effect than that of a verdict taken upon questions submitted by a Court of equity, formerly through the form of feigned issues, but now through an order settling issues, as affecting the application, by the Court, of legal and equitable rules to the facts of the case.

I think that the judgment dismissing the complaint should be set aside, and the claims of the lawful wife and children of the testator established by a decree of the Circuit Court.

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7 S. C. *303

*MOORE v. JOHNSON.

(Columbia. April Term, 1876.)

[*Reference* ⇦88.]

Judgment of Circuit Court, report of Referee and order of reference set aside on the ground that the report did not conform to the rules in relation to the manner in which the facts found by the Referee, and his conclusions of law, should be stated, and the cause remanded for trial by jury.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 134; Dec. Dig. ⇦88.]

[*Reference* ⇦88.]

The facts referred to in Section 296 of the Code, requiring the facts found and the conclusions of law to be stated separately, are the conclusions of fact drawn from the testimony.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 134; Dec. Dig. ⇦88.]

[*Reference* ⇦88.]

A clear statement of all material facts proved, or properly inferable from the proofs, should be stated first, and then should follow the conclusions according to the judgment of the Referee.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 134; Dec. Dig. ⇦88.]

[This case is also cited in Wilson v. Braddy, 16 S. C. 522, without specific application.]

Before Townsend, J., at Chesterfield, September Term, 1874.

This was a creditor's bill for settlement of the estate of Allen McFarlan, deceased, of whose will W. D. Johnson and others were executors.

The case is as follows:

This was an action in the Court of Common Pleas for the County of Chesterfield, instituted by the executors of the last will and testament of Allan McFarlan, deceased, against his heirs at law and creditors, to marshal the assets of his insolvent estate.

The usual order enjoining creditors and calling upon them to establish their claims before the Court was issued and published, and John C. Evans, of Cheraw, was appointed Referee, before whom the claims of creditors should be established. On the day of a reference for this purpose was held by him at Cheraw, and among the claims against the estate of the late Col. Allan McFarlan offered for proof was one held by Henry T. Moore, Esq., as executor of the last will and testament of his deceased mother, Margaret Moore. This was a bond, bearing date February 25, 1864, in the penal sum of $18,463, conditioned for the payment of $9,231.50, in two equal annual instalments, with interest from date, payable annually, until paid. The bond was given for the purchase money of real estate and a wagon, and was secured by a mortgage on the property sold. When presented for proof its execution was admitted by the counsel for McFarlan's estate, and the only payment endorsed on it was one of $500, January 31, 1867, which Moore acknowledged to have received, without prejudice to

*304

*any claim McFarlan might set up to have the bond scaled. There was no other payment claimed to have been made. Mr. Moore then offered to adduce testimony to shew to the Referee the real value and actual consideration of the bond, to which proof the counsel for the estate of McFarlan objected. The testimony, however, was taken by the Referee, subject to objection, and was as follows:

Thomas E. Powe, examined:

I am acquainted with the land purchased by McFarlan from the estate of Moore. Value before the war, on the terms of sale, one-third cash, balance on credit, $10 to $12 an acre; at the present time, on the same terms, it would bring from $10 down to $8. It lies prettily. The railroad and public road run through it; that and public road rather injure it. Colonel McFarlan joins on the Northwest. Less valuable when taken as a separate tract; as a separate tract less valuable. I know it should have brought $8, any way. There are 434 acres four miles from town, all well timbered; no open land.

H. T. Moore, sworn. [All this class of testimony in relation to land valuation objected to.]

The consideration of the bond in addition to the land was a two-horse wagon, which said wagon brought $110. The land was the next purchase, and was bid off at $19.75 per acre; twelve of the town lots were bid off at $210 each, and twelve at $220 each. The condition of the sale was: All sums over $500, one-third cash, balance one and two years. Purchasers had the choice to put the whole amount in bond. At the sale I was requested by parties to take the whole in Confederate money, as well as the one-third cash. I would see what the property would bring. I refused to take Confederate money beyond the cash payment. Two or three parties bought property, and I refused to take Confederate money for the whole. Mr. Lynch asked me at the sale whether I would take Confederate money when the instalments fell due. I would not agree to it; I would not be under any obligation to take it; if it was good I would take it; I would not promise

*305

to take it. Colonel *McFarlan was present at the sale, but do not know that he heard the conversation; this conversation occurred while the sale was going on; one purchaser, Frank Ellerbe, purchased beyond the cash amount, and I afterwards agreed to take Confederate money by his paying me fifty per cent. on his bid, as I thought I could use it; I value the wagon at $50; as to the value of the lots, I sold in 1855 three lots adjoining the lots in question at $118.85 on four months' time; the lots I sold had no improvements; the little grove made them more desirable for building purposes.

E. Brown:

I would value the Moore lots before the war, on credit, one-third cash and one and two years' time, at $75 per lot average.

The foregoing testimony was offered by the creditor in establishing his claim, which, with the acknowledged execution of the bond and mortgage, was all the testimony adduced. The counsel for the executors of McFarlan offered no testimony. The Referee thereupon made the following report upon this claim and filed the same May 1, 1872.

"Among the claims presented is one in favor of Henry T. Moore, as executor of Margaret Moore, secured by a bond and mortgage of certain real estate, as mentioned in the complaint, dated 25th February, 1864, for the sum of $9,231.50, with a credit of $500, endorsed 31st January, 1867.

"The only contest in regard to this claim was in regard to the manner in which the same should be scaled. On the part of the executors, it was contended that the bond should be scaled according to the table fixed by the Act of 1869, commonly called Corbin's Act, while on the part of the creditors it was contended that the bond, if scaled at all, should only be scaled according to the ordinance of the Convention of 1865. The Referee feels bound by the express terms of the law to scale this claim according to the Act. The contract was made during the period contemplated by the said Act, and, from the testimony adduced, it would seem that the contract was made with reference to Confederate Treasury notes as a basis of value; and, if so, then the law is positive and

*306

*requires that the bond in question should be scaled according to the table fixed by the Act. The Referee is fully impressed with the fact that this decision, which he has felt compelled by the arbitrary terms of the law

to make, will work very great, in fact the grossest, injustice to the creditor, and he will be glad if the Court can see that he has erred in subject. If the claim can be scaled according to the principle fixed by the ordinance of the Convention of 1865 instead of the table fixed by the Act, then, according to the testimony adduced, the amount of said claim should be $9,280.18 instead of $342.68."

To this judgment of the Referee, the creditor, Henry T. Moore, excepted as follows, viz.:

The defendants (the executors of Allan McFarlan) will please take notice that Henry T. Moore excepts to the ruling of the Referee on the claim presented by him as executor, and his finding thereon, for the following reasons:

1. That the burden of proof was on the defendants to show that the claim was contracted "in Confederate States notes, or with reference to Confederate States notes as a basis of value," which was not required on the reference.

2. That if the Act approved the 29th of March, 1869, is the rule by which to determine the character of the contract, the testimony offered established the fact that said claim was not made "in Confederate States notes, or with reference to said notes as a basis of value."

3. That the testimony offered by the plaintiff (the creditor) was sufficient to establish that said claim was not made "in Confederate States notes, or with reference to said notes as a basis of value."

4. That the testimony showed, if said claim is subject to be scaled at all, it is subject to the operation of the ordinance of 1865, and not to the operation of said Act.

5. That the application of said Act to this claim impairs the obligation of the contract.

6. That the ruling and finding of the Referee is contrary to law, unjust and inequitable.

*307

*His Honor the presiding Judge made a decree confirming the report of the Referee so far as it relates to the claim of Henry T. Moore and ordering said report to stand as the judgment of the Court.

Henry T. Moore appealed on the following grounds:

1. Because the creditor's exceptions to the Referee's report are well taken, and, for reasons embodied in said exceptions, the findings of the Referee should have been overruled by the Circuit Judge and his judgment reversed. The said exceptions should have been sustained by the Court and judgment given for the creditor, Henry T. Moore, for the amount of his claim unscaled, and it was error in the Circuit Judge to overrule the exceptions and to sustain the Referee.

2. Because by all the rules of law and evidence the creditor, Henry T. Moore, established his claim before the Referee for the full amount due, and the executors of McFarlan introduced no testimony to controvert this proof, or to show affirmatively that the said claim is subject to the operation of any scaling Act. Wherefore, the judgment of the Court, as well as the finding of the Referee, is unsustained by the testimony, is against the evidence, and contrary to the law of the case.

Hudson, for appellant.
Prince, contra.

May 18, 1876. The opinion of the Court was delivered by

WILLARD, A. J. Where an issue of fact involving a question of intention to be drawn inferentially from the circumstances attending a transaction is tried by the Court or a Referee, the full benefit of a review of such decision of fact cannot be had in this Court if the matter decided is doubtful or disputable. In that case we recognize that the means and opportunities of the Court of original jurisdiction, having the parties and their witnesses before it, are superior to those afforded to this Court for determining such questions, and we accordingly defer to it. It follows that the rule governing the trial of issues before a jury, namely, that the parties are entitled to have the inquiry into the facts of the case made under a correct understanding of the law applicable to these facts, is to some extent applicable to issues tried before a Court or a Referee.

*308

*If it appears, as is reasonably to be inferred, that a misapprehension of the law has affected prejudicially the inquiry into the state of facts, it may become impossible to correct the error in all its effects and consequences without setting aside the conclusions of fact affected by it and sending back the issues of fact for further consideration in the Circuit Court.

In the present case we are compelled to conclude, from the language of the Referee's report, that he regarded the Act for converting values in Confederate currency into lawful money as establishing to some extent the right to have such a reduction made in the case. It is by no means clear what was his view of the effect of the law. We are strongly impressed with the conclusion that he placed the right of the parties too much upon the terms of the statute and did not attach sufficient importance to the pure question of intention, the real issue before him. Instead of finding as matter of fact an intention to deal together with reference to Confederate currency, and embodying this finding in language showing that the true bearing and importance of that issue was fully understood, his report disposes of the question of fact in terms that lead us to conclude that he regarded that issue as subordinate to the question of the right to have this debt scaled under the terms of the Act.

The report says: "The Referee feels bound by the express terms of the law to scale this claim according to the Act. The contract was made during the period contemplated by the said Act, and, from the testimony adduced, it would seem that the contract was made with reference to Confederate Treasury notes as a basis of value; and, if so, then the law is positive and requires that the bond in question should be scaled according to the table fixed by the Act. The Referee is fully impressed with the fact that this decision, which he has felt compelled by the arbitrary terms of the law to make, will work very great, in fact the grossest, injustice to the creditor."

We have so fully stated our views on the law in Neely v. McFadden, (2 S. C., 169,) McKeegan v. McSwiney, (ibid, 191,) Harmon v. Wallace, (2 S. C., 208,) and Parker v. Wilson, (3 S. C., 296,) that no further explanation of them is required. It is plain that the idea of the effect of this statute entertained by the Referee differed materially from that prescribed in the cases above named. The expression "it would seem" does not meet the requirements of the law regarded as a

*309

finding of fact. It does not express *a judgment, but a speculative opinion. It is open to the inference that the question of fact did not receive full and separate judicial consideration.

The Code (Sec. 296) relating to trials before the Court or Referees, requires that "they must state the facts found, and the conclusions of law separately." The facts here referred to are the conclusions of fact drawn from the testimony. The facts should be stated briefly, distinctly, and independently of any view taken of the law of the case. If this is strictly followed, the Court, should it differ in point of law from the Circuit Court in any case, will be enabled to apply its views of the case intelligently. A discussion of the merits of the case according to the view of the Court or Referee, in which the facts are grouped and arranged to support the views entertained by the law of the case, is not a compliance with this requirement. A clear statement of all material facts proved or properly inferable from the proofs should be stated first, and then should follow the conclusions, according to the judgment of the Court. The finding in the present case is not of the character required, and the failure to treat the conclusions of fact and law separately and independently prevents this Court from correcting the error of law without disturbing the findings of fact.

We think that the question of the intention as to the kind of currency with reference to which they were acting should be tried by a jury.

The judgment, report and order of reference must be set aside, and the cause remanded for an order settling such issue, and for the trial thereof by a jury, and for such proceedings thereupon as to the Court may seem proper.

MOSES, C. J., and WRIGHT, A. J., concurred.

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7 S. C. *310

*MASSEY v. DUREN.

(Columbia. April Term, 1876.)

[*Trial* ⇦336.]

A verdict finding the issues for the defendant and adding matter which does not qualify the previous meaning of the jury will not be set aside, and is no ground for a new trial.

[Ed. Note.—Cited in Love v. Turner, 71 S. C. 327, 51 S. E. 101.

For other cases, see Trial, Cent. Dig. § 789; Dec. Dig. ⇦336.]

Before Mackey, J., at Lancaster, August, 1873.

This was an action of "trespass to try title," by James R. Massey and others against Wiley R. Duren, Able Funderburk and Hannah Funderburk. It was commenced in 1860. The pleas were the general issue, and a special plea by Wiley R. Duren, alleging that the land sued for was owned in fee by Thomas R. Duren, an infant son of the defendant Wiley R. Duren, in whose behalf he, the said defendant, was in possession.

The case prepared for this Court, after stating the evidence, proceeded as follows:

After argument of the cause before the jury by the counsel for the plaintiffs and defendant Wiley R. Duren, respectively, the presiding Judge proceeded to charge the jury, and, after getting nearly through, he paused and inquired of the counsel on both sides what should be the form of the verdict. The counsel for the plaintiffs responded that it should be, in form, if for the plaintiffs: "We find for the plaintiffs the land in dispute and damages." And the attorneys for the defendant Duren responded that, if for the defendant, it should be, in form: "We find for the defendant the land in dispute;" and the presiding Judge, after these responses from the attorneys sitting together in Court, charges the jury accordingly as to the form of the verdict. Neither party excepted to the charge of the Judge in any particular to the jury before they retired; nor was there any request made to charge which he declined. The jury, after retiring, returned with the following verdict:

"We find for the defendant the land in dispute.

(Signed) "A. Carter, Foreman.

"The land in dispute wherein we find for the defendant is that occupied by Wiley R. Duren, and designated on plat by a piece of white paper.

(Signed) "A. Carter, Foreman."

*311

*Whereupon the plaintiffs moved for a new trial on the minutes of the Court, which was refused in an order as follows:

"On hearing the plaintiffs' motion to set aside the verdict of the jury, rendered at the present term of the Court, and for a new trial and argument of counsel, the motion is refused."

The plaintiffs appealed and moved this Court to reverse the order on the following grounds:

1. Because, aside from their paper title, the plaintiffs proved title in their ancestor, James R. Massey, by possession of the lands claimed, commencing in January, 1830, and continued by him and his heirs up to the date of the trespass by the defendant Duren in the year 1858.

2. Because there was no evidence that the Blair survey of the Walker grant, under which their ancestors first took possession, and which covers the trespass, was not the true location of that grant.

3. Because no superior title, or title of any kind, was shown to any portion of the land embraced within the limits of the Blair survey by the defendant in William Robinson, under whom he claimed.

4. Because the evidence established title in the plaintiffs by a regular chain from the grants down to so much of the land found for the defendant as is covered by the George Johnson and the Cousart grants.

5. Because the plaintiffs proved title to the whole of the lands by possession for more than ten years after their ancestor, James R. Massey, became the exclusive owner thereof under and by virtue of the deeds executed to him by the Commissioner in Equity, dated 1st November, 1842.

6. Because the defendant Duren showed no title whatever to the land claimed by him in his son, Thomas Duren, and pretended to no title therein in himself.

7. Because the verdict of the jury is wholly unsupported by the evidence.

Moore, for appellant:

I. To plaintiffs' declaration, the defendant, Wiley R. Duren, pleaded—

First. The general issue.

*312

*Second. A special plea setting up title to the land described in the declaration in his son Thomas R. Duren.

The verdict of the jury found a large part of the land for the defendant, Wiley R. Duren, who, by neither of his pleas, asserted a claim to the same, or any part thereof, in himself.

The question raised by this appeal is not whether the jury erred upon any question of fact, but whether, upon the pleadings and evidence, their verdict, as a question of law, can be sustained?

It may be conceded that the defendant, Wiley R. Duren, would have been entitled to a general verdict for the defendant upon showing—

1. A failure of the plaintiffs to show that he had committed any trespass upon the land described in the declaration, as defined by the plat of the survey made by order of the Court.

2. A failure of the plaintiffs to show title in themselves to the land.

3. Or if a prima facie title was shown in them—that superior title existed in his son, Thomas R. Duren, or in any other person—in other words, title out of the plaintiffs.—Blair v. Young, 2 Hill, 415. But the verdict found a large part of the land for the defendant himself.

II. It, must, therefore, have been based on the second plea of the defendant, (which, although irregular, was not stricken out,) in which he avers title in his son to the whole of the land described in the declaration and defined in the plat of survey ordered by the Court; but the jury found for the defendant only that part of the land represented on the plat which is covered by the white paper laid over the same.

1. Even had the defendant, therefore, claimed the land as his own, the jury, instead of a verdict for the defendant, should have found for the plaintiffs all the land represented on the plat not covered by the white paper.—Dyson v. Leek, 5 Strob., 143.

2. In no aspect of the case could the jury have found any portion of the land for the defendant—his pleas being only tantamount to the general issue.—Underwood v. Sims, 2 Bail., 81.

3. Had a verdict been rendered simply for the defendant, it would have established no more than his right to the locus in quo of the trespass.—Henderson v. Kenner, 1 Rich., 478.

4. A verdict simply for the defendant would not have precluded the plaintiffs from commencing a second action for the same

*313

land *at any time within two years. (Act of 1744.) Aliter—where a certain portion of the land is found for the defendant.—Parker v. Leggett, 13 Rich., 171.

III. The verdict of the jury is equivocal. In the first section, they say they find the land in dispute, i. e., the land described in the pleadings, for the defendant; but in the second section, or their addendum, they only find that part of the land represented on the plat of survey covered by the white paper for the defendant. Does not this discrepancy alone, even if stronger grounds were wanting, present a sufficient reason for granting the new trial which the Circuit Judge refused?

IV. How far the rules of practice relating to actions of this kind, so far as they extend the power to juries to find special verdicts, have been modified or changed by the Code of Procedure, is, perhaps, yet un-

determined. But whatever may be the change effected; even if a jury may now, in an action of this nature, find a portion of the land in controversy for the defendant, and the remainder for the plaintiff; or, (as in this case,) leaving the right to the remainder undetermined, it is clear that a verdict finding such portion for the defendant cannot be sustained if inconsistent with the record or unsupported by such evidence as would have been necessary had the defendant been the plaintiff in the action.

1. Here the verdict is plainly inconsistent with the record; for the defendant, by his pleas, disclaims any right in himself to the land found for him by the jury.

2. An examination of the testimony will show that he utterly failed to produce any legal evidence of title to the land in his son, Thomas R. Duren.

V. The rule that conclusions of a jury upon questions of fact will not be disturbed by this Court is fully appreciated; but this Court has never yet decided, and I presume never will, that it has no power to correct an error of the Circuit Judge in refusing a new trial, where the verdict of the jury is inconsistent with the record and unsupported by any evidence whatever.

VI. In looking to the evidence in this case, I trust it will produce the impression on the minds of this Court—

1. That, even leaving out of view the antecedent possession of the land by the ancestor, James R. Massey, commencing with the Blair survey in 1829, his possession and that of his heirs or devisees under the deeds of the Commissioner in Equity, of the

*314

19th of De*cember, 1842, open, notorious, adverse and continued without lawful interruption, until the year 1859, when the defendant, Wiley R. Duren, squatted upon the same, the plaintiffs had acquired a good and sufficient title to said land; and that the attempt of the defendant, Wiley R. Duren, to set up a title in his son, is a mere bald pretense, utterly unsupported by the evidence.

Kershaw and Allison, contra:

First. Can the verdict be maintained in its present form?

Location is a question of evidence, and the finding of a jury thereon will not be disturbed where there is no misdirection of the Judge, unless for manifest error.—Izard v. Montgomery, 1 N. & M., 381; Couts v. Matthews, 2 N. & M., 99; Walsh v. Holmes, 1 Hill, 12; Bann v. Bobo, 14 Rich., 51; Evans v. Corley, 9 Rich., 143.

This Court has declared that it has no jurisdiction for the correction of "errors of fact or wrong conclusions of fact drawn from proof or evidence," except in cases of chancery.—Sullivan v. Thomas, 3 S. C., 545.

The form of the verdict was substantially consented to by both parties.

Ordinarily juries can only find upon the issues presented by the pleadings, but at the request of parties they may express an opinion distinct from their verdict, as in this case.—Hartshorn v. Wright, Pet., 66, 64.

Second. Can the verdict be treated as a general verdict for defendant?

The superadded words may be rejected as surplusage—"mere useless matter, not qualifying their previous meaning."

City Council v. Wickman, 2 Speer, 374: "We find for the plaintiff the within lot," describing it by metes and bounds, held good as a general verdict for plaintiff, and the rest rejected as surplusage.

Frean v. Cruikshanks, 3 McC., 84: Before the jury could find any verdict for defendant they must have been satisfied that plaintiff's case had failed. They need not have found affirmatively as to the right of defendant. They were induced to go beyond by the remarks of the counsel and the Court. There is no uncertainty as to their finding if the addition be rejected. Defendants ought not to suffer by reason of their going beyond their duty.

*315

*Third. As a general finding for defendant, can it be sustained?

(a.) It was a question of evidence as to location and possession, and the evidence was conflicting.

(b.) The preponderance of evidence of possession was with defendants.

(c.) The Blair survey was evidently an attempt to appropriate the Robinson land, in violation of plaintiff's own title deeds, and the jury were justified thereby in drawing inferences unfavorable to plaintiff's claim under it.

The possession of plaintiff's tenants, with the exception of transient trespassers, after 1853, were all within the smaller location of the Walker grant.

They could not affect the owners of the Robinson land.—Duren v. Massey, 3 S. C., 34.

The mere survey of the land, continued systematic trespasses, casual acts of ownership, cutting timber, &c., is not such a possession as will divest the owner of his right or create and be bar of the Statute of Limitations.—Bailey v. Irby, 2 N. & McC., 343; White v. Reil, idem, 534.

But as these are matters of fact within the purview of the jury to determine, this Court will not interfere.—Sullivan v. Thomas, 3 S. C., 545.

May 18, 1876. The opinion of the Court was delivered by

MOSES, C. J. This was an action of trespass to try title, in which the defendant, after pleading the general issue by a plea not very artificially drawn, justified the trespass alleged in the declaration by aver-

ring title to the locus in quo in his infant son, Thomas R. Duren, in right of whom he entered. There was no exception to the charge of the presiding Judge, nor any request and refusal to charge before the jury left their seats.

The difficulty arises from the form of the verdict, which, after finding "for the defendant the land in dispute," with a seeming purpose to define the boundaries to which it intended to refer, is accompanied with the further words: "The land in dispute wherein we find for the defendant is that occupied by Wiley R. Duren and designated on plat by a piece of white paper." The jury were not to blame for the form which they adopted in responding to the issues raised by the pleadings, for the Court, before they retired, asked of the counsel on the respec-

*316

tive sides, "What should be the *form of the verdict?" While the plaintiff's attorney replied, "If for the plaintiff, it should be 'We find for the plaintiff the land in dispute and damages.'" The attorneys for the defendant answered: "If for defendant, it should be 'We find for the defendant the land in dispute.'" And the presiding Judge, on these responses being made, instructed the jury to shape the verdict the one way or the other in conformity to them. The plaintiff, not being able to contest the verdict for error of law, not having made a single exception to the charge of the Court, now seeks to set it aside as not representing any conclusion by the jury on the issues submitted.

The issues made by the pleadings presented questions which were only to be affirmatively or negatively answered by the jury. If affirmatively, then the plaintiffs were entitled to recover; if negatively, then, as they failed to sustain the allegations of their declaration, they took nothing by their action, and the defendant was entitled to a verdict, which would have amounted to no more than the expression by the jury that the plaintiffs had not proved their case.

The finding, then, was really of the "substantial matter" involved in the pleadings. Mr. Justice Washington, in Patterson v. U. S., (2 Wheat., 225 [4 L. Ed. 224],) says: "It is true that if the jury find the issue, and something more, the latter part of the finding will be rejected as surplusage." In delivering the opinion of the Court in Weikman ads. City Council, (2 Speers, 371,) Judge Wardlaw said: "It is only when a verdict, before certain and valid, has been cumbered by the addition of useless matter not qualifying the previous meaning that the addition can be rejected as surplusage." In the case at bar, the verdict, without the words which "cumber" it, was certain as to the intention of the jury, and valid as their expression on the very issues on which they were to pass. To set it aside, because of additional words, which do not really qualify the judgment of the jury on the material issues involved, and thus permit a second trial, where nothing in the course of the trial was excepted to, would be without any sufficient cause, and more particularly here, when the plaintiffs by their silence at the time they should have spoken contributed to the very error of which they now complain. The verdict must stand and be recognized simply as one for the defendant, and only as such have effect.

The motion is dismissed.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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7 S. C. *317

*SEIGLER v. SEIGLER.

(Columbia. April Term, 1876.)

[*Guardian and Ward* ⇐33.]

A guardian held responsible for the estate of his ward received in 1857 in the notes of private individuals, he having neglected to collect the same when he could have done it before the war commenced.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 142–161; Dec. Dig. ⇐ 33.]

[*Guardian and Ward* ⇐33.]

It is the duty of a guardian to collect choses in action received by him as the estate of his ward and to put the estate in the condition of investment. If he neglects this duty he will be responsible to his ward.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 142–161; Dec. Dig. ⇐ 33.]

[*Guardian and Ward* ⇐33.]

A guardian is accountable for the nominal value of debts which it was his duty to collect and which he does not shew were not collectable at the time.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 154; Dec. Dig. ⇐33.]

[*Guardian and Ward* ⇐148.]

Where the evidence furnishes no proper data for reducing the amounts paid in the years 1862, 1863 and 1864 by a guardian for his ward, he should be allowed the full amounts paid, and it is error to scale them under the Act.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 497; Dec. Dig. ⇐148.]

Before Carpenter, J., at Edgefield, November, 1875.

This was a petition in the Probate Court by William M. Seigler against William K. Seigler, for account as guardian of the estate of the petitioner.

On the 5th of November, 1856, the defendant was appointed by the Court of Equity for Edgefield District and gave bond for the discharge of his duties. The estate of the ward at that time consisted of his distributive share of his father's estate, amounting to some two thousand eight hundred dollars in the notes of two individuals, one of them Hezekiah Edwards, whose note amounted

to about $1,200, and the other Robert Cheatham, whose two notes (one for about $900, the other for about $700,) amounted to $1,600. In January, 1857, the defendant received said notes from the administrators of the petitioner's father, and in his return to the Ordinary charged himself with $2,812.24, the aggregate amount of said notes. In 1859, Edwards paid $200 on his note, and the defendant loaned it to L. B. Cochran upon his note, taking no surety, and in 1863 the defendant collected the balance due on the note of Edwards and invested $600 thereof in Confederate seven-thirty notes. In February, 1863, he took from Robert Cheatham a new note, with one S. B. Storm as surety thereon. This note was for $2,335.27, and included both of the previous notes, interest being added.

In 1862, 1863 and 1864, the defendant made payments for the petitioner.

The Probate Judge held that the defendant was liable for the full amounts of the notes of Edwards and Cheatham, and that the

*318

*payments made in 1862, 1863 and 1864 be scaled under the Acts of the Legislature.

The defendant appealed on the grounds:

1. Because His Honor Judge Boney erred in not allowing the defendant credit for the amount of the notes of Hezekiah Edwards, Little Berry Cochran and Robert Cheatham, when the evidence clearly established the facts that the defendant received said notes as the distributive share of his ward, the plaintiff, in his father's estate, and that the makers of said notes were perfectly solvent at the time the defendant received said notes for his ward.

2. Because the Probate Judge erred in not allowing the defendant credits for his investments of so much of the proceeds of the notes mentioned in the first ground of appeal as was collected by him in seven-thirty Treasury notes of the Confederate States.

3. Because the Probate Judge erred in scaling the payments made by the defendant for his ward, the plaintiff, during the years 1862, 1863 and 1864, under the Act of the Legislature commonly called the "Corbin Bill."

4. Because it is respectfully submitted that said decree is contrary to law, equity and good conscience.

His Honor the presiding Judge confirmed the decree of the Probate Judge.

The defendant appealed to this Court on the same grounds as those above stated, with some additional grounds.

Gary, for appellant:

The respondent called the appellant to account in the Probate Court for his guardianship of respondent's estate. The bulk of said estate consisted of notes given to John D. Seigler, of whom petitioner was a distributee, and not of money. The receipts in Confederate money and investments in Confederate securities were transactions in good faith on the part of the guardian. The returns and testimony, it is submitted, show not only that the Probate and Circuit Courts are in error in their conclusion that the guardian kept no separate account of the funds of his ward and thus committed a legal breach of trust, but that the loss to the ward is one which should not fall on the guardian.

*319

*An executor may show that an item in his return was charged by mistake.—Wright v. Wright, 2 McC. Ch., 197; Nance v. Nance, 1 S. C., 209.

The Court will open settlements made by mistake, though receipts in full be given.—McCrae v. Hollis, 4 DeS., 122.

An execution marked satisfied may be shown not to have been really satisfied, and the execution may still retain its lien among creditors.—Sims v. Campbell, 1 McC. Ch., 53.

The Court will relieve from a mistake of law as well as of fact.—Lowndes v. Chisolm, 2 McC. Ch. R., 455; Hopkins v. Mazyck, 1 Hill Ch., 242; Gist v. Gist, B., 343.

There is clearly no foundation for the suggestion that a guardian is liable, at all events, for the solvency of a security which he takes for money due to the ward. In the management of their funds he is bound to exercise the same caution and circumspection that a prudent man would do in the conduct of his own concerns, and no more.

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The power of judging of the sufficiency of the security is reserved to him.—O. Dill v. Young, 1 McM. Eq., 155.

Guardians and all other persons acting in a fiduciary capacity are bound to exercise that diligence in collecting and managing the funds of their cestui que trust that a prudent man would exercise in the management of his own affairs.—Glover v. Glover, McM., 153.

There is no rule in this State prescribing the securities on which trust funds shall be lent or invested; and where a trustee, in investing funds, acts faithfully and with common diligence and sagacity, he will not be liable if the funds be lost.—Boggs v. Adger, 4 Rich. Eq., 408.

Unless there is evidence of neglect the Court will not hold an administrator responsible for a debt lost by the insolvency of the debtor.—Clark v. Wert, 1 Strob. Eq., 185.

The rule laid down by Chancellor Wardlaw is that a trustee is answerable for those losses only which are occasioned by such acts or omissions as a prudent man could not do or omit in his own affairs.—Nance v. Nance, 1 S. C., 121–2.

It is said that if there was no mala fides in the conduct of the trustee the Court will always favor him, for a trust is an office necessary in the concerns between man and man, and, if faithfully discharged, is attended no small degree of trouble and anxiety.

*320

*"This Court," says Chancellor Kent, "has always treated trustees, acting in good faith, with great tenderness."—Thompson v. Brown, 4 Johns. Ch., 628.

The liability of trustees, it is well remarked, is not measured by the abstract rule of their duty. The universal test of their liability or exemption from liability is this: Is there, or is there not, evidence of faithful endeavors to fulfill it? Any rule more rigorous than this, it is added, would deter prudent and honest men of ordinary capacity from accepting the appointment.—Hext v. Porcher, 1 Strob. Eq., 171, 172; Saunders v. Rodgers, 1 Rich., (N. S.,) 456.

To take advantage of a mistake committed in an evidently honest endeavor by the trustee to perform his duty, and to make him liable for the consequences, would neither square with the dictates of justice nor promote the true policy of the Court or the interest of its sanctions.—Hext v. Porcher, 1 Strob. Eq., 170.

The rule of law, as administered in the Court, is stated to be, that when trustees bona fide exert themselves to discharge their duty, and, without exceeding the line of their duty, merely commit an error in judgment, unless there is a plain violation of trust, they shall not be visited severely; the fair exercise of their judgment is a protection to them, although the consequences may be attended with loss. And that where a trustee acts from moral necessity and according to the usage of mankind, if he acts as prudently for the trust as for himself, and according to the usage of business, he will not be liable for any loss that may occur.—Spence's Equitable Jurisdiction of the Court of Chancery, vol. 2, 932.

An executor is only required to manage the estate in his charge as a prudent man would his own, and, in case of loss, the question of his liability cannot be resolved by any general rule, but depends on the particular circumstances of each case.—Bryan v. Milligan, 2 Hill Eq., 361.

Transactions in Confederate currency during the war and investments in Confederate securities, when properly made, must now be held to be as valid and binding as if made in times of peace in sound currency.—Watkins' Exec's v. Page, 21 Grattan's Va. R.

Government securities are the safest investment and are never at peril.—Hill on Trustees, 381; Lewin, 343.

An investment by a guardian of his ward's Confederate currency in Confederate bonds bearing interest was no breach of trust.—Waller v. Cresswell, 4 S. C., 353.

*321

*If a guardian is liable for investing his ward's Confederate currency in Confederate bonds, he is only liable for the value in lawful money of the currency invested.—Idem.

These notes were used as money in nearly all the business transactions of many millions of people. They must be regarded, therefore, as a currency imposed on the community by irresistible force by a government obedience to whose authority in civil and local matters was not only a necessity but a duty. They were the only measure of value which the people had, and their use was a matter of almost absolute necessity.—Thorington v. Smith, 8 Wallace, 11, 12, 13; see also opinion of Mr. Justice Willard in Neely v. McFadden, 2, 5, 6 Rich., 173, 174; Pickens v. Dwight, 4 S. C., 368; Pearce v. Venning, 14 Rich. Eq., 86.

An unforeseen event, the consequence of a revolution in the government, is set down as a ground for relief in this jurisdiction under the head of accident.—1 Story's Eq., § 93; Hinton v. Kennedy, 3 S. C., 481.

The Confederate government was a part of the government of South Carolina, and the State of South Carolina, in all her departments, recognized and dealt with the currency of the Confederate government as money, and this justified a trustee in accepting as a medium of payment the only currency that was in existence here. It is a question of good faith and common diligence, and is to be governed by the law of South Carolina. —Pearce v. Venning, 14 Rich., 86.

Abney, contra:

There is no controversy as to the liability of the guardian for the $27.50 received from Mrs. M. Seigler in 1857, and the $57.32 and $58.22 received from the estate of Jeremiah Seigler respectively in 1867 and 1869. The appellant's grounds of appeal raise the question as to his liability for the $2,812.24 only. The respondent maintains that the appellant is also liable for the $2,812.24.

"The primary duty of the executor is that of administration," not investment; and the appellant while executor should have first collected the notes of Hezekiah Edwards and Robert Cheatham, which, as he claims, aggregated the $2,812.24, and administered fully before settling the estate of the ward's father and transferring them to himself as so much money.—Nance v. Nance, 1 Rich.,

*322

*(N. S.,) 221; Glover v. Glover, McM. Eq., 153; Powell v. Evans, 5 Ves., 839; Hill on Trust., 380; Wil. on Ex., 846.

The guardian testifies that he took the notes and charged himself with them as so much money, believing them to be good. He afterwards treated them as his individual property by taking new notes in his own name simply, and by not returning the money paid by Cheatham, or in any way accounting for it; and it is evident that he considered himself responsible to his ward for the full amount of the notes. He therefore assumed the debt and cannot now shift upon the ward responsibility which has resulted in loss.—Clark v. Tompkins, 1 S. C., 120; Spear v. Spear, 9 Rich. Eq., 194; Hill on

Trust., 371; Freeman v. Fairlee, 3 Meri., 41; 2 Story's Eq. Juris., § 1270; Adams' Eq., p. 33, n., § 143.

a. If the original notes of Edwards and Cheatham were improper securities for investment, the guardian should have called them in and changed the investment as soon as practicable "into public securities, or bonds secured by lien on real estate, or at least bonds of third persons, with proper securities."—Spear v. Spear, 9 Rich. Eq., 201; Nance v. Nance, 1 S. C., 218; Caffrey v. Darby, 6 Ves., 488; Hill on Trust., 380.

b. And "it is not sufficient excuse for the neglect of the trustee that the testator had himself created the objectionable security" and "considered the existing securities to be a sufficient investment."—Hill on Trust., 380; Powell v. Evans, 5 Ves., 844; DeMarmerville v. Crompton, 1 V. & B., 359; Bullack v. Wheatley, 1 Coll., 130; Hemphill's App., 18 Penn. St., 303; Spear v. Spear, 9 Rich. Eq., 194.

The original notes of Edwards and Cheatham were improper securities, because:

(*a.*) Proper "securities should primarily consist of mortgages of unencumbered real estate of a value sufficient to guarantee the debt against all contingencies liable to occur or capable of being foreseen;" and "bonds of individuals should not be taken in lieu of real securities, unless unobjectionable investments cannot, in the exercise of reasonable diligence, be procured." And the testimony fails to show that real securities could not be procured.—Nance v. Nance, 1 S. C., 224; Allen v. Gaillard, 1 S. C., 279.

(*b.*) The burden is upon the guardian to show a proper investment, upon an accounting with the cestui que trust.—Ibid; 1 Story's Eq. Juris., § 468; Lupton v. White, 15 Ves., Jr., 432.

*323

*(*c.*) There was no security to the original notes, and no investment without sureties is good.—Nance v. Nance, 1 S. C., 226; Spear v. Spear, 9 Rich. Eq., 184.

The notes as changed afterwards and made payable to appellant in his individual capacity were not valid investments, since the guardian fails to show that he could not invest in public securities, or bonds secured by lien on real estate, and the necessity and propriety of investing merely in notes with only one surety.—Nance v. Nance, 1 S. C., and cases cited.

If we admit that Edwards' note, with Sheppard as surety, was a valid investment, then the guardian is still liable, because—

a. It was collected to relieve the surety, and for no advantage to the ward.—Cureton v. Watson, 3 S. C., 456; Sanders v. Rogers, 1 S. C., 459.

b. The $200 was lent to Cochran, and his note taken therefor without surety.—Nance v. Nance, 1 S. C., 226.

The guardian acted without warrant of law in receiving the $600 in Confederate currency, and investing it in seven-thirty Confederate notes, if the note was the property of his ward, and he should sustain the loss.—Meyer v. Mordecai, 1 S. C., 383; Fitzsimmons v. Fitzsimmons, ibid, 413; Womack v. Austin, ibid, 440; Sanders v. Rogers, ibid, 453; Cureton v. Watson, 3 S. C., 458; Horn v. Lockhart, 17 Wallace, 570.

The receiving of the balance of the note in Confederate currency, which is now on his hands worthless, does not relieve him.—Ibid.

Were it admitted that the note of Cheatham, with Strom as surety, was a proper investment, and for the ward, then still the guardian is liable, because he delayed so long after the war to bring any action on the note against Cheatham, and has never brought any action against Strom or the estate which he left; nor does he show that he cannot collect the money out of Cheatham's or Strom's estate.—Glover v. Glover, McM. Eq., 153.

The appellant's fifth ground of appeal is unfounded, as no question was made before the Circuit Court as to scaling; and the respondent understood him as thereby abandoning his third ground of appeal from the Probate Court.

It is submitted by the respondent that the judgment of the Circuit Court affirming that of the Probate Court is in accord with the law and equity involved in the case.

*324

*May 18, 1876. The opinion of the Court was delivered by

WILLARD, A. J. We find no sufficient ground to reverse the decree of the Circuit Court.

The guardian received the estate of his ward in 1857. The estate then consisted of choses in action arising on notes of individuals. It was the clear duty of the guardian to collect demands of this nature and to put the estate in the condition of investment. The principles applicable to this duty are stated by us in Nance v. Nance, 1 S. C., 209. It is stated that it was not practicable at the place of residence of the guardian and his ward to make investments conformable to the general principles settled in that case. That fact does not appear in evidence and cannot be assumed. The guardian neglected this important duty until the disturbed condition of business resulting from the war rendered it impracticable to place the estate in a condition of proper security. The subsequent inability of the guardian to make judicious investments must be referred to in his neglect to place the estate in proper condition at an earlier day.

The guardian was properly held accountable for the nominal value of the debts which it was his duty to collect, he not having made it to appear that such debts were not

collectible at the time when they should have been collected.

The decree was clearly wrong in not allowing to the guardian the full amount advanced for his ward in Confederate currency. The evidence afforded no proper data for reducing the amounts thus paid to any other standard than that of the current value of Confederate money.

The counsel for appellant urges that he was deprived of a full hearing before the Circuit Court on the appeal from the Probate Court. It will not be necessary to consider whether such fact could affect the validity of the decree of the Circuit Court, for it appears that, subsequently to the decree being made, the appellant's counsel was heard, and the Court, on such hearing, refused to disturb the decree. The counsel for appellant has received a full hearing in this Court, and all matters are open before us as completely as they were in the Circuit Court, and we see no good reason for sending the case back for further argument there.

*325

*The decree of the Circuit Court should be modified to conform to the principles of this decree, and the cause remanded for the correction of the account accordingly.

MOSES, C. J., and WRIGHT, A. J., concurred.

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7 S. C. 325

BUCKNER v. RAILROAD COMPANY.

(Columbia. April Term, 1876.)

[*Eminent Domain* ⇐156.]

Where the owner of land which has been taken by a railroad company dies after the land has been appraised, but before the appraised value has been paid, the title passes to his heirs or devisees, together with the right to demand payment, and they alone, and not the executor, can maintain an action for the money; and it makes no difference in such case that in the proceedings to obtain an appraisement a judgment was entered for the appraised value.

[Ed. Note.—Cited in Blackwell v. Ryan, 21 S. C. 122; Kerngood v. Davis, Id., 205.

For other cases, see Eminent Domain, Cent. Dig. § 425; Dec. Dig. ⇐156.]

Before Farmer, J., at Beaufort, March, 1872.

This was an action by Thaddeus G. Buckner, as executor of the last will and testament of Thomas W. Gillison, against the Savannah and Charleston Railroad Company.

The complaint alleged:

I. That on the ——— day of ———, 1860, the Charleston and Savannah Railroad, being desirous of obtaining the right of way through the lands of Thomas W. Gillison, the plaintiff's testator, situate in Prince William's Parish, County and State aforesaid, called "Cotton Hall," instituted proceedings according to law, which resulted in an award by the jury in favor of the said Thomas W. Gillison, on the 30th of September, 1860, for the sum of $700.

II. That judgment was entered up on the said award, and execution issued thereon, on the day and year aforesaid.

III. That the said Charleston and Savannah Railroad Company [illegible] tendered payment of the said judgment to the said Thomas W. Gillison in his lifetime, or to the plaintiffs since his death.

IV. That the said Charleston and Savannah Railroad Company, being unable to meet their engagements, their road and equipments were sold in the year 1866, and purchased by cer-

*326

tain parties, who *formed a new company and obtained a new charter under the name and style of the Savannah and Charleston Railroad Company, and entered into possession of the road, and have continued in the use and occupation thereof until this time.

V. That the said Thomas W. Gillison in his lifetime, never executed, nor has the plaintiff or any one else executed, a conveyance or other instrument whatever, transferring or releasing the interest of the said Thomas W. Gillison in the land aforesaid set apart for the use of the Charleston and Savannah Railroad; and neither the said Thomas W. Gillison in his lifetime, nor the plaintiff since his death, have been paid for the same, or tendered payment by any one in whole or in part; and the plaintiff therefore is entitled to claim the delivery of the possession of the said premises, with damages for withholding the same, or to payment of the said sum of $700, awarded as aforesaid, and interest thereon.

VI. That the plaintiff has applied to the defendant for a settlement of this claim, but has been unable to obtain any satisfaction from them.

VII. That Thomas W. Gillison duly executed his last will and testament, whereof the plaintiff was appointed executor, and that he has duly qualified thereon.

VIII. Wherefore the plaintiff prays: That the said Savannah and Charleston Railroad Company may be adjudged to deliver to him possession of the said premises, and to pay damages for withholding the same, or to pay the plaintiff the award aforesaid, to wit, $700, with interest from the 30th of September, 1860, and costs, and that they may be enjoined from making use of the said land until said payment shall be made; and that such other and further relief may be granted as may be consistent with law and equity.

The defendant answered, denying the first, second, third and seventh paragraphs of the complaint.

His Honor the presiding Judge rendered judgment, as follows:

Farmer, J. The issues in this action having been brought on for trial at this term

of the Court, and on hearing Messrs. Colcock and Hutson & Moore for the plaintiff, and R. DeTreville, Esq., for the defendant, and a verdict for the plaintiff having been duly rendered for twelve hundred and forty-four dollars and twenty-two cents:

*327

*It is adjudged that the plaintiff do recover against the said defendant the said sum of $1,244.22, and also for his costs and disbursements.

It is further adjudged and ordered that if the said defendant, the Savannah and Charleston Railroad Company, do not pay the said sum of $1,244.22, and also the said sum of to the plaintiff or his attorneys within sixty days from the date of this judgment, the said Savannah and Charleston Railroad Company, their agents and servants, be enjoined from entering upon the said lands described in the pleadings, to wit, the plantation called "Cotton Hall," belonging to the estate of the said Thomas W. Gillison, situated in Prince William's Parish, in the County of Beaufort and State aforesaid, and from running their cars, engines or trains upon, or in any way using so much or such parts of their track as passes through or over the said "Cotton Hall" plantation or any part thereof.

The defendants appealed on the following ground:

Because the facts stated in the complaint, and the law applicable to them, fail to establish any cause of action by the plaintiff against the defendants, and do establish that plaintiff is not entitled to either his verdict or to the extraordinary judgment thereon entered by His Honor Judge Farmer on the 5th March, 1872.

Campbell & Seabrook, for appellants:

1. This action is to compel the appellants to pay the alleged debt of another not a party to the case. There is no contract and no cause of action ex contractu between the parties here.

2. The appellants have whatever title to the land in question the Charleston and Savannah Railroad Company had—no more nor less. It has either a title in fee or no higher title than a possession only authorized by law.

3. This possession, as well as the respondent's rights, is protected by the special remedy provided by law, which remedy is not pursued in this case.

4. If the Charleston and Savannah Railroad Company had no title to the land, the appellants can have none derived from that

*328

*company, and must stand upon their chartered rights, and in that way acquire title, and they ask to be remitted to those rights.

Colcock & Hutson, contra:

The only difference between this case and the two cases of W. D. Gillison, appellant, v. the Savannah and Charleston Railroad Company, and T. H. Gregorie v. the same, recently decided in this Court, is that judgment was rendered against the Charleston and Savannah Railroad Company upon the award of the Commissioners who assessed the value of the right of way over the land of the plaintiff's testator.

The complaint alleges that neither payment nor tender was ever made by the defendant or the Charleston and Savannah Railroad Company; and the defendant makes no denial of this allegation in his answer.

It becomes necessary, therefore, only to refer to the decision of this Court in the two cases above mentioned, which covers all the points and authorities which appertain to the case at bar.

May 18, 1876. The opinion of the Court was delivered by

WILLARD, A. J. We held in Gillison v. Railroad [7 S. C. 173] that where a railroad company authorized to acquire lands by an Act authorizing the appointment of Commissioners to appraise such lands, and declaring that "the lands and right of way so valued by the Commissioners shall vest in the said company in fee simple as soon as the valuation thereof may be paid or tendered and refused," proceeds in the manner pointed out by the statute and obtains an appraisal, and takes possession under such appraisal, but without paying the amount of such appraisal, the interest acquired by the company under such transactions is bound for the payment of such appraised value. We held that such company is to be regarded as if in possession of lands under a contract to purchase the same without having paid the purchase money. In this case the fee of the lands remains in the original owner, subject to the contract and right of possession under it.

We also held that a purchaser from the company of its property and franchises, succeeding it in the possession of the land, takes it subject to such obligation. It follows, applying these rules to the present case, that the fee remained in T. W. Gillison, the former

*329

*proprietor, and at his death passed to his distributees by operation of law, who are entitled to receive the appraised value of the land. It is alleged that T. W. Gillison left a will appointing the plaintiff his executor, but it is not alleged that he made any disposition by his will of his real estate, or gave his executor any control over his land. Under these circumstances the executor shows no title to this money due according to the appraisal.

The fact that judgment was entered upon such appraisal cannot affect the right of the executor to sue. Assuming that such a judgment could be obtained, it would not affect the right of the heirs, or the devisees, should there have been a devisee of the lands by

the will, to claim the benefit of it; for it would be regarded in equity as a security for the money, and would follow the right to demand such money.

The judgment should be set aside and the complaint dismissed.

MOSES, C. J., and WRIGHT, A. J., concurred.

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7 S. C. 329

DE SAUSSURE v. BOLLMANN.

(Columbia. Nov. Term, 1875.)

[*Vendor and Purchaser* ⇐130.]

Where under a mortgage to secure the payment of the purchase money of land the land is sold under a decree of foreclosure to which a prior judgment creditor of the mortgagor was not made a party, for a sum less than the mortgage debt, the purchaser acquires such a marketable title as one with whom he afterwards contracts for a sale of the land is bound to accept.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 245, 246, 247; Dec. Dig. ⇐130.]

[*Mortgages* ⇐427.]

To an action for a foreclosure of a mortgage of real estate, all encumbrancers, as judgment creditors for instance, existing as such at the commencement of the suit, must be made parties, otherwise they will not be bound by the decree.

[Ed. Note.—Cited in Warren, Wallace & Co. v. Burton, 9 S. C. 198; Marion County Lumber Co. v. Tilghman Lumber Co., 84 S. C. 509, 66 S. E. 124, 877.

For other cases, see Mortgages, Cent. Dig. § 1286; Dec. Dig. ⇐427.]

[*Mortgages* ⇐534.]

A purchaser under a decree to foreclose a mortgage given for the purchase money of the land sold whose bid is not sufficient to extinguish the mortgage debt acquires the equity of redemption, and, it seems, a valid title even as against a prior judgment creditor who was not made a party to the action.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1555; Dec. Dig. ⇐534.]

[*Trusts* ⇐189.]

Where real estate is devised to a tenant for life, with remainder to his children and with power in the executors of his will to sell the property at the request of the tenant for life and reinvest the proceeds on the same limitations, and the tenant for life conveys his interest to a trustee for the benefit of his children, one afterwards contracting for the purchase of the property is not bound to accept a conveyance from the executors of the will, the tenant for life and the trustee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 241; Dec. Dig. ⇐189.]

*330

*Before Reed, J., at Charleston, September, 1875.

This was an action by Wilmot G. DeSaussure, Julius Trouche, Florence T. Downey and Lawrence A. Duval, as executors of the last will and testament of Etienne Poincignon, deceased, Clarence A. Trouche and Gustavus Follin, against Behrend Bollmann for specific performance of a contract for the sale of a lot of land.

The case was as follows:

On the 18th of March, 1875, the plaintiffs made a contract with the defendant for the sale to him of the lot in question at the price of $1,800, and on the same day they tendered to him a deed of conveyance of the lot executed by themselves. An abstract of the title, exhibited by the plaintiffs with their complaint, shewed that one Woolf J. Jacobi, on the 31st of August, 1860, conveyed the lot to John P. Laborde, and that on the same day Laborde mortgaged the lot to Jacobi to secure the payment of the purchase money; that Jacobi assigned the mortgage to one Philip A. McBride, who assigned it to M. H. McBride; that M. H. McBride assigned it to the "Savings Building and Loan Association," and that body, on the 3d of June 1863, assigned it to Etienne Poincignon; that Etienne Poincignon, on the 24th of September, 1866, filed a bill in equity against John P. Laborde for foreclosure of the mortgage. There was no other defendant in this bill.

That on the 11th of March, 1867, an order for sale of the mortgaged premises was made; that the sale was made by the Master, Etienne Poincignon being the purchaser, and on the 2d of May, 1867, the Master conveyed the lot to him. The sale was reported and the report confirmed by the Court.

On the 7th December, 1871, Etienne Poincignon made his will, by which he devised the said lot to his nephew Clarence A. Trouche for life, with remainder to his children. The devise is as follows:

"I give and devise * * *, also my house and lot of land on the East side of State street, to my nephew Clarence Trouche for and during his natural life; and after his death I give and devise the said houses and lots of land equally between his children then living and the children then living of any child then dead; such children taking among them the parents' share by representation absolutely. * * *

*331

*"It is my will, and I order and direct, that in case any of the tenants for life of any portion of the real property hereinbefore devised shall, during the continuance of such life estate, deem it for his or her interest that the real property in which he or she is respectively interested be sold, disposed of or exchanged, it shall and may be lawful for my executors, hereinafter named, or such as shall qualify upon this my will, and the survivors or survivor of them, or the trustee or trustees appointed in their lieu and stead, as often as occasion requires, upon being thereunto requested in writing by such life tenant, to sell, dispose of or exchange, and upon such sale, disposition or exchange to execute and deliver conveyances therefor, all or any part of such real property as they may be request-

ed, and the proceeds arising from such sales to reinvest in other property, real or personal, and to hold such reinvested, exchanged or acquired property to and for the several life tenants respectively in the same manner as the original property."

The plaintiffs, Wilmot G. DeSaussure, Julius Trouche, Florence C. Downey and Lawrence A. Duval, were appointed executors of the will. It was admitted to probate on the 15th of July, 1873, and all the executors qualified.

On the 11th of August, 1873, Clarence A. Trouche conveyed to Gustavus Follin all his right, title, interest, life estate, claim and demand whatsoever of, in and to the said lot for the term of his natural life in trust to collect the rents, to pay taxes and insurance on the buildings, &c., and then to apply the net balance of the income to the maintenance, education and support of his daughter, Marie L. Trouche, and his son, Paul E. Trouche, in such manner and in such proportions as to the said Gustavus Follin, in his sole discretion, shall seem best for said children.

It was further shewn that on the 27th day of July, 1860, a judgment for $2,000 was entered up in Court of Common Pleas for Charleston District by Melvin P. Wilbur against John P. Laborde.

It seems to have been conceded that the proceeds of the foreclosure sale were insufficient to satisfy the mortgage debt.

The objections made to the title were: 1. The judgment in favor of Melvin P. Wilbur. 2. That under the conveyance by Clarence A. Trouche to Gustavus Follin, interests are given to the two children of Clarence A. Trouche, who are under age and are not, and cannot be, united in the conveyance to the defendant.

*332

*His Honor the presiding Judge, after hearing argument, made a decree for the specific performance of the contract, and ordering the costs to be paid by the defendant.

Campbells & Whaley, for appellant:

1. A judgment creditor is a necessary party to a bill for foreclosure of mortgage.

That he is a proper party will not be denied.

The error in not making him a party arises from the mistaken applicability of the English cases, in which the mortgagee is treated at law as the legal owner even before the condition broken, and in following those cases in the American Courts, where the English law has not been changed. In the consideration of the question before this Court, we can derive no light from the English authorities, and it must be solved by those cases in our own Courts which depend upon the Act of Assembly of 1791, which abolishes the doctrine that the mortgagee is the legal owner when the mortgagor is in possession.—General Statutes, p. 536, § 1.

In a case lately considered by Chief Justice Waite, (In re Bennett, bankrupt,) it was held that the mortgagee could not recover rents and profits until after bill filed against the mortgagor, with proper averment of the insufficiency of the mortgaged estate to pay the debt, following the case of Matthews v. Preston, (6 Rich. Eq., p. 307,) in which, at page 308, the Court say: "In a Court of equity, independent of the provisions of our Act of Assembly of 1791, the mortgagor is regarded as the owner of the land even after forfeiture, and the mortgagee is only considered in the light of a creditor having a lien on the land. * * * Here they all stand upon the same footing as regards ownership in the land. None are considered as having rights founded upon legal title, but all are alike regarded as creditors simply having liens on the property and having precedence in payment according to their priorities."

There is no rule of pleading better known than that which requires all persons in interest to be made parties to the action.

That the judgment creditor of the mortgagor has such an interest in a foreclosure suit is evident from the case of McClure v. Mounce, 2 McC., 423. In delivering the opinion of the Court, Mr. Justice Colcock says: "The abstract question is, when mortgaged land is sold without a regular foreclosure,

*333

either at law or in *equity, what interest passes to the purchaser? And the case above mentioned furnishes a direct answer. The equity of redemption is sold." Therefore here is the interest which the judgment creditor had and now has.—that is, the right to sell the equity of redemption.—and, having this, the right to redeem follows: and by buying at the Sheriff's sale he obtains the right to redeem from a purchaser at a foreclosure sale, where he is not a party.

That a judgment creditor is a necessary party.—See Curtis v. Hitchcock, 10 Paige, 399, 400, 406, 407, 408; Haines v. Beach, 3 John. Ch., 459; Cook v. Manicus, 5 John. Ch., 89; Ensworth v. Lambert, 4 John. Ch., 606.

2. The second objection to the title is:

That under the conveyance by Clarence Trouche to Gustavus Follin interests are given to persons under age, who are not, and cannot be, united in the conveyance to Behrend Bollmann.

The property in question passes under the will of Poincignon as follows: "I give and devise * * *, also my house and lot of land on the East side of State street, to my nephew, Clarence Trouche, for and during his natural life."

Trouche, on 11th of August, 1874, conveyed his interest to Follin, "in trust, to hold for the life of Clarence Trouche, and to collect the rents, etc., and, after payment of taxes, etc., to apply the rents, etc., to the maintenance of Clarence A. Trouche's children during his lifetime."

After this, (that is, on 18th March, 1875,) the executors of Poincignon with Clarence A. Trouche the grantor and Follin the grantee and trustee as aforesaid, join in making title to Bollmann.

By the deed of Trouche to Follin, his interest and estate passed to the said Follin for the grantor's children. There is no power given to the trustee to change the estate, and it is a matter of doubt even if this Court would authorize the converting of real estate into personalty without requiring the trustee to put in security.

The power and duties of the trustee are defined in the deed as follows: "I do hereby nominate, constitute and appoint the said Gustavus Follin as my true and lawful attorney, for me and in my name, lieu and stead, to manage and conduct all the business appertaining to the said lots of land, to rent the same, collect the rents thereof, keep the same insured, and generally to do all and whatsoever I myself could personally do relative thereto; and also for me, and in my name, lieu and stead, to ask, demand and re-

*334

ceive of and *from the executors of the said Etienne Poincignon the interest and income arising from the said investment; and for me, and in my name, lieu and stead, to give, make and deliver all necessary, sufficient and proper acquittance, receipts and discharges therefor."

There is no power given to sell and convey, and none is to be implied from any words or powers contained in this deed.

The request that Trouche could make of the executors, if complied with, would annul his conveyance to Follin. In fact, Follin, the trustee, could require Trouche to make the writing requesting the executors to convey to Follin, if necessary to assure the estate conveyed to Follin.

Under the deed of Trouche, the interest of the infants cannot be divested by Trouche and Follin joining in with the executors to create a different estate.

3. The Court will not decree specific performance when there is any doubt about the title.—Butler v. O'Hear, 1 DeS., 383. The marginal note is as follows: "The Court will not compel the specific performance of an agreement and oblige defendant to accept a title which the complainant cannot make out to be clearly good and free from encumbrances."—Sug. on Vend., 8 Am. ed., p. 577.

DeSaussure & Son, contra:

The facts in this case are sufficiently set out in the appellant's brief to be thus summarized:

In July, 1860, M. B. Wilbur entered up a judgment in the Court of Common Pleas against John P. Laborde, who, in August, 1860, subsequent to the obtaining of said judgment against him purchased a lot of land on State street, in the city of Charleston, and mortgaged it for the purchase money, which mortgage, by sundry assignments, came finally to be owned by Etienne Poincignon, the testator of these respondents, who, in 1867, foreclosed the mortgage, and, to protect himself bid in the property for less than the mortgage debt. Poincignon died in 1873, and, by his will, devised the said house and lot on State street to his nephew, Clarence A. Trouche, for life, with remainder to his children, with power to his (Poincignon's) executors to sell and reinvest the proceeds upon the written request of the life tenant. Clarence A. Trouche conveyed by way of assignment his life estate in the said property to Gustavus Follin, upon certain trusts set

*335

*forth in the appellant's brief, to wit: To receive the rents and profits, and apply them for the benefit of himself and children. Subsequent to such assignment, Trouche and Follin join in a written request to the executors that the house and lot be sold and the proceeds reinvested, and, thereupon, under the power contained in the will, the said executors sold the same at public auction to Behrend Bollmann, the appellant, and tendered to him a conveyance thereof; but he refused to accept the titles and comply with the terms of his purchase upon the same grounds he now appeals upon.

Upon these grounds, the case was argued before His Honor Judge Reed, who thereupon ordered and decreed that Bollmann accept the titles and comply with his purchase.

From such decree Bollmann appeals upon the grounds already stated as encumbrances upon the property:

1. A judgment entered up in the Court of Common Pleas for Charleston District on 27th July, 1860, by Melvin B. Wilbur v. John P. Laborde.

The questions raised by this first objection are: Did this judgment constitute a lien upon subsequently acquired property, which was mortgaged for the purchase money, sold under decree of foreclosure and bought in at the sale for less than the mortgage debt?

Was not the seizin and disseizin too instantaneous to create any estate in the vendee upon which the lien of this judgment against him could attach?

The rights of dower and homestead stand on much higher grounds relative to mortgages for the purchase money than a judgment lien, and are therefore more carefully guarded: but time and again has it been decided that a conveyance and a mortgage back by the vendee for the purchase money was too instantaneous a seizin for either of these rights to attach as against the mortgagee.

Also, of a seizin for an instant a woman shall not be endowed.—1 Coke Litt., 576.

And Justice Parsons has said:

It certainly is law that where the husband is seized but for an instant, of this seizin his wife shall not be endowed. The seizin for

an instant is where the husband by the same act, or by the same conveyance by which he acquires the seizin, parts with it.—Holbrook v. Finney, 4 Mass., 586.

The husband must have been beneficially seized at his death to entitle to dower; and this principle applies where the husband

*336

*takes a conveyance in fee and at the same time mortgages the land back to the grantor, or to a third person, to secure the payment of the purchase money. Dower she cannot claim as against rights under that mortgage; such an instantaneous passage of the title in and out of him is not a sufficient seizin to entitle the wife to dower as against the mortgagee.—Cord's Leg. and Eq. Rights of Mar. Women, § 508; 4 Kent Comm., 39; 1 Hilliard on Mort., 681; Willard on Real Est., 62; 1 Washburn on Real Prop., 176; 2 Hilliard on Real Prop., 323; 1 Hilliard on Real Prop., 136; Stow v. Tift, 15 John., 463; Jackson v. Dewitt, 6 Cowen, 316; Maybury v. Brien, 15 Peters, 38; Bogie v. Rutledge, 1 Bay, 312; Crafts v. Crafts, 2 McC., 54; Frazier v. Center, 1 McC. Ch., 279; Calhoun v. Calhoun, 2 S. C., p. 283; Huguenin v. Cochran, 2 Amer. Rep., 303.

Where a mortgage is made simultaneously with the purchase of land, and as a part of the same transaction, no intervening right of homestead is created in the mortgage.—1 Hilliard on Mort., p. 2, note b, citing New England v. Merriam, 2 Allen, 391; Calhoun v. Calhoun, 2 S. C., 283.

For the purposes of this case these decisions as to dower and homestead only go to prove how fixed is the principle laid down in Freeman on Judgments, § 365, in these words:

"Nothing is better settled than this—that if the vendor, at the time of parting with his title, takes a mortgage or a judgment as a part of the same transaction to secure his purchase money, he retains a lien on the estate conveyed, not to be displaced by any other encumbrance."

A mortgage, trust deed, or other instrument given to secure the purchase money, takes precedence over a prior judgment lien against the vendee.—Freeman on Judgments, § 360.

No encumbrance against the vendee will attach upon an instantaneous seizin which is immediately conveyed back to the vendor by way of mortgage.—Willard on Real Est., 559.

In New York, by statute, "whenever lands are sold and conveyed and a mortgage is given by the purchaser at the same time to secure the payment of the purchase money or any part thereof, such mortgage shall be preferred to any previous judgment which may have been obtained against the purchaser."—Willard on Real Est., 124, 559; 1 Hilliard on Mort., 328, note, 331, note, 664, note; 4 Kent Comm., 435.

*337

*The lien of a judgment does not in equity attach upon the mere legal title to the land in the defendant when the equitable title is in another person.—Illis v. Tously, 1 P. Ch., 284.

Judgments are not specific liens; they are general liens; and, as such, they cannot prevail against prior equities.—In re Howe, 1 P. Ch., 128.

The prior equity in this case was that of the vendor to Laborde being paid for his property before it should pay the debts of Laborde.

For other decisions against the first ground of objection we offer the following cases: Ahrens v. White, 39 Mary., 409; Brown v. Pierce, 7 Wall., 217; White v. Carpenter, 2 P. Ch., 266; Kristed v. Avery, 4 P. Ch., 15; 9 Amer. Law Rev., 504; Thaxter v. Williams, 14 Pick., 54.

In this latter case the decision went so far as to give precedence to the mortgage for the purchase money over a mechanic's lien for buildings actually erected upon the land.

All of these decisions relative to dower, homestead and judgments are based upon the clearest principle of justice, not of justice only, but of common honesty,—that the creditors of a debtor cannot take the property of another, for which the debtor has not paid, to pay his debts to them. Such a proceeding could and would not be tolerated; for the very terms upon which the debtor held the property was upon the condition that he should pay for it; and, in case he should fail to do so, the property should be primarily liable for the debt. The thing sold must remain as a security for the payment of its own price, for, were it otherwise, all transactions in real estate must necessarily be in cash, and, that being impossible, the change of property from hand to hand, which creates its principal value, would be most effectually stopped and its value destroyed.

To the second ground of appeal:

2d. That, under the conveyance by Clarence A. Trouche to Gustavus Follin, interests are given to persons under age who are not and cannot be, united in the conveyance to Behrend Bollmann. The answer is simple enough, for a reference to the appellant's brief shows the words of the will under which Trouche acquired his interest to be: "I give, etc., also my house and lot of land on the east side of State street, to my nephew Clarence Trouche for and during his natural life; and, after his death, I give and devise the said houses and lots of land equal-

*338

ly between his children then *living and the children then living of any child then dead, such children taking among them the parent's share by representation absolutely."

Under this devise Trouche had nothing but a life estate in the property; the remainder in fee was to his children living at his death and the children of any child then dead. And the legal estate during the life estate of Trouche remained in the executors, because they were compelled by a provision in the will, upon the written request of Trouche, to do a certain act which no one else could: to sell the property constituting the life estate and reinvest the proceeds. "and to hold such reinvested * * * property * * * in the same manner as the original property."—Tucker v. Tucker, 1 S., 408; Brewster v. Striker, 2 Coms., 20.

What, then, could Trouche assign? Certainly nothing but his life estate; and that he did assign nothing else appears from the deed of assignment to Follin, giving him only the power, which Trouche had, to collect the rents and profits and apply them for the benefit of Trouche and his children by giving them a present support and by paying taxes, insurance and repairs, preserving the estate in remainder.

A tenant for life may alien his estate, but his grantee then becomes a tenant for the life of his grantor.—Willard on Real Est., 57.

Thus the assignment to Follin could in no wise affect the title to the premises sold to Bollmann, because the interest of the children under such assignment was in the life estate, and the evident intention of the testator was that the life tenant should have the privilege of choosing the kind of property that estate should be in. The conveyance to Bollmann could not destroy either the life estate or the estate in remainder, because the proceeds of sale then took the place of the house and lot and both estates remained as before. How, then, if the children under the assignment had only an interest in the life estate, and that is not in any way affected or destroyed by the conveyance to Bollmann, but remains as before, only changed in the form of investment, could any interest of the children in the life estate affect the titles to this property? It cannot.

The second objection is based, we think, upon a misapprehension of what the life estate which was assigned is in. It was not given in that specific house and lot or noth-

*339

ing else, but in that *house and lot or any investment of the proceeds of its sale, as the life tenant might choose.

That such was the intention of the will is shown by the clause giving the executors power to sell and reinvest when requested in writing by the life tenant. Such request was made both by Trouche and his assignee, and is endorsed upon the conveyance tendered.

June 1, 1876. The opinion of the Court was delivered by

MOSES, C. J. It is not to be doubted that a mortgage of real estate executed for the security of the purchase money creates a lien against which no subsequent encumbrance affecting the mortgage could prevail. While it has been held in this State that the equity of redemption is such an estate in the mortgagor as may be subject to sale under a judgment against him, thereby vesting it in the purchaser, still the mortgage will take priority over judgments against the mortgagor, both antecedent and subsequent, and will be first entitled to satisfaction out of the sale of the property which it covers. Judgment creditors, as well as junior mortgagees of the same premises, even where the title vests in the mortgagee, and is not retained in the mortgagor, as under an Act of 1791, have an interest in the equity of redemption, which is necessarily affected by a sale under foreclosure.

Proceeding on the principle of "doing complete justice," which always governs a Court of equity, it has been held, both in England and New York, that "to a bill for foreclosure and sale of mortgaged premises all encumbrancers or persons having an interest existing at the commencement of the suit, subsequent as well as prior in date to the plaintiff's mortgage, must be made parties, otherwise they will not be bound by the decree."—Haines v. Beach, 3 John. Ch., 459. Chancellor Kent, with the learning for which he was so distinguished, and the research with which he examined all questions presented for his decision, has there so fully reviewed the authorities, and set forth the reason and policy which confirm his conclusion, that the attempt to add anything to his convincing argument would be vain and superfluous. Conforming to the general rule, this Court said in Manufacturing Company v. Price, (4 S. C., 338,) that "one who holds by title derived from the mortgagor subsequent to the mortgage is not concluded by a decree of foreclosure to which he was not a party."

*340

*It does not, however, follow in the case before us that, although the plaintiff in the judgment against Laborde was not made a party to the foreclosure by Poincignon, the assignee of the mortgage, the omission works such a defect in the title as will discharge the purchaser, Bollmann, from the specific performance of his contract. All that the vendor is required to tender is a good and marketable title; it is not enough for the defendant to show that the title may be possibly defeated.—Thompson v. Dulles, 5 Rich. Eq., 370; Laurense v. Lucas, 6 Rich. Eq., 217. The purchase by Poincignon under his bill for foreclosure vested in him the equity of redemption reserved to the mortgagor and thus conferred upon him the absolute estate in the lands. The proceeds of the sale fell short of the amount due on the mortgage. The judgment against the mortgagor was ob-

tained in 1860, and nearly fifteen years had elapsed before the sale to Bollmann, and no step in all that intervening time has been taken by Wilbur, the judgment creditor, for the sale of the equity of redemption remaining in Laborde. Neither to this moment has he intervened by any process to subject, if he could, the proceeds of the sale to the payment of his debt.

But suppose he were now to take proceeding under his judgment for the sale of the equity of redemption,—what right would a purchaser at such a sale acquire? By a Court of competent jurisdiction the mortgage has been foreclosed, and whatever interest Laborde had in the land has been conveyed to Poincignon on his purchase. In a contest of claim between him and such a purchaser, it must be decided in favor of the one who holds through the higher lien, and Poincignon's title is derived from a sale under a mortgage given to secure the purchase money of the land, the subject of dispute, and would necessarily prevail.

Mr. Story, in Section 742 of his work on Equity Jurisprudence, says: "The exercise of this whole branch of equity jurisprudence respecting the rescission and specific performance of contracts is not a matter of right in either party, but it is a matter of discretion in the Court,—not indeed of an arbitrary or capricious discretion, dependent upon the mere pleasure of the Judge, but of that sound and reasonable discretion which governs itself, as far as it may be, by general rules and principles, but, at the same time, which withholds or grants relief, according to the circumstances of each particular case, where these rules and principles will not furnish exact measure of justice between the parties." Applying the recognized

*341

*principles which govern the Court in the administration of this branch of its jurisdiction, we do not see in the objection urged by the first ground of appeal anything which would warrant its interposition against the relief sought by the complaint.

Not so, however, with the other question raised by the motion. Whatever right devolved on Clarence E. Trouche by the devise to him of a life estate in the property was assigned, released and conveyed by him for the benefit of his children, all minors, to Follin, in trust for their use. The language of the deed, after referring to the words of the will, embraces "all his right, title, interest, life estate, claim and demand whatsoever of, in, to and out of all and singular the devise and bequest hereinbefore recited, and the lot of land therein mentiond and the investments thereby provided." It was not possible for him to have employed a more comprehensive expression to denote his intention of transferring, for the benefit of his children, all the interest which he took under the will. The right reserved to him by the will to demand of the executors a sale or exchange of the property, that the proceeds of the sale may be reinvested, and such reinvested, acquired or exchanged property held for his benefit, depended upon his retention of the premises devised. The title was in him for life. He had the right to alienate his interest by gift or sale. Suppose for a money consideration he had bargained and conveyed the premises to a third person,—could he, in that event, have exercised his power under the will to demand and require a sale or exchange of them by the executors? By this decree he had transferred all his interest, and the purpose contemplated by the testator in making a sale or exchange at his request would therefore fail, for the effect intended could not be accomplished. Follin, the trustee under Trouche's deed, had no authority to sell and convey; his cestuis que trust were all infants, and could not be divested of their interest by a sale or exchange unless by the authority of a competent Court. His uniting with the executors in the deed to Bollmann was a breach of the trust confided to him by the deed of Trouche.

The defect thus appearing in the title precludes respondents from the right of compelling specific performance of the contract referred to in the complaint.

Looking to the whole case, we do not think, in a matter resting on the sound and reasonable discretion of the Court, regulated, however, by general principles, that this is a case

*342

where costs should *follow the decree. The executors were acting in good faith, but misled as to the effect of the trust deed which Trouche executed.

The judgment of the Court below is reversed and the complaint dismissed, each party paying his own costs.

WRIGHT, A. J., concurred.

WILLARD, A. J., concurred and filed the following separate opinion:

We are agreed, for the reasons stated in the opinion of the Chief Justice, that the vendor did not have, at the time of making his demand for specific performance of the contract of sale, a good and marketable title to the lands agreed to be sold. It is therefore a matter of discretion whether the Court will permit the title to be completed at the present time. I think that such permission ought not to be granted. There is an outstanding encumbrance by judgment, such judgment creditor not having been made a party to the foreclosure suit. It may prove on investigation that the lien of that judgment is lost, but that fact should be determined in a proceeding to which the judgment creditor is a party, as the question involved is worthy of judicial consideration.

At all events, in my judgment, the objection urged tends to affect prejudicially the

marketable value of the premises, and, as the question of allowing the completion of the title is one of discretion, and not of strict right, I think specific performance should not be decreed.

For the reasons above stated, I concur in the judgment of the Court.

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7 S. C. 342

DAVIS v. VAUGHAN.

(Columbia. April Term, 1876.)

[*Justices of the Peace* ⇐155.]

A Circuit Judge has no power to extend the time prescribed by Section 370 of the Code of Procedure for taking an appeal from a Trial Justice.

[Ed. Note.—Cited in Foot & Son v. Williams, 18 S. C. 601; Doty & Co. v. Duvall, 19 S. C. 145; Bigham v. Holliday, 52 S. C. 529, 30 S. E. 485; Manuel v. Loveless, 56 S. C. 428, 35 S. E. 1; Gibbes v. Beckett, 84 S. C. 536, 66 S. E. 1000.

For other cases, see Justices of the Peace, Cent. Dig. § 529; Dec. Dig. ⇐155.]

Before Cooke, J., at Greenville, March Term, 1875.

This was an action by Thomas W. Davis against John Vaughan to recover the possession of personal property. It was brought before a Trial Justice, and on the 17th of

*343

December, 1874, judgment *therein was entered for the plaintiff. The defendant, on the same day, prepared a written notice of appeal and served the same on the Trial Justice. The case was placed on the docket of the Circuit Court, and on March 12, 1875, the plaintiff made an affidavit that the notice and grounds of appeal had never been served, and that he was constantly at his place of business, in the city and County of Greenville, for more than five days immediately succeeding the trial of the case before the Trial Justice.

On March 12, 1875, a motion was made on behalf of the plaintiff to strike the case from the docket of the Circuit Court. The motion was denied, and His Honor ordered that the defendant have until the first day of May to complete the appeal. From this order the plaintiff appealed to this Court, and now moves that the said order be reversed.

Earle & Wells, for appellant, cited Dwar. on Stat., (Pot. ed.,) 225; Code, §§ 370 and 371; Humphrey v. Chamberlain, 1 Ker., (11 N. Y.,) 274; Wait v. Van Allen, 8 Smith, (22 N. Y.,) 319; Caldwell v. The Mayor &c., of Albany, 9 Paige, 572; The Bank of Monroe v. Widner, 11 Paige, 529; Butler v. Salles, 13 Smith, (27 N. Y.,) 698; Cotes v. Carroll, 28 How. Pr. R., 436.

Grey & Vance, contra.

June 7, 1876. The opinion of the Court was delivered by

WRIGHT, A. J. This case was heard and determined by a Trial Justice upon whom notice of appeal with the grounds stated was duly served according to Section 370 of the Code of Procedure, General Statutes, 659. The respondent below was not served, nor does it appear that there was any effort on the part of the appellant to comply with the requirements of Section 371 of the Code, General Statutes, 659, relative to the perfecting of appeals from such inferior Courts. The time allowed by the statute in which to appeal had expired and the Circuit Judge granted further time to permit a compliance by the appellant with the required conditions.

The only question before the Court is, when the time limited by the Act for perfecting appeals from inferior Courts has expired, has a Circuit Judge the right to extend it?

The object of the provision was to establish a uniform system by a designated period in regard to such appeals, and within such

*344

*they must be held. A Circuit Judge has no power to change the time so allowed by law, and thus render it fluctuating at his will, according to what he may suppose the exigencies and the circumstances of the particular case demand. In Potter's Dwarris on Statutes, page 255, it is said: "Whenever a statute imposes terms and prescribes a thing to be done within a certain time, the lapse of even a day is fatal, because no Court can admit of any terms but such as directly and precisely satisfy the law."

Our statute prescribes the exact time in which an appeal may be taken from an inferior Court to the Circuit Court, and when that time has expired the right is lost and cannot be restored by the interposition of a Circuit Judge.

In the State of New York, where the Code affixed the time within which an appeal may be taken, it has been held that it cannot be allowed after its expiration. Judge Denio, upon this subject, says: "The Code prescribes the time within which an appeal may be taken from the special to the general term, and it was not in the power of the Court to extend that period, or to allow an appeal when the time had been suffered to expire."—Humphrey et al. v. Chamberlain, 1 Kernan, (11 N. Y.,) 274. Again this same doctrine is fully sustained in the case of Wait v. Van Allen, 8 Smith, (22 N. Y.,) 319.

The motion must be granted.

MOSES, C. J., and WILLARD, A. J., concurred.

7 S. C. 344

ROSENBERG v. LEWI.

(Columbia. April Term, 1876.)

[*Homestead* ⟸95, 128.]

There can be no claim of homestead against a mortgage of the property in which the claim is made.

[Ed. Note.—Cited in Hornesby v. Burdell, 9 S. C. 306; City Council of Charleston v. Caulfield, 19 S. C. 205; Elliott v. Mackorell, Id., 243; Youngblood v. Lathen, 20 S. C. 375.

For other cases, see Homestead, Cent. Dig. §§ 146, 224; Dec. Dig. ⟸95, 128.]

[*Mortgages* ⟸581.]

As a general rule, counsel fees of others than the mortgagee are not, it seems, payable out of the proceeds of the sale of mortgaged property in proceedings for foreclosure.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 2111/2, 1669–1679; Dec. Dig. ⟸ 581.]

Before Cooke, J., at Abbeville, January, 1876.

This cause was heard upon a statement of the case, which is as follows:

On the 22d day of February, 1871, Garrison A. Visanska, one of the defendants, mortgaged to H. K. Thurber & Co. a tract

*345

*of land in the County and State aforesaid, containing 1,050 acres, known as the Belcher plantation, as security for a debt of $2,000 which he owed them. The mortgage was subsequently duly assigned by H. K. Thurber & Co. to David Lewi.

David Lewi commenced his action to foreclose the mortgage against Garrison A. Visanska on the 8th of April, 1874, and on the same day filed a notice of the pendency of the action in the office of the Clerk of the Court of Abbeville County. The summons and complaint were served on Garrison A. Visanska by the Sheriff on the 13th day of April, 1874. The complaint of David Lewi was answered by Garrison A. Visanska and several defenses were pleaded.

The cause was heard before his Honor Judge Carpenter, sitting for Judge Cooke, and a judgment of foreclosure was signed and entered on the 23d day of April, 1875, ascertaining the debt secured by the mortgage to be $2,037.94, besides costs, and the mortgaged premises ordered to be sold for cash on sale day in November, 1875, and the debt paid out of the proceeds. The equity of redemption of the said Garrison A. Visanska and of all persons claiming under him was foreclosed and the mortgaged premises advertised for sale under the judgment. On the 14th day of April, 1874, the day next after the personal service of the summons and complaint on Garrison A. Visanska, he made a deed of conveyance of the Belcher plantation and a tract of land on Little River in said County, but of no other property, to the respondent, Wolf Rosenberg, for his creditors. The tract on Little River had been mortgaged by Garrison A. Visanska to Morris Israel as security for a debt due to him. After the execution of the mortgages several judgments had been obtained against Garrison A. Visanska, some of them before and some after the conveyance. In the deed of conveyance to Wolf Rosenberg, Garrison A. Visanska claimed a homestead in the Little River tract of land, if he should be entitled by law to the same, but made no claim of homestead in Belcher plantation. On the 19th day of April, 1875, Wolf Rosenberg filed in the office of the Clerk of Abbeville County his complaint against the appellants, David Lewi, Morris Israel, certain judgment creditors, Anna R. Visanska and Garrison A. Visanska, setting forth the conveyance of Garrison A. Visanska to him: that the Belcher plantation had been mortgaged by Garrison A. Visanska to H. K. Thurber & Co., and by them assigned to Da-

*346

vid Lewi; that the Little *River tract of land had been mortgaged to Morris Israel, and that judgments against Garrison A. Visanska had been obtained after the making of the mortgages by him; and further alleging that Anna R. Visanska preferred a claim arising out of an alleged marriage contract between her and her husband, Garrison A. Visanska. The complaint of Wolf Rosenberg admits the validity and priority to the judgments of the mortgage held by David Lewi, but alleges that the amount of the debt secured by it is unknown to him; alleges that Garrison A. Visanska claims a homestead in the Little River tract, and that plaintiff is in doubt and perplexity as to the claim of Anna R. Visanska, that of Garrison A. Visanska to homestead and the alleged mortgage to Morris Israel. The complaint demands an injunction restraining the appellant from selling the land to foreclose his mortgage and judgment creditors from selling the lands until these claims last mentioned shall be decided. On the 15th day of October, 1875, the order for injunction was made. The cause came to a hearing before his Honor Judge Cooke, January Term, 1876. The complaint was answered by David Lewi, 13th November, 1875; Garrison A. Visanska failed to answer. On the hearing there was no evidence that Garrison A. Visanska had ever resided on the Belcher plantation, and he admitted that he had never done so. And in reply to a question by the Court, Visanska said he would take his homestead in the Belcher plantation, and was told by Judge Cooke that he must act upon his own judgment. It was proved that the Belcher plantation was ten miles from any residence of Garrison A. Visanska. The Belcher plantation and the tract on Little River are both mentioned in the judgment of the Circuit Court, which decides that Garrison A. Visanska is entitled to homestead, and, further, "that he is at liberty to select his homestead

and have it taken from the lands above named," and directed the Sheriff to lay it off according to law in said lands. The judgment dissolved the injunction and ordered that the Belcher plantation should be sold for one-half of the purchase money in cash, and the other half on a credit until the 1st of January next, and did not exact of the purchaser any security or bond for the same.

David Lewi appealed from so much of the judgment of the Circuit Court, entered February 4, 1876, as adjudges that the co-defendant, Garrison A. Visanska, is entitled to a homestead in the Belcher tract of land and

*347

in the tract on Little River, mentioned *in said judgment, and is at liberty to select his homestead in them and to have it laid off from them, and orders the Sheriff to lay off his homestead in said tracts of land.

Also, from so much of said judgment as orders the Belcher tract of land to be sold for one-half of the purchase money in cash and the other half on a credit until the first day of January, 1867, without requiring security for the same, whereas the judgment of foreclosure entered on the 23d day of April, 1875, in the action of David Lewi against Garrison A. Visanska directed that the Belcher tract be sold for cash.

Also, from so much of said judgment as requires the Referee therein appointed to report out of what fund the counsel fee of the attorney of Wolf Rosenberg, the plaintiff, shall be paid, and will move to reverse the said judgment in these particulars.

Burt, for appellant, submitted the following points and authorities:

That a homestead is the residence of a family—the place where the home is, where the family permanently reside.—Smythe on Homestead and Exemptions, § 68, and authorities cited: Article II, Section 32, Constitution of 1868.

That occupancy, use as a homestead, actual residence, define and constitute a homestead, and are required by the homestead laws of all the States.—Smythe, §§ 169, 170; House v. House, S. C. Reports, 232.

The residence must be actual, not constructive.—Smythe, § 66.

That intention to use land at some future day as a homestead is not sufficient.—Idem, § 171.

That neither Visanska nor his family having resided on the Belcher plantation, even temporarily, or at all, he has no right to have any part of it set off to him under the pretext of a homestead.

That if Visanska ever had any claim or right to homestead in that plantation, it was divested by his mortgage dated 22d February, 1876, of which the appellant is assignee.—Homestead Building and Loan Association v. J. A. Enslow, ante p. 1.

That, if not divested by the mortgage, it was divested by the deed of 14th of April, 1874, to respondent Rosenberg.—Same case.

*348

*That, if not divested by the mortgage nor the deed, it was precluded by the decree of foreclosure in the case of David Lewi, the appellant, against Garrison A. Visanska, of 23d April, 1875.

Parties to a foreclosure suit are concluded by the decree; the law supposes that whatever claims they may have had are litigated by them; if their rights were not asserted, they are forever barred from asserting them.—Benjamin v. Railroad Company, 49 Barber, 441.

The principle of res judicata is applicable to the claim of homestead.—Wright v. Dunning, 49 Barber, 46 Illinois Reps., 275; Lee v. Kingsburry, 13 Texas, 68; Smythe, § 414.

As to the judgment of Judge Cooke changing the terms of sale determined by the judgment of Judge Carpenter to a credit for one-half of the purchase money, and requiring of the purchaser neither security nor even bond, and directing the titles to be made to the purchaser, it is denied that it was competent for him to make the change.

Whilst there can be no appeal from one Judge of the Circuit Court to another Judge of the same Court, or from the same Judge to the same Judge, it is conceded that an administrative order made by the same Judge or by another Judge in the same cause, in a proceeding before him, and in altered circumstances, may be rescinded or modified, it is denied that a judgment or decree formally signed and filed can be modified by the Judge who made it or by another Judge of the same Court, unless in an action or proceeding directly assailing its validity for fraud, accident or other cause. The terms of sale fixed by the judgment of Judge Carpenter were not involved in the case of Rosenberg against Lewi and were not before Judge Cooke.

The Code of Procedure (Chapter VIII, Section 416, p. 674 of Revised Statutes) provides that "every direction of a Court or Judge made or entered in writing and not included in a judgment is denominated an order."

A judgment is the sentence of the law pronounced by the Court upon the matters contained in the record.—3 Black Com., 395; 1 Waite's Practice, 427.

Final judgments are such as at once put an end to the action by declaring that the plaintiff had or had not entitled himself to recover the object of the action.—1 Waite's Practice, 427.

*349

*A judgment is the final determination of the rights of the parties in the action.—Code of Proc., Title VIII, Chapter 1; § 268, Revised Stat., p. 630.

A decree is a sentence or order of the Court corresponding to a judgment at law, pronounced at the hearing or submission of

the cause, by which the rights of the parties are determined.—1 Waite's Practice, 427.

Until a decree had been settled and entered by the Register it might have been rectified by motion to vary the minutes. Those applications must have been made to the Court or officer by whom the decree was pronounced.—1 Waite's Practice, 439.

The term decree is not retained under the Code; the word judgment designates the determination of the rights of the parties.—1 Waite's Pr., 445, 3 Waite's Pr., 588.

The distinction between an order and a judgment is that an order is the decision of a motion; a judgment is the decision of a trial.—3 Waite's Pr., 594.

On an appeal from a judgment, if an error has been committed which by possibility might have prejudiced the appellant, the judgment must be reversed.—Brown v. Richardson, 20 N. Y., 476; 2 Tillinghast & Sherman, 930.

Thomson, contra.

June 7, 1876. The opinion of the Court was delivered by

WRIGHT, A. J. While it may be true that a Circuit Judge may on motion after notice change the terms of a mere administrative order which he has made, he cannot interfere with his pronounced judgment in a cause except as provided by the Code of Procedure. The time fixed by the two orders for the sale of the mortgaged land having passed, it is now of no practical importance to consider which of them is to be recognized as effective so far as they express the conditions on which the sale was to be made. A new order must be made which will necessarily supersede them both.

It is not material to inquire whether Visanska had such a residence on either of the tracts of land which would have entitled him to the exemption claimed under the provisions of the Constitution and the Acts of the Legislature if both parcels had been subject to judicial sale by any proceeding other than

*350

one arising under a *mortgage. If he ever had any claim of homestead in the Belcher plantation or the Little River tract, he had divested himself of it by the mortgage, for as to such an instrument there can be no right of homestead as against the claim of the mortgagee.—Homestead Building and Loan Association v. J. A. Enslow, (ante, p. 1.)

If, after satisfaction of the mortgages and the costs consequent upon their foreclosure, there should be a surplus when he makes the application in due form, it will be time enough to consider whether his right by way of homestead in such surplus may entitle him to receive it in bar of the claims of his other creditors.

So much of the order as looks to the payment of the counsel of Rosenberg, the respondent, out of the mortgaged property by requiring the Referee to be appointed to report out of what fund it should be paid must be reversed.

No reason or cause appears why the debt due on the mortgage held by Lewi, the appellant, should be subjected to the chance of not being fully paid by application of any portion of the proceeds of the sale to the fees which Rosenberg has incurred by his intervention in the case.

The debt established by the decree of the 23d of April, 1875, and the order then made for the foreclosure by sale must be recognized as valid.

It is accordingly ordered that the sale, after due advertisement, may be fixed for any sale-day to be named by the appellant or counsel, on the following terms: One-fourth cash and the balance payable in six months, secured by bond bearing interest from date, together with personal security and mortgage of the premises.

MOSES, C. J., and WILLARD, A. J., concurred.

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7 S. C. *351

*PRINCE v. NANCE.

(Columbia. April Term, 1876.)

[*Exemptions* ⇦16.]

One who is the head of a family is not entitled to the exemption of one-third of the yearly products or earnings allowed by Section 9 of the Act approved 22d February, 1873.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 15; Dec. Dig. ⇦16.]

[*Exemptions* ⇦70.]

Under the proviso contained in Section 7 of the Act, the exemption contained in Section 6 of said Act cannot be allowed against a judgment for rent of the land on which the crop claimed to be exempt was made—such claim being an obligation contracted in the production of the crop.

[Ed. Note.—Cited in Oliver v. White, 18 S. C. 239.

For other cases, see Exemptions, Cent. Dig. § 94; Dec. Dig. ⇦70.]

Before Cooke, J., at Abbeville, February, 1876.

This was an action by Washington L. Prince against Drayton Nance.

The case is contained in the following statement for this Court, signed by the attorneys of the parties, as authorized by the Act of Assembly authorizing such statement:

The plaintiff, on the 23d day of January, 1875, sued out his complaint against the defendant for arrears of rent for several past years, claiming as due him the sum of $612.-32, besides interest. On the same day the plaintiff sued out his writ of attachment, which was executed on the same day by the Sheriff, who, by virtue of it, seized and took into possession three bales of cotton, five

thousand pounds of cotton in the seed, more or less, five hundred bushels of cotton seed, more or less, two mules, two horses, one wagon and one buggy and harness, as the property of the defendant.

The plaintiff, on the 30th day of January, gave an order to the Sheriff to release the mules and horses from the attachment, which was done.

The defendant, on the day of , 1875, filed an answer containing counter-claims, but admitted, after allowing his counter-claims, that he was indebted to the plaintiff in the sum of $392.14.

On the 25th day of January, 1875, the defendant, by his attorney, gave notice to plaintiff's attorney of a motion to set aside or dissolve the attachment.

This motion was heard and determined by His Honor Judge Cooke at Anderson on the 4th day of February, 1875, who made the order in the case, a copy of which is below given.

By virtue of this order the Sheriff proceeded to sell the cotton attached, and realized from the sale the sum of $279.81, which he has in his hands or under his control.

*352

*At April Term, 1875, Judge Carpenter, sitting for Judge Cooke, gave judgment for the plaintiff against the defendant for the sum of $392.14 (the sum admitted by defendant) and his costs.

For this sum and costs judgment was duly dockered and execution issued on the 25th day of April, 1875.

At January Term, 1876, the money still being in the Sheriff's hands or under his control, the defendant's attorney made a motion that the money in the case in the Sheriff's hands be paid to the defendant, upon the ground that the defendant was entitled by law to one-third of such crop as he may make in each year.

The presiding Judge granted the order, a copy of which, marked "B," is annexed to this statement.

A statement of the facts in relation to the rent due and crop made by the defendant in 1874 is made in his sworn statement, a copy of which is appended to this statement, marked "C."

Due notice of appeal was given by plaintiff's attorney.

The number of bales of cotton sold by defendant to White Brothers should be stated six instead of seven.

Order of Judge Cooke of date 4th February, 1875:

This case came on to be heard at Chambers, at Anderson Court House, upon a motion to set aside the attachment sued out by the plaintiff and levied upon certain property of the defendant; and, after hearing affidavits and the observations of the counsel for the plaintiff and defendant respectively, it is ordered and adjudged as follows:

1. That the mules, horses and buggy and all other property of the defendant levied, excepting the cotton, be turned over to the defendant without delay.

2. That the Sheriff sell the cotton and hold the proceeds, subject to the further order of the Court, and until the action now pending between the plaintiff and defendant shall be determined—the same being liable to the payment of the landlord's (the plaintiff's) claim for rent for the year 1874 to the extent of one-fourth of the crop raised during that year by the defendant, (the tenant,) there being no other liens against the said defendant.

3. It is further ordered that the plaintiff pay all the expenses incurred by reason of the attachment of the said mules, horses and buggy and ten dollars to the defendant's attorney for the costs of this motion.

*353

*"B."

On hearing the pleadings in this case and observations of counsel, on motion of Perrin & Cothran, attorneys for defendant, it is ordered that the Sheriff pay over to the defendant in this case the moneys in his hands arising from the sales of cotton made by him, and that the defendant have leave to enter up judgment and issue executions for the costs.

"C."

Drayton Nance, the defendant in the said action, being duly sworn, says as follows:

1. That he rented from the plaintiff a plantation for the years 1872, 1873 and 1874, at the price of four hundred dollars for each year.

2. That on the said rent he has paid as follows: For 1872, the sum of $203; for 1873, the sum of $320; and for 1874, the sum of $136.

3. That in 1874 he made, as he thinks, about nineteen bales of cotton; it is not yet all gathered from the field, and a part of it is not yet ginned. Of this crop, he sold, at Due West, three bales, the proceeds of which he paid to the plaintiff. He sold to White Brothers seven bales, and applied the net proceeds to a debt he owed them for supplies furnished during the year 1874 to run the farm, leaving still due three hundred and thirty-six dollars and thirty-three cents. He sold to Quarles & Perrin two bales, and applied the net proceeds to the debt due to them for supplies furnished in aid of running the farm, leaving still due to them eighty-one dollars and sixty-two cents. Of the balance of the crop, three bales were packed and ready for market—the same that have been levied on under the attachment. The balance of the crop, supposed to be about four bales, is not yet ready for market.

The plaintiff appealed on the following grounds:

1. Because the order of Judge Cooke, of February, 1875, directed in substance the

payment of the money from the sale of cotton to the plaintiff in the event of his obtaining judgment.

2. That the execution against the defendant and the defendant's money were at the same time and now are in the Sheriff's office and

*354

*hands; that in such case the law presumes a levy and the application of the money to the execution without order of Court.

3. That the Constitution disallows an exemption of yearly products from attachment, levy and sale, when made to enforce the payment of obligations contracted in the production of the same.

4. That persons making advances in the cultivation of crops are entitled to a lien on the same to the extent of such advances in preference to all other liens; that rent is placed on the same footing; and that the law allowing one-third of products to laborers and others does not apply to said liens.

5. That, as a fact, far more than one-third of the crop, in value, was allowed by the presiding Judge to the defendant, and allowed without estimate or proof.

6. That the presiding Judge, in his order, altogether overlooked the plaintiff's rights.

Thomson, for appellant:

1. Money in the hands of the Sheriff is subject to the lien of an execution in his office against the owner of it.—Means v. Vance, 1 Bail. Rep., 39; Noonan v. Gray, 1 Bail. Rep., 437.

2. That the Constitution disallows an exemption of yearly products from attachment, levy and sale for payment of obligations contracted for the making of the products.—Also Act of Assembly, Revised Stat., 29, § 32; A. A. 1872–73, p. 372, § 7.

3. That there is no exemption of yearly products where there is a lien for advances and supplies, and that rent is now placed on the same footing as an agricultural lien.—Revised Stat., 557, § 55; A. A. 1873–74, p. 788; A. A. 1874–75, p. 844.

4. That the exemption is from attachment, levy and sale, and not from liens.—Revised Stat., p. 29, § 32; Revised Stat., p. 475, § 3; A. A. 1872–3, p. 373, § 9.

Perrin & Cothran, contra.

June 7, 1876. The opinion of the Court was delivered by

WRIGHT, A. J. The respondent rented a plantation from the appellant for the years 1872, 1873 and 1874, for which he agreed to pay the sum of four hundred dollars per year.

On the 23d day of January, 1876, action was brought by appellant against him for arrears of rent, claiming as due the sum of

*355

six *hundred and twenty dollars and thirty-two cents ($620.32). On the trial it was admitted by the respondent that there was due the appellant for arrears of rent of land three hundred and ninety-two dollars and fourteen cents, ($392.14,) for which amount judgment was given in favor of the appellant. It appeared that the crop raised by the respondent was much more than sufficient to pay the rent of the plantation. He was a laborer during the said years engaged in the production of a crop, and as such claimed an exemption of one-third of its yearly products, under the Act approved 22d day of February, 1873.—No. 308, 15 General Statutes, 369. If he was entitled to one-third of the crop raised each year, by reason of the said Act, he had clearly received that amount; for it certainly cannot apply to the year 1872, and it is not certain that its operation could be extended to the rent for 1873, the contract for which having been made before its passage.

The express object of Section 9 of the Act of Assembly above mentioned is to secure exemption in the nature of a homestead of one-third of the yearly "products or earnings" to every person "not being the head of a family," and not to persons who are heads of families, as they have the right to the homestead exemption, in a proper case, by laying claim thereto as provided by law.

In order to obtain the benefits of Section nine (9) of the Act of February 22d, 1873, it devolves upon the respondent to show that he "is not the head of a family." This has not been done.

If respondent could even bring himself under Section six (6) of the said Act, the exemption he claims could not avail against the judgment of the appellants, which was obtained on "an obligation contracted in the production of the crop;" for the last proviso of the seventh Section of the Act prevents the extension of the exemption contained in the said sixth Section to such obligations.

The motion is granted, and the Sheriff of Abbeville County, in whose hands or control the proceeds of the sale of cotton are alleged to be, will, after deducting all proper costs, pay over the same to the appellant or his attorney.

MOSES, C. J., and WILLARD, A. J., concurred.

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7 S. C. *356

*GIBSON v. GIBSON.

(Columbia. April Term, 1876.)

[*Appeal and Error* ⇦440; *Sheriffs and Constables* ⇦125.]

After notice of appeal from an order made under a rule against the Sheriff directing an attachment to issue against the Sheriff, the Circuit Court has jurisdiction to modify the order so as to meet the justice and law of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2198; Dec. Dig. ⇦440; Sheriffs and Constables, Cent. Dig. § 252; Dec. Dig. ⇦125.]

[*Appeal and Error* ⇐1033.]

A party in whose favor the modification is made could not well interpose an objection to it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052–4062; Dec. Dig. ⇐ 1033.]

Before Carpenter, J., at Edgefield, November Term, 1875.

On February 20, 1867, Ambrose Gibson entered up a judgment, in the Court of Common Pleas for Edgefield County, against Nancy Gibson, for $3,208.34, and on March 30, 1874, A. P. West and P. Jennings, for another, recovered another judgment against Nancy Gibson which was entered up in the same Court on that day. On the 1st of October, 1874, execution was issued on the judgment of West and Jennings, and immediately thereafter H. Wall, Sheriff of Edgefield County, levied the same upon land belonging to the defendant in the execution. The land was sold by the Sheriff on the 4th day of January, 1875, and this was a rule upon him on behalf of Ambrose Gibson to show cause why the proceeds of the sale should not be applied to his (Ambrose Gibson's) judgment.

The first order made by the Circuit Court upon the rule to show cause was dated November 20th, 1875, and on November 27th, 1875, notice of appeal therefrom, on behalf of the Sheriff and West and Jennings, the junior judgment creditors, was duly served, and on the 29th of November, 1875, the second order of the Circuit Court was made.

The terms of the above mentioned orders, and such other facts as may be necessary to a full understanding of the case, will be found in the opinion of this Court.

The grounds of the appeal are as follows:

1. Because the said Hardy Wall was entitled under the law to deduct the expenses of said sale from the proceeds thereof.

2. Because the said Hardy Wall was entitled, under the law, to deduct the costs of the action and execution under which said land was sold from the proceeds.

*357

*3. Because there was at the time of said sale no execution in the hands of the said Hardy Wall, Sheriff, on the judgment of the said Ambrose Gibson, the original execution having lost its active energy and been returned to the Clerk.

4. Because the said Hardy Wall was not required by law to take notice of said judgment when there was no execution issuing therefrom in his hands.

5. Because the said Hardy Wall should have been authorized by said order to pay the expenses of the sale of said land and the costs of the case under which it was sold from the proceeds of said sale.

A. J. Norris, for appellants.

Bonham, contra.

June 7, 1876. The opinion of the Court was delivered by

WRIGHT, A. J. There were two judgment creditors of Mrs. Nancy Gibson. She was possessed of land which was levied upon and sold under the execution in the junior case. The funds arising from the sale being in the hands of H. Wall, then Sheriff of Edgefield County, the contest was between the two judgment creditors as to how said funds should be applied.

The costs on the execution in the junior case were regularly taxed. The senior judgment creditor gave notice to the Sheriff before the sale that the money arising from the said sale should be applied to his judgment, and after the sale a rule was served upon the Sheriff requiring him to show cause why all the money received by him from the sale of the land of Mrs. Nancy Gibson should not be applied to the payment of the senior judgment. The rule was answered by the Sheriff, and the plaintiff in the junior case stated that all the said proceeds of sale had been applied to the senior judgment except so much thereof as were required to pay the costs and disbursements and expenses of the sale of the land in the junior case, the sale of the land having been made under the execution in that case, and that the whole costs and expenses of the case should be paid out of the funds arising from said sale.

After hearing the return, His Honor the presiding Judge, on the 20th day of November, 1875, made the following order:

*358

*"That H. Wall, late Sheriff, do pay to the said senior plaintiff or his attorney the whole balance of $500 for which the land was sold on or before the first Monday in January, 1876, and that failing to do so he be attached for contempt of the order of this Court."

From this order the junior judgment creditor and H. Wall, late Sheriff of Edgefield County, appealed on the 27th day of the same month and stated the grounds of their appeal.

On the 29th day of November, 1875, on motion of the attorney for the senior judgment creditor, the order of November 20 was modified by His Honor Judge R. B. Carpenter, as follows:

"That said Hardy Wall is hereby directed to pay over, in accordance with the terms of the original order, the whole balance of the $500 received by him from the sale of the land of said Nancy Gibson on the judgment of said Ambrose Gibson, after deducting his fees, commissions and expenses of said sale, said fees, &c., to be confined to the sale and not extend to the tax costs of the suit—only to the sale of the property."

It is thus perceived that the order of November 20th, 1875, is so modified by the order of November 29th as to allow the "expenses of sale" incurred under the junior execution to be paid out of the proceeds of the sale.

The appropriation of the proceeds thus directed was in strict conformity with the long-established practice, maintained and confirmed by numerous decisions, to be found in the reports. The appellant, however, contends that after his notice of appeal the Court was without jurisdiction to modify the order, but in no point of view is the exception well taken.

The question arose on a rule against the Sheriff, which had resulted in an order for his attachment unless he paid over to the oldest judgment the whole proceeds of the sale.

If it appeared to the presiding Judge before his order had been executed that the conditions on a compliance with which the sale could only be discharged were in excess of those which should lawfully have been imposed, while the order was under his control, the time not having expired, we can see nothing which prevents his reforming it to meet the justice and law of the case.

The exception, however, could not well be interposed by the party in whose favor the modification was made. The motion is dismissed.

MOSES, C. J., and WILLARD, A. J., concurred.

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7 S. C. *359

*SANDERS v. COUNTY COMMISSIONERS.

(Columbia. April Term, 1876.)

[*Creditors' Suit* ⇨8; *Counties* ⇨158.]

An action in the nature of a creditor's bill cannot be maintained against County Commissioners to subject a fund consisting of public moneys to equitable distribution among those entitled to the same.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. § 19; Dec. Dig. ⇨8; Counties, Cent. Dig. § 221; Dec. Dig. ⇨158.]

Before Maher, J., at Colleton, March, 1876.

This was an action by B. Sanders against the County Commissioners of Colleton County. The case is fully stated in the opinion of the Court. The defendants appealed.

Tracy & Tracy, for appellants.

Henderson & Behre, contra.

January 13, 1876. The opinion of the Court was delivered by

WILLARD, A. J. This is an action in the nature of a creditor's bill by a judgment creditor of Colleton County, in behalf of himself and other creditors of that County of a specified class, against the defendants, as County Commissioners of that County, to enjoin and restrain them from paying out or disposing of any of the funds collected, or to be collected, for the payment of the past indebtedness of said County and for the appointment of a Referee, the taking of an account of the assets in their hands and already administered, that creditors may be called in and the outstanding claims of the County be ascertained, and that they may be ordered to be paid in equitable proportions from such funds as may be applicable thereto, and for general relief.

It appears that certain special taxes have been authorized and levied for the payment of certain past indebtedness of Colleton County, under which moneys have been collected and paid to the County Treasurer, and still further payments to that fund are anticipated. It is not disputed that the plaintiff is one of the class of creditors entitled to payment out of such fund. It appears, however, that the amount to be paid is in excess of the available funds; that the defendants, as County Commissioners, have drawn orders on the County Treasurer for the payment of some of the demands of the class entitled to be paid. It is not alleged, however, that the demands so paid from the fund were not lawful demands of the class contemplated by the law authorizing the special taxes. The County Treasurer is not made a party.

*360

*The Circuit Judge, upon this state of facts, made an order of injunction, restraining the County Commissioners, which, upon the hearing on pleadings and affidavits, was continued until the final judgment. This injunction restrained the defendants, as County Commissioners, from paying out any funds collected, or to be collected, for the payment of the past indebtedness of the County. It also appointed Referees, and directed them to take "an account of the amounts received for the payment of the past indebtedness of the County of Colleton by the County Commissioners, and how and to whom the same was distributed by them; that they call in the creditors of the said County whose credits accrued prior to November, 1874, by advertisement in the Walterboro News until May 1, 1876, and that they audit the claims so presented; that they report the amount of the claims actually due, and the state of the funds in the hands of the County Treasurer of Colleton County applicable to the payment of the same, distinguishing the fiscal years in which the claims respectively accrued, and any funds specifically applicable to particular fiscal years, and in what proportions distributable among the creditors, due regard being had to the payments already made to such creditors as have heretofore received partial payments on their accounts from funds specifically appropriated for past indebtedness, in order to equalize the same with other creditors."

The only equity alleged as ground for the relief sought is that the County Commissioners have authority to draw on the County Treasurer, for the payment of claims of the class to which the plaintiff's demand belongs, against a fund in the hands of the County

Treasurer specifically appropriated by law for that general purpose, but insufficient to pay all that have legal demands upon it. In order to maintain the action of the Circuit Court, it is necessary to establish two propositions: first, that the plaintiff has a right to have the fund in question ratably distributed among those entitled to it; and, second, that a Court of equitable jurisdiction is competent to make such division.

If these propositions should be established in favor of the plaintiff, and it should be made to appear as a general proposition that the plaintiff has a right to some relief, a question would arise whether he has brought the proper and necessary parties before the Court.

*361

*The plaintiff cannot succeed in the fundamental propositions just stated consistently with the recent decision of this Court in County Commissioners v. Winnsboro National Bank [7 S. C. 78]. Has he a right, either at law or in equity, as a creditor, to have a fund applicable by law to the payment of his demand, consisting of public moneys in the hands of a public treasurer, ratably distributed among those entitled to it? If there is any such right existing, we know of no case that sanctions or enforces it.

In Jacobs v. Winnsboro Bank, just referred to, the suit was by the County Commissioners and the School Commissioner against the bank, which held a special deposit belonging to the County Treasurer, for a decree placing in their hands certain portions of such funds, which they allege to be applicable by law to disbursement in these several departments of the County government. They failed to make the County Treasurer a party defendant, and a decree of distribution was made, which we set aside. It was there held that a Court of equity could not seize and administer funds in a public treasury; that the duty of applying such funds rests upon the administrative officers and could not be transferred to the Court. That if a party had a specific right to payment out of funds appropriated by law for that purpose, the proper remedy was by mandamus to compel the officers chargeable with such neglect properly to perform such duties; but that the Court could not lay hold of public funds and perform itself the functions devolved by law upon administrative officers.

As between individuals there is no general equity to convert a fund for the payment of debts exclusively owned and controlled by the debtor into assets on the ground alone that the fund is insufficient to meet the demands upon it. A debtor, though insolvent, has, independent of the interference of insolvent or bankrupt laws, a clear legal and equitable right to apply his estate to the payment of his debts, with such preferences and in such order as he may judge best, and cannot be compelled to give any account of the reasons of his conduct, provided his motives be honest. If instead, however, of applying his means to the payment of his debts he conceals them so as to defeat process issued by his creditors, then there is an equity to compel him to disclose the state of his property, to restrain him from making away with such property, and to have his estate held and administered in equity as assets for the payment of his debts. This equity is the foundation of the creditor's bill,

*362

*inter vivos, as a feature of equitable cognizance. Such a bill was founded upon a judgment recovered at law, execution issued and returned unsatisfied, either wholly or in part, and on an allegation to that effect that the operation of the process had been defeated by the fraudulent acts of the judgment debtor, intended to cover his property from the process of his creditors.

Thus we see that, as between individuals, the only equity of the creditor to lay hold of the estate of his debtor, when there is a judgment at law, is derived from the fact that legal process against such debtor has been defeated by his fraud. He must either proceed to divest his debtor of his estate in favor of his creditors, as a class, under insolvent or bankrupt laws, or exhaust the ordinary process of the Court.

The foundation of this doctrine, as we have said, is the general right of the individual to apply his estate to the payment of his debts in such manner as he may judge best, even though insolvent. Without losing sight of the qualifications of this right already noticed, we will next inquire whether political bodies, such as the States, Counties and lesser municipal bodies, are within the reason on which this general rule rests. Such political bodies have, except as restricted by positive law, either constitutional or statutory, all the powers of individuals in regard to acquiring, holding and disposing of property. Political bodies possessing sovereign attributes have, in addition, powers and immunities in excess of those possessed by any individual citizen. It is enough, however, for our present purposes to say that whatever an individual may enjoy in respect of his property such political bodies may enjoy, unless relinquished or taken away by positive law.

Another proposition bears on the subject. Neither the Courts of law or equity have power to adjudge such political bodies insolvent. The solvency of such bodies is not dependent upon the extent and value of property held by them for public purposes where such bodies possess power to impose and collect taxes. If the taxing power is unlimited, then while the taxable property is in excess of the amount of its indebtedness insolvency, in fact, cannot exist. If the taxing power is limited, as frequently in the

case of a County or city, by statute law, and of the State by its Constitution, then the insufficiency of the taxing power must be referred to a public policy limiting it, and not to anything in the nature or the condition of its means significant of a state of insolvency.

*363

*It follows that the return of an execution unsatisfied against a political body subject to such process does not afford even presumptive evidence of insolvency. Thus the whole foundation of the creditor's bill is gone in its application to political bodies of the nature that we have described.

It is not necessary, at the present time, to point out the remedies that are under the control of parties holding ordinary process on a judgment or decree against such bodies other than the State.

We considered, in Morton v. Hoge, (4 S. C., 430,) the nature of the remedy by mandamus as a means of enforcing the provisions of law looking to the payment of public debts by the exercise of the taxing power. In Jacobs v. Winnsboro Bank and in State v. Smith [7 S. C. 275] we considered the application of that writ to compel public officers, under a specific obligation to apply public moneys to the payment of public debts, to perform such duties. Neither authority or principle warrant us in the addition to the list of remedies available against public political bodies, such as the State, County or lesser municipality, the creditor's bill.

The plaintiff attempts to support his right of action by affirming that the County Commissioners are trustees for the creditors he assumes to represent. It will not be necessary to deny that their public duties are in the nature of a trust. The public body which they represent and for which they act is entitled to the beneficial enjoyment of the public powers and public property held under the title to their offices. They are clearly not trustees for the creditors of the public body. The trust involved in a public office is not an ordinary trust or specially cognizable as such in equity. It is a trust of a very special character, coupled with a discretion more or less limited by law. That discretion is a political function and is inseparable from the trust. A Court of equity could not exercise that discretion, for the reason that it is a political function, nor can it assume the administration of the public trust without assuming also the exercise of such discretion which is inseparable from it; consequently it will not interfere, unless, as in the case of Auditor v. Treasurer, (4 S. C., 311,) such public officer has misapplied public funds or seeks to misapply them, in which case the Court interferes only to the extent of preventing the public property from being diverted from the uses to which it is dedicated by law.—(Same case, p. 313.)

*364

*The present case being against the County Commissioners alone, their power to audit and make drafts on the County Treasurer is the proper subject matter of the present controversy.

The County Commissioners have no direct control over the funds in the County treasury.—County Commissioners v. Winnsboro National Bank, (ante p. 78.)

Their powers are purely political, and their discretion such as the law of their office casts upon them. It is not competent for the Courts to take to themselves the administration of discretion of that class, for the same reasons that preclude them from performing administrative duties connected with the disbursement of public moneys, as has been already said.

The order of the Circuit Court should be set aside and the complaint dismissed without costs.

MOSES, C. J., and WRIGHT, A. J., concurred.

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7 S. C. 364

BOLLING v. STOKES.

(Columbia, April Term, 1876.)

[*Trusts* ⇐169.]

To a bill by the executrix of a deceased trustee for the appointment of a trustee in the place of the deceased to whom she might account, as executrix, the children of a tenant for life entitled in remainder as well as the tenant for life herself are necessary parties.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 224; Dec. Dig. ⇐169.]

Before Cooke, J., at Greenville, July Term, 1875.

This was a bill in equity, filed on May 21st, 1867, by Louisa C. Bolling against Abigail M. Stokes, T. Henry Stokes, her husband, Martha A. Hickson, William Hickson, her husband, and Anna Childs, and afterwards amended by making George W. Collins a party defendant. It alleged that Mary A. Bolling, deceased, made her last will and testament whereby she devised and bequeathed her whole estate to her executor to sell the same and hold the proceeds in trust for her four children, the said Abigail M. Stokes, Martha A. Hickson, Sarah S. Sullivan and Harriet M. Childs, and pay over to them, annually, the interest on the fund during their respective lives, and, on the death of any one of them, then her share, being one-fourth,

*365

to be paid over to her children. That *Harriet M. Childs intermarried with the said George W. Collins, and then died, leaving as her only child the defendant, Anna Childs. That Sarah S. Sullivan had also died leaving children. That Thaddeus C. Bolling, the husband of the plaintiff, was appointed executor of the will; that he qualified as execu-

tor and sold the estate; that he died early in the year 1866, leaving a last will and testament, of which the plaintiff was appointed executrix; that the trust fund was in her hands as executrix, and that she was unable to manage and take care of the same.

The bill prayed "that a suitable trustee may be appointed for Abigail M. Stokes and Martha A. Hickson, to whom she (the plaintiff) may pay over and transfer their trust estates under the will of their mother above mentioned." It further prayed "that titles may be made to Anna Childs for the house and lot purchased by her mother, as already stated, in lieu of her share of her grandmother's estate," and that the share due the children of Sarah S. Sullivan be adjudicated and settled under a bill which they had filed against the plaintiff.

The defendants, Abigail M. Stokes and T. Henry Stokes, put in answers. In July, 1867, an order was made by Chancellor Lesesne referring it to the Commissioner of the Court to ascertain and report the amount of the trust fund in the hands of the plaintiff belonging to the defendants, respectively; whether it would be to the interest of the minor, Anna Childs, to take the house and lot purchased by her mother, or whether the defendant, George W. Collins, should be permitted to take the same and pay for it at the price at which it was sold. That he also report as to the condition of the investments made by the trustee, &c.; also suitable trustees for Mrs. Abigail M. Stokes and Mrs. Martha A. Hickson, with leave to report any special matter. In 1869 the Clerk of the Court made a report under the above stated order upon all the points which were therein referred to the Commissioner. As to the amount of the trust fund, he reported that on the 14th of April, 1862, a final settlement of the estate was made by the executor before the Ordinary, wherein it was found that there was due the three defendants, Anna R. Childs, Martha A. Hickson and Abigail M. Stokes, each the sum of $2,760.11. As to the house and lot, he recommended that it be conveyed to George W. Collins. He also reported as to the investments and their partition amongst the parties entitled there-

*366

to. He recommended that *the whole matter as to the account by the plaintiff as executrix be referred to the Judge of Probate for "a new settlement to be there made of the estate of Mary A. Bolling, and a new decree be given thereon, &c. He also recommended that T. Henry Stokes be appointed trustee for his wife and William Hickson for his wife.

On September 24, 1869, Judge Orr made a decree confirming the report of the Clerk and making it the decree of the Court.

On December 14, 1869, the Judge of Probate made what purported to be a final decree upon the accounts of the executor of Mary A. Bolling, deceased, in which he stated that the trust fund amounted to $11,280.35; that Mrs. Stokes and Mrs. Hickson had been paid more than was due each of them. Then he ordered that they each refund the amount over paid her; that the notes in which investments were made be transferred to the parties entitled to the same, and that the executrix of the said Thaddeus C. Bolling, deceased, "be discharged from further accounting to this Court on her complying with the terms of this decree."

In December, 1871, Abigail M. Stokes filed a petition in the Court of Probate against Louisa C. Bolling, executrix of Thaddeus C. Bolling, praying that she be required to account for the annual interest of the petitioner's share of the trust fund, alleging that such share amounted to $2,760.11¼ and $300. The petition stated the death of Mary A. Bolling possessed of a considerable real and personal estate; that she left a last will and testament, bearing date January 15th, 1853. It also stated the contents of the will so far as the rights and interests of the four tenants for life were concerned; it set forth a copy of the decree of 14th April, 1862, by which the share of the petitioner was ascertained to be $2,760.11¼; and it further alleged that the petitioner was entitled to another sum of $300, being her share of the proceeds of the sale of some Florida lands; and that on 26th May, 1866, the executor died, leaving a last will and testament, in which he appointed the defendant, Louisa C. Bolling, executrix; that the said will had been admitted to probate, and that she, the defendant, had qualified as executrix.

On November 1, 1872, the Judge of Probate made a decree by which he set aside the decree of the Ordinary of 14th of April, 1862, and held that the amount due to the petitioner was that found to be due by the Court of Probate on 14th of December, 1869, which was $673.87, and the note of T. Henry Stokes for $487.58, (which was assigned to her in

*367

said settlement, the said amount and *note having been reduced one-half,) and also interest on the amounts received since said settlement; and the interest, amounting to $229.10, he ordered the defendant, as executrix, to pay to the petitioner.

The petitioner appealed from the decree of the Judge of Probate to the Circuit Court.

On 30th of March, 1874, His Honor Judge Cooke made an order "that the case be referred back to the Judge of Probate and for an accounting by the executrix of any funds that may have come into her hands since the decree of the Court of 1869, or that were not accounted for at that time."

On May 1, 1874, the Judge of Probate made a report to the Circuit Court under the above mentioned order, in which he stated that "the defendant had already accounted

in her annual returns for all sums received by her since the final settlement made by this Court the 14th of December, 1869," and that the attorney for the plaintiff had insisted on taking into the account receipts given by the plaintiff and her husband to the defendant for interest due the plaintiff, "but as they were all given and dated before the final settlement in 1869, the Court ruled them out on the ground that the order did not contemplate going back of said final settlement unless there were moneys unaccounted for." The petitioner appealed from the above decision of the Judge of Probate, the notice of appeal being entitled Abigail M. Stokes, plaintiff, v. Louisa C. Bolling, executrix, defendant, in the Court of Probate.

On July 9th, 1875, His Honor Judge Cooke made an order entitled Abigail M. Stokes v. Louisa C. Bolling, executrix, appeal from Probate Court, whereby he ordered "that the cause entitled Louisa C. Bolling, executrix, &c., v. Anna R. Child, Abigail M. Stokes, Martha A. Hickson and William Hickson," being a bill filed in the Court of Equity for Greenville County (their District) on May 21st, 1867, be restored to Calendar No. 3 of this Court:" that the children of Mrs. Abigail M. Stokes be made parties defendant to the said cause, and that the petition above entitled be retained, and that the same, with the case in equity, after amendment, be referred to a Referee to state the account between the petitioner and Louisa C. Bolling, the executrix, and he overruled a motion of defendant's counsel to dismiss the petition upon the ground of res adjudicata, under the proceedings filed in 1876 in the Court of Equity.

*368

*The defendant, Louisa C. Bolling, appealed from the order of His Honor Judge Cooke above stated, entitling her notice of appeal Abigail M. Stokes, respondent, petitioner, v. Louisa C. Bolling, executrix, appellant, defendant, appeal from Judge of Probate.

The grounds of appeal were as follows:

1. It is respectfully submitted that His Honor erred in overruling the motion of the defendants to dismiss the appeal, because the matter was adjudicated.

2. It is respectfully submitted that His Honor erred in ordering the case of Louisa C. Bolling, executrix, v. A. M. Stokes et al., restored to the docket, because the said cause had been heard and decided by His Honor Judge Orr at the September Term of the Court, 1869, and from that decision there had been no appeal.

3. It is respectfully submitted that His Honor erred in ordering the children of the said Abigail M. Stokes to be made parties to the suit because they have no interest in the subject matter of this suit, the same being to determine the interest of the life tenant and not of the remaindermen.

4. Because it is respectfully submitted that the order of His Honor is contrary to the law.

Perry & Perry, Moore & Earle, for appellant.

Sullivan & Stokes, contra.

June 23, 1876. The opinion of the Court was delivered by

WILLARD, A. J. The proceedings upon the record are confused and evidently in some respects erroneously described. As far as we can understand their nature and import, they were as follows:

A bill was originally filed bearing the above title, alleging the will of Mary A. Bolling, by which her four children took life estates in certain property, with remainders to the children of such children. The life estates were put in trust, T. C. Bolling being therein designated as trustee. It alleges the death of the trustee, that the complainant was the executrix of such trustee and the death of one of the children, leaving children to take under the remainders. Those entitled to take by way of remainder were not made parties. The bill prayed the appointment of a trustee in the place of the deceased trustee, to whom the complainant might account as executrix. The defendant,

*369

Abigail M. Stokes, one of the *children of the testator, was made a party and answered. The result of the bill was an interlocutory order, directing a reference to a commissioner to take proof and report as to a special matter set forth in the pleadings that need not be particularly referred to, also as to the condition of the investments and as to a suitable trustee. A report was made under this reference, which was confirmed. Among other things it was ordered, upon the confirmation of the report, that in a settlement in the Probate Court certain payments be allowed, and that T. H. Stokes be appointed trustee for his wife Abigail M. Stokes, upon entering into bonds, &c. It appears that the trustee named never qualified. No trustee appears to have been made to represent any of the children. It appears that subsequently an accounting was had before the Judge of Probate, but the trust estate was not represented as such, nor were the grandchildren made parties to such settlement.

It is to be inferred from the fact of a reference to the Probate Court, that it was in contemplation that the executrix of the former trustee should account as executor alone, and not as trustee, and that the trust estate should be represented in such accounting. The effect of the accounting that took place, as referred to above, is in issue between the parties, both as it regards Mrs. A. M. Stokes and the other parties entitled to life estates or remainders. The order appealed from, although entitled in the petition before the

Probate Court, appears to us to be in reality an order made in the suit instituted by the original bill, and so should have been entitled. That order appears to us unobjectionable so far as it reinstates that cause on the docket and provides for making those entitled to remainders parties. The leading object of the bill never was accomplished, namely, the appointment of a trustee. The other objects of the bill cannot be properly accomplished without making all parties entitled to life estates and remainders under the original will parties, inasmuch as the corpus of the estate is intended to be affected by it as the disposition of annual income.

The other matters contained in the order, in our judgment, were prematurely disposed of. The proper parties should be before the Court before any attempt is made to unravel the complicated proceedings that have taken place subsequently to the first interlocutory decree already referred to.

The order should be affirmed, so far as it directs the original suit to be docketed and directs further parties to be made to the

*370

*bill. As to all other matters, it should be modified so as to reserve such matters for future consideration, after the proper parties are all before the Court.

MOSES, C. J., and WRIGHT, A. J., concurred.

7 S. C. 370

EDWARDS, Administrator, v. CREDITORS OF KING.

(Columbia. April Term, 1876.)

[*Executors and Administrators* ⇐222.]

When an administrator knows of the debt against his intestate, notice under the Act of 1789, Section 27, need not be given.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 766; Dec. Dig. ⇐222.]

Before Townsend, J., at Darlington, October Term, 1874.

This was an action by B. W. Edwards, administrator de bonis non of Leviniah King, deceased, against the creditors and heirs at law of Leviniah King, to marshal her assets, and for a sale of the real property to pay debts.

The case may be briefly stated as follows:

On the 27th October, 1860, B. Clements recovered judgment against Leviniah King, in the Court of Common Pleas for Darlington County, in the sum of $1,315.40. Leviniah King afterwards died leaving a last will and testament. B. Edwards was at that time Commissioner in Equity for Darlington County, and in October, 1862, by virtue of his office as Commissioner in Equity, he took out letters of administration upon the estate of the said Leviniah King and gave notice to creditors to prove their demands.

In January, 1870, Edwards, who, at that time, had ceased to be Commissioner in Equity, took out letters of administration "de bonis non" on the estate of the said Leviniah King and filed this bill, stating that there were no personal assets, and asking for a sale of the real estate. Creditors were called on to prove their demands, and in April, 1870, Clements proved his judgment before the Referee. An order for the sale of the real estate was obtained under this bill. It was sold and the proceeds applied to the payment in part of Clements's judgment, leaving a balance due thereon of $281.25. It further appeared that Edwards had received some personal assets of the estate of Leviniah King and turned the same over to her legatee before he filed this bill.

*371

*It also appeared that Leviniah King had appealed from the judgment of Clements; that Edwards knew of the judgment and of the appeal, and that the appeal was pending until about December, 1871, when Edwards abandoned it.

Formal notice of the claim under the judgment was not given to Edwards.

The question in the case was whether such formal notice was necessary in order to charge Edwards with the assets he had received and turned over to the legatee. The Referee to whom the case had been referred held that he was liable, because he knew of Clements's judgment before he turned over the assets.

Exceptions were taken on that ground by Edwards to the report, but the exceptions were overruled by His Honor the Circuit Judge and the report confirmed.

Edwards appealed.

Spain, for appellant.

McIver & Boyd, contra.

July 1, 1876. The opinion of the Court was delivered by

WRIGHT, A. J. The report of the Referee and the opinion of the Court so commend the conclusions which they announce on the points made in the case that little need be added.

The principal question really involved may be thus stated: Is a party who would be affected and fixed by implied or constructive notice relieved of a required duty imposed by law, because he has actual and positive knowledge of the act from which the obligation arises?

It would appear that the mere statement of the proposition carries with it an answer that no argument can refute. The judgment was recovered against the testatrix in 1860; it was suspended by an appeal, of which due notice had been given. Edwards administered in 1862, and, according to the finding of

the Referee, had knowledge both of the judgment and the appeal, and, in fact, was the appellant in the very case in which, in her lifetime, Clements had recovered the judgment.

He himself abandoned it, shortly before the sale of the real estate, which was ordered by the Court on a proceeding on his part to subject it to the claims of creditors which had

*372

not been reached *by the personal assets. Can it lie in his mouth to say all this is true, but the Act of 1789 requires that the creditor should have given me notice of his debt, and, although he could not have given it to me in a more full and explicit manner than I before had it, and although the whole purpose of the statute has been accomplished, yet my satisfying the legatee before I paid the creditor should work no prejudice because a knowledge which I acquired in the due administration of my office was not afterwards repeated to me by the creditor. If so specious an argument as this can relax the rules by which a Court of equity is guided in administrating the rights of creditors and regulating the duties of trustees and other fiduciaries, they rest on weaker and more fallacious principles than the proud boast of their origin has ever accorded to them. The design of this Section of the Act was to bring to the notice of the creditor not only the amount of the demand but its character, so that in the application of the assets a due regard should be had to the priorities established by a succeeding provision in it. If he has it in any form the fact of knowledge is proved, and if he violates the requirements of the statute it is his own wrongful act, and the Court is without means of affording him relief.

The motion is dismissed.

MOSES, C. J., and WILLARD, A. J., concurred.

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7 S. C. 372

Ex parte LILLY.

(Columbia. June Term, 1876.)

[*Courts* ⇐68.]

Where the term of a Circuit Court, as fixed by law, has expired, the Judge has no power, by order, to continue its existence, convene it at another time, and proceed to the trial of cases.

[Ed. Note.—Cited in De Leon v. Barrett, 22 S. C. 420; Hardin v. Trimmier, 30 S. C. 393, 9 S. E. 342.

For other cases, see Courts, Cent. Dig. § 240; Dec. Dig. ⇐68.]

[This case is also cited in De Leon v. Barrett, 22 S. C. 413, and distinguished therefrom.]

Before Mackey, J., at Chester, January, 1876.

This case is stated in the opinion of the Court. (*a*)

(*a*) The names of the counsel have not been furnished.

July 1, 1876. The opinion of the Court was delivered by

MOSES, C. J. By the eighteenth Section of the fourth Article of the Constitution, the Court of General Sessions is required "to sit

*373

in *each County in the State at least three times in each year, at such stated times and places as the General Assembly may direct." By "An Act to fix the time for the holding of the Circuit Courts in certain Counties herein mentioned." (15 Stat. at Large, 324,) the Court of General Sessions for the County of Chester was directed to be held "at Chester on the first Monday of January, and on the third Monday of March and September, and the Court of Common Pleas at Chester, for the County of Chester, on the first Wednesday after the first Monday of January, and on the first Wednesday after the third Monday in March and September." The term of the Circuit Court for the County of Chester which commenced on the first Monday of January, 1876, adjourned on Saturday, the eighth day of the same month, as appears by the following entry on the minutes: "Saturday, January 8, 1876, the Court then adjourned for the term, and directed the Clerk to enter in the journal that the Court adjourned from day to day, but without any date being fixed for its reassembling." It further appears that on January 24, 1876, the following order was made by the Circuit Judge: "State of South Carolina, Chester County.—It is ordered that the Sheriff of Chester County do forthwith proceed to summon the grand and petit jurors to be and appear at the court house, in Chesterville, at 10 o'clock next Monday morning, the 31st instant, for the trial of John Lilly et al., charged with burglary and larceny, and of such other cases as may be brought before them pursuant to law." By virtue of said order the jurors were summoned, appeared, and the Judge presiding, a Court legally organized, as was supposed, proceeded to what must have been regarded as the principal object for which it had convened.

A bill for grand larceny was presented to the persons who were said to constitute the grand jury against the said John Lilly, which, on being returned "true bill," he was tried by the persons sitting as a petit jury, a verdict of guilty returned, on which he was sentenced and committed to the Penitentiary for the space of nine years. Being in custody of the Superintendent of that institution, he now is brought before us by a writ of habeas corpus, and claims a right to be discharged, because detained without lawful authority, his detention being, as he alleges, under the sentence of a Court, or a tribunal acting as such, without due power by law to control his person. In fact the whole proceeding, from the bill to

his committal to his present custody, is challenged as void in law.

*374

*The term of the Circuit Court for Chester which commenced on the first Monday in January, 1876, necessarily ended at 12 o'clock of the night of the succeeding Saturday, for, by the Act already referred to, the term for the County of York was to commence at Yorkville on the Monday next thereafter. The order of January 8, 1876, by its very terms operated as an adjournment of the session for Chester, and the direction of the Court to the Clerk "to enter in the journal that the Court adjourned from day to day, but without any date being fixed for its reassembling," could not affect or qualify the express adjournment, which was not only announced by the Court and entered on the journal, but was required by law.

The Court for the County of Chester could not at the same time be in session and not in session, nor could it be regarded in session from its adjournment on 8th January, 1876, until the Saturday night following the 14th (Monday) of January, 1876, for during all the time within those dates the Judge was required to preside over and hold the other Courts of his circuit. The order, too, is contradictory in itself, for an adjournment from day to day necessarily implies a day fixed for meeting, to wit, each day succeeding the daily adjournment.

Whence did the Circuit Judge derive his power to convene the Court for Chester by the order which he signed on 24th January, 1876, —the day when, by the Act, he was required to hold his Court at Yorkville for the County of York? In vain we look to the statutes for any authority which empowers him to issue an order directing the Sheriff to summon grand and petit jurors to appear at the court house of a County for the trial of any particular party, much less before any bill has been presented against him. How, after the adjournment of the Court of Chester, could he officially know that the petitioner, John Lilly, was charged with "burglary and larceny?" No bill had been then given out, and we are not aware of any other mode by which it could have been brought to his judicial notice, unless on some proceedings for bail.

Full and ample provision has been made for special terms of the Court of General Sessions and Common Pleas in aid of the expeditious disposition of all the business which may be brought before them. Continuing each Court of a Circuit in session from day to day until the time fixed by law for its next meeting is inconsistent with the statutes, which prescribe the time to be allotted to each Court of a Circuit by requiring the Judge on some named succeeding day to hold some other Court of his Circuit.

*375

*It is not difficult to perceive the serious and disastrous consequences which might follow if a Judge were at liberty to call a term of his Court at his discretion to try either a particular case or any cases over which it might have general jurisdiction. It will be conceded that they would not likely be the less to be apprehended because the Court was called without any public notice, on a mere order directing the Sheriff to summon the grand and petit jurors to meet at the court house for the trial of a particular case, "and of such other causes as may be brought before them pursuant to law."

In our judgment, the proceeding by which the prisoner has been convicted and committed to the Penitentiary is without legal authority. While he must be released from his present custody, he must be remitted to the Sheriff, to be detained until discharged in conformity with the order heretofore filed.—See Ex Parte DeHay, 3 S. C., 564.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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7 S. C. 375

McLAUGHLIN v. COUNTY COMMISSIONERS.

(Columbia. April Term, 1876.)

[*Constitutional Law* ⇐52; *Mandamus* ⇐102.]

"M" having claims against the County which had been audited by the County Commissioners, and the amount thereof fixed, the Legislature passed an Act authorizing the County Commissioners to levy "three and one-half mills, one-half mill of which, if so much be necessary, shall be set apart and paid by the County Treasurer in settlement of the audited claims of 'M.'" The tax having been levied, and the moneys realized therefrom being in the hands of the County Treasurer, "M" demanded of the County Commissioners checks on the County Treasurer for the amount to which "M" was entitled under the terms of the Act, which were refused: *Held*, That mandamus would lie to compel the County Commissioners to draw the checks: *Held*, further, That the Act in question was not the exercise of a judicial power, but merely such a tender of means for the payment of the claims which any individual debtor would have the right to make to his creditor, and which the creditor could reject or accept as he pleased.

[Ed. Note.—Cited in State v. Durant, 71 S. C. 317, 51 S. E. 146.

For other cases, see Constitutional Law, Cent. Dig. § 72; Dec. Dig. ⇐52; Mandamus, Cent. Dig. § 217; Dec. Dig. ⇐102.]

[This case is also cited in State ex rel. Seale v. Durant, 71 S. C. 311, 51 S. E. 146, and distinguished therefrom.]

Before the Supreme Court, Columbia, April 5, 1876.

This was a petition to the Supreme Court by Mrs. M. A. McLaughlin for a mandamus to compel the County Commissioners of Charleston County to draw a check upon the

*376

County Treasurer for *the amount of her claims therein specified against the County of Charleston.

The facts are stated in the opinion of the Court.

Melton, Chamberlain & Wingate, for petitioners.

A. G. Magrath, for the County Commissioners.

The opinion of the Court was delivered by

WILLARD, A. J. The relator demands a writ of mandamus to compel the County Commissioners of Charleston to deliver to her checks on the County Treasurer drawn against a fund raised by special tax, and specifically appropriated by law to the payment of certain audited accounts against the County held by her.

It appears from the petition for mandamus, uncontradicted by the return, that the relator holds various claims against the County of Charleston, amounting in the aggregate to $12,904.87, which were in the year 1872 audited by the County Commissioners, the predecessors of the present incumbents, at that sum.

By an Act of Legislature, approved December 22d, 1875, (15 Stat., 610, § 7,) authority was conferred on the County Commissioners of Charleston to levy "three and one-half (3½) mills, one-half (½) mill of which, if so much be necessary, shall be set apart and paid by the County Treasurer in settlement of the audited claims of M. A. McLaughlin." The tax in question has been levied, and moneys realized therefrom are now in the hands of the County Treasurer. The relator has demanded of the County Commissioners checks on the County Treasurer for the amount subject to payment to her under the terms of the law, which have been refused.

The question upon mandamus is, whether a specific ministerial duty has been imposed by law to perform the act which the relator seeks to compel. If such appears to be the case, and her demand for compulsory performance is in support of a recognizable right that has been denied, then the mandamus ought to go.

It is very clear that if the Act in question is operative according to its declared intention, then the relator has acquired an unconditional right to the whole of the fund resulting from the tax of one-half mill or so much thereof as may be necessary to pay the amount of the claims held by her that had

*377

been audited and were unpaid *at the date of the passage of the Act. This is the only demand the relator makes, her present application having relation solely to the fund in hand under the appropriation to her, and to claims audited before the passage of the Act.

The first point of objection on the part of the County Commissioners is, "that they are not, by the said Section of the said Act, to do anything in regard to the claim of the relator, and therefore the mandamus prayed for against them ought not to be ordered to issue." When an Act directs money to be paid from a public treasury, but does not specify the mode of making payment, it is to be regarded as intending that such payment, as to matters of form, shall be made in conformity to the general regulations of law respecting payments of such class or character. Such an Act imposes a specific obligation upon all officers having duties to perform necessary for the making of such a payment, under the general laws relating to that subject, upon the familiar principle that a legislative mandate implies the requisite means of its performance, if in the general compass of the powers of the officers by whom the mandate ought to be executed.

No dispute is made as to its being within the general duties of the County Commissioners to draw checks upon the County Treasurer for amounts properly payable from the County treasury. It follows that, unless it can be made to appear that the Act is inoperative, in so far as it assumes to give the exact measure of duty on the part of the County Commissioners as it regards the relator's demand, the writ should issue. The proposition relied on by the County Commissioners to sustain their position that the law is inoperative is, that the question, to the extent that it assumed to fix the relator's right to the fund in question, was the exercise of a judicial function that could not be constitutionally performed by the Legislature.

The County Commissioners, in presenting this proposition, connect it with the statement of the fact that an action is pending relating to the same claims and undecided; but this fact can have no bearing on the question of the constitutional authority of the Legislature. If they have authority to direct that the claims should be paid at all, they clearly have authority to direct such payments, notwithstanding the pending of an action for their recovery.

*378

*The constitutional question must be considered in reference to two distinct clauses of the Constitution.

Section 26, Article 1, of the Constitution declares: "In the government of this Commonwealth, the legislative, executive and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of the said departments shall assume to discharge the duties of any other."

Had the question been the right of the Legislature to fix the amount due to a creditor of the State, no serious doubt could have arisen as to its competency so far as it regards the Section of the Constitution just quoted. Should the Legislature attempt to

vary the obligation of its contract with its creditor, that would present a totally different question arising under another clause of the Constitution. But where the sole effect of its action was to impose a burden on the State, it could not be affirmed that such an act had anything of a judicial nature in it. Every individual, sui juris, has a right to concede his liability to a demand against him, and that concession becomes evidence of his liability so as to displace other proofs, and in some instances binds him irrevocably. The same right resides somewhere in the government of the State, and its character is no more judicial than when exercised by an individual. In the case of the State, it affords the only remedy the creditor of the State can acquire. He cannot sue the State unless the legislative authority is exercised so as to create an imperative duty on the part of some public officer to pay the demand of such creditor. He is without remedy. This power is not lodged with the judiciary, for precluding the creditor from suing the State is equivalent to declaring that the adjustment of the indebtedness of the State belongs to some other department of the government than the judiciary. Then it must be lodged with the Legislature, unless placed by the Constitution in the hands of some executive or administrative officer. Can, then, an Act of the Legislature fixing the indebtedness of a County, as it regards a person claiming to be its creditor, be regarded as an assumed exercise of a judicial authority? Whether the validity of such an Act is affected by the constitutional powers granted to County Commissioners is another question. Clearly it is not judicial. Had the Act assumed to determine as matter of law the true indebtedness existing between the relator and the County of Charleston, and pro-

*379

ceeded to make provision for its *payment, its construction would necessarily be such as to preclude the idea that it was an attempt on the part of the Legislature to substitute, as against the will of the creditor, its own measure of obligation in the place of that existing under the law of the contract. The natural conclusion, as it regards such an Act, would be that its object was to tender to the party specific means for the payment of his debt, in excess of that which he had a right to claim under the law of his contract, on condition that he would accept the ascertainment of the debt as final. This would be tendering a compact which an individual is competent to offer and make in his own case, and which the State as certainly should be capable of doing. If the creditor should not accept, it might happen that the law would fall to the ground and the rights of the parties would continue to stand on the law of the contract.

The fact that such an Act may have the effect to fix upon the County an indebtedness not fairly resulting from the law of the contract does not in itself make the Act an exercise of judicial function. A judicial act assumes to bind the different parties antagonizing each other before the Court; this only assumes to bind one of them. It is not assuming to do what the Courts ought to do, but precisely what they ought not to do, in any case, and that for the reason that it is not within the judicial function but something opposite to it in its nature. This is clearly no ground for holding that the Act in question in its effect upon the County is an encroachment upon the proper province of the judiciary.

It will not be necessary to consider the question whether the Legislature have authority to dispense with the exercise of the powers of the County Commissioners conferred on them by the Constitution and substitute its own will as to the nature and extent of the burden of indebtedness imposed on the County in the place of the proper action and audit of the County Commissioners, for the Act in question does not tend to any such effect. The Constitution (Article XIV, Section 19,) gives County Commissioners jurisdiction in all matters relating to disbursements of money for County purposes. What the powers are, if any, that were intended by this Section to be placed beyond the authority of the Legislature need not be considered. The Legislature and the County Commissioners who audited the relator's claim both considered that they had fully exercised their constitutional and legal powers in reference to the ascertainment of the indebted-

*380

ness to the relator. All that remained *was the steps for payment. The Act recites the fact of audit and bases the provisions for payment upon such action of the County Commissioners. It will hardly be questioned, and certainly cannot be successfully disputed, that where there has been a full exercise of the functions of the County Commissioners, and that action receives the direct assent of the Legislature, that that is the end of the matter.

It is not necessary to consider the question whether the Commissioners have authority to revise the audit of their predecessors, and whether such authority is interfered with by the Act, for it does not appear that they have taken any steps in that direction or intend to take any. All they claim in their return is that they are not bound to do anything but to sit and await the result of a suit at law. They do not interpose their right to audit or reaudit as a constitutional objection to giving the Act the effect contended for by the relator.

It is clear that the Legislature has the right to bind the people of a County by a law unless precluded from so doing by the Constitution, and it is equally clear that where the constitutional action of the Coun-

ty authorities has resulted in the ascertainment of a debt due from the County the Legislature has authority to give that determination the force of a law in binding the people of the County.

Under these views it must be concluded that the relator is entitled to the remedy demanded in her petition.

MOSES, C. J., and WRIGHT, A. J., concurred.

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7 S. C. *381

*ORR v. ORR.

(Columbia. April Term, 1876.)

[*Judicial Sales* ⟸42.]

Where the purchaser objects to the mode of proceeding, the Court, under rule to show cause, will not set aside, on the ground of fraud, a sale of real estate made by the Sheriff under decree for sale.

[Ed. Note.—Cited in Le Conte v. Irwin, 19 S. C. 560; Iseman v. McMillan, 36 S. C. 34, 15 S. E. 336; Ex parte Jenkins, 48 S. C. 334, 26 S. E. 686.

For other cases, see Judicial Sales, Cent. Dig. § 80; Dec. Dig. ⟸42.]

Before Cooke, J., at Anderson, February, 1876.

This case is sufficiently stated in the opinion of the Court.

Harrison & Whitfield, for appellants.

McGowan & Moore, contra.

July 1, 1876. The opinion of the Court was delivered by

MOSES, C. J. Under a proceeding in the cases stated, on the 21st October, 1875, a tract of land, of which one James Orr died seized, was ordered by the Court to be sold on sale day in December following. It was offered by the Sheriff, and knocked down to J. M. Smith at the price of $1,650; the bid was transferred to his son, Jeptha P. Smith, who complied with the conditions of the sale and received a title. It appears that, before any deed was executed, a notice, of which the following is a copy, was served on the Sheriff:

"The State of South Carolina,
"Anderson County.

"W. W. Orr, Administrator,
"v.
"Georgiana Orr, J. W. Orr, and Others.

"Complaint to Marshal Assets, Sell Land, Relief, &c.

"To Sheriff McGukin:

"You will take notice that the land sold under the proceedings in this case is claimed to be void, on account of fraud, and that application will be made to set aside the sale.

McGowan & Moore,
"Complainant's Attorneys.

"December 20, 1875."

*382

*On February 10, 1876, an order was passed by the Circuit Judge reciting the order for sale, and the fact that the land was bid off by J. M. Smith; that in affidavits filed it was alleged to have sold for less than its value by $1,500 in consequence of the biddings being chilled by combination entered into by the said J. M. Smith, which resulted in a large loss to the creditors of the estate of the said James Orr, deceased, and requiring the said J. M. Smith to show cause why the sale should not be set aside and another ordered. Affidavits were submitted both in support of the sale and against it. No rule or other proceeding seems to have been taken against Jeptha P. Smith, who held the deed for the land from the Sheriff, but among the affidavits presented to the Court below was one from him in which he affirms that he is the legal owner of the said land, and objects "that his title should be divested or clouded in the summary way proposed by this rule." The Court concluding "that there was not full and fair competition at the Sheriff's sale on account of an agreement by the said Smith to chill the sale and stifle competition, ordered and decreed that the sale be set aside and annulled, and that the Sheriff shall sell the premises at, &c., &c., &c., on the terms of the original order of sale, and that biddings be commenced by a bid of Mrs. L. J. Rankin for the sum of $2,800." From this order the said J. M. Smith and Jeptha P. Smith appeal and move its reversal.

In our view it is only necessary to notice so much of the grounds on which the motion rests as denies the power of the Court to deprive a citizen of his property by the summary mode of a rule to show cause.

The contract of sale had been executed, and a title to the land vested in the purchaser by the delivery of the Sheriff's deed. It could not be divested through a proceeding by a mere motion. The Constitution, by the 14th Section of the first Article, declares "that no person shall be arrested, imprisoned, despoiled or dispossessed of his property, immunities or privileges, put out of the protection of the law, exiled or deprived of his life, liberty or estate, but by the judgment of his peers or the law of the land." This prohibition, which but enforces "a rule of common right," is recognized in Magna Charta and prevails in the administration of the laws of every civilized government. "The law of the land" is not, in the sense of the Constitution, to be applied to every provision of the Legislature affording new reme-

*383

dies, enforcing new penalties, or *establishing new Courts for the redress of wrongs, but has reference to those long recognized forms and usages, which, if not coeval with our provincial legislation, certainly prevailed as

a part of our judicial system at the adoption of the State Constitution in 1790. Except in "cases in chancery" and where it is waived in conformity with the Code, a party cannot be deprived of his property except through a trial by jury. Indeed, so far as relates to real estate, he can be disseized of it through no other legal form. It is true that if a title is assailed for fraud, or as having been procured by improper or undue means, it may be set aside by a Court exercising equitable jurisdiction, and this mode has prevailed in South Carolina from the organization of its Chancery Courts. There the party has the benefit of a full and regular trial with all its accessories, not the least among them being his right not only to produce his own witnesses, but of cross-examining those who are introduced against him.

In Hamilton v. Hamilton, (2 Rich. Eq. 355 [46 Am. Dec. 58]), Chancellor Harper was not satisfied with his authority to entertain the case in the form in which it was presented, for at page 361 he says: "Being a complete executory contract, I must seek for something which will authorize me to set it aside, and it seemed to be agreed that the motion was to be decided on the evidence before me, as if a bill had been filed for that purpose." In Holmes v. Holmes, (3 Rich. Eq., 63,) Chancellor Dunkin, delivering the opinion of the Court, said: "Upon the question as to the proper mode of proceeding, the Court means to conclude nothing at the present time. My individual opinion is that a proceeding by bill is the most proper mode to bring such question as is here raised to a hearing. Certainly if the question as to the fairness of the sale is to be tried upon a rule against the purchaser, (unless the facts can be agreed on, as in the case of Hamilton v. Hamilton,) the case must be tried and adjudged upon the facts admitted in the answer to the rule. The purchaser, whether he claims under a deed executed or on an executory contract that is complete, has rights which, in a disputed state of facts, are not to be concluded by the affidavits of witnesses who have not been subjected to the ordeal of a cross-examination."

The conclusion drawn by the counsel of the respondents from the case of Pope v. Frazee, (5 S. C., 269,) that no title vests in the purchaser until confirmation of the sale, is not a legitimate inference from the opinion accompanying the judgment. The point

*384

there *ruled was that the confirmation of the report and the action of the parties interested, conforming to the report, barred the mortgagor, whose land had been sold under foreclosure, from maintaining an action to annul the sale because the Sheriff who made it was interested in the purchase. In the matter before us the sale has not been confirmed. It is not, therefore, necessary for us now to pass upon the effect of such an order when made, for the point does not arise in the cause.

It may not be out of place to remark that the order for the sale of the Orr land did contemplate the execution of a deed to the purchaser on his complying with the prescribed conditions and his investiture with whatever title such a bare instrument would convey. This is apparent from so much of the terms as required the purchaser to execute a mortgage for the credit portion of the bid, for to give effect to such an instrument he must at least have had the naked title.

We are not disposed to hold that the sufficiency and validity of a title should be decided on a mere motion to set it aside. Our investigation in that mode admits of the reception of testimony only by affidavits—precludes the Judge from the opportunity of any observation of the witnesses, and the respective parties from the benefit of a cross-examination. It is best and safest not to deviate from forms of proceeding which have heretofore been found fully adequate to the end in view and the best calculated to lead to a correct and just conclusion.

The motion to set aside the order is granted, without prejudice to any of the parties interested to resort to such course in regard to the subject matter as they may be advised.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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7 S. C. *385

*COOKE, Executor, and ZEIGLER, Executrix, v. PENNINGTON and PRICE.

(Columbia, April Term, 1876.)

[*Evidence* ⇐207.]

Where the attorney of a party agrees in writing that a certain deed of conveyance of real estate offered by the other side shall be received in evidence at the trial and directs the Referee to incorporate the admission into his report, which is done he cannot at the trial object to the deed on the ground that it has not been proved.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 708; Dec. Dig. ⇐207.]

[*Evidence* ⇐373.]

A mortgage of real estate must be proved according to the common law rules of evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1581; Dec. Dig. ⇐373.]

Before Carpenter, J., at Richland, October Term, 1875.

This was an action by Thomas H. Cooke, executor, and Jane M. Zeigler, executrix of Daniel Zeigler, deceased, against John M. Pennington and William Price for foreclosure of a mortgage of real estate given by John M. Pennington to the testator and to the said Jane M. Zeigler, bearing date February 26, 1872.

Price was made a defendant on the ground, as alleged in the complaint, that he purchased the land at a sale for taxes made in May, 1873. The case was referred to a Referee to take the evidence upon the issues raised by the pleadings. The only evidence as to the execution of the mortgage reported by the Referee was that of the plaintiff, Cooke, who testified that he drew the mortgage, and that it was executed in his presence but not witnessed by him.

The Referee also reported that the plaintiff's attorneys, by an instrument of writing, bearing date April 29, 1875, admitted the execution of the deed taken by Price when he purchased at the tax sale and authorized the Referee to incorporate such admission in his report, which was done.

At the trial, the defendants' counsel offered the original tax deed in evidence and was informed by the Court that it regarded no tax title or deed as in evidence; that the Court would in an ordinary case remand the report to the Referee with leave to the defendant to prove said tax deed, but the Court would extend no favor to the defendants' claim under a tax title.

To this ruling the defendant Price excepted.

The defendants then moved to have the complaint dismissed on the ground that the execution of the mortgage had not been proved.

The motion was overruled and the defendants excepted.

Judgment of foreclosure was then entered against the defendants, and they appealed on the following and other grounds:

*386

*1. That His Honor erred upon the trial in ruling that no tax deed of the defendant Price was in evidence before the Court.

2. That His Honor erred in overruling the defendants' motion to dismiss the complaint upon the ground that the execution of the mortgage from John M. Pennington to Daniel and Jane M. Zeigler, set forth in the complaint, had not been proved according to law.

[For subsequent opinions, see 9 S. C. 83; 15 S. C. 185.]

Bacon for appellant.

Baxter & Seibels, contra.

July 1, 1876. The opinion of the Court was delivered by

MOSES, C. J. The motion seeks to reverse the order made by the Circuit Court in the said cause, and the judgment thereon entered, on the two following grounds:

First. That His Honor the presiding Judge erred in ruling that no tax deed of the defendant, Price, was in evidence.

Second. That His Honor overruled the exception of the appellant to the introduction of the mortgage because not proved according to law.

Both exceptions are well taken. The admission of April 29, 1875, by the respondent's attorney, of the execution of the deed from the County Auditor to Price, conveying, as alleged, the premises purchased at a tax sale, with authority to the Referee to incorporate it into his report, must be accepted as an acknowledgment of the introduction of the instrument in evidence. The course of the counsel for the respondents, in his cross examination of Price, on May 1, 1875, in relation to his purchase of the land on the sale of it for taxes, makes clear the understanding of the counsel at the time of the admission and the practical effect proposed by it. To limit its purpose, as is now claimed, would operate as a surprise on the appellant, Price, who must have supposed that the admission dispensed with the necessity of the introduction of either of the subscribing witnesses to prove his deed. The presiding Judge seems to have been impressed with this view; for he said "that the Court would in an ordinary case remand the report of the Referee, with leave to the defendant to prove the said tax deed, but that the Court would extend no favor to the defendants' claim under a tax title." The party was entitled to every benefit which his title conferred, and the rules of law, both

*387

in principle and practice, must *have a general application, so far as they are to affect legal rights, without regard to the sources through which they may be derived. If, according to the statute law of this State, a good title to land may be conferred by a sale under a process for the collection of taxes, a Court of law is as much bound to enforce it as if obtained in any other regular mode.

In regard to the second ground, it is enough to say that the common law rule as to the proof of execution of attested instruments has always prevailed in South Carolina. Except the change made by the Act of 1802, (5 Stat. at Large, 435, Gen. Stat., 514,) which dispenses, under certain circumstances, with proof of the execution of any note or bond by the subscribing witness, it still obtains without any modification.

The motion to set aside the order and judgment is granted and the case remanded to the Circuit Court.

WRIGHT, A. J., and WILLARD, A. J., concurred.

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7 S. C. 387

BLACKWELL v. TUCKER.

(Columbia. Nov. Term, 1875.)

[*Payment* ⇐12.]

A and B were seized as tenants in common of equal undivided moieties in three tracts of land. B died intestate and A became his administrator, and afterwards, under a bill in equity filed by the heirs of B against A, A became the purchaser of the lands at a sale by the Com-

missioner. The heirs of B were his widow and children—the latter infants. The Bond of A to the Commissioner was given in 1860, and early in 1863 A applied to the widow to receive Confederate money in payment of a moiety of the purchase money, which she declined to do. In July, 1863, A paid to the Commissioner, in Confederate Treasury bonds, one-half the amount of his bond for the purchase money, but did not inform the Commissioner of the widow's refusal to receive Confederate money: *Held*, That the payment was fraudulent and void, and that A was liable to the widow and children for their moiety of the purchase money.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 50; Dec. Dig. ⟸12.]

Before Carpenter, J., at Edgefield, June, 1875.

This was an action by Susan Blackwell and her four children, who were infants, and sued by their guardian ad litem against Landon Tucker, to set aside and vacate, on the ground of fraud, a payment made in July, 1863, on a bond held by the Commissioner for the benefit of the plaintiff.

The case was as follows:

*388

*James Blackwell, husband of the plaintiff, Susan Blackwell, and father of the infant plaintiffs, and the defendant, Landon Tucker, were seized in fee as tenants in common of three tracts of land, each being entitled to one moiety thereof. Blackwell died intestate and the defendant became the administrator of his estate. The widow and children of Blackwell then filed a bill against the defendant for partition of the real estate and a decree was made for the sale thereof. In December, 1860, the sale was made by the Commissioner of the Court and the defendant became the purchaser, and on 3d of December, 1860, gave his bond to the Commissioner for $7,525, the amount of the purchase money, one-half payable one year after date and the other half two years after date.

The following payments were endorsed on the bond:

Received December 3d, 1860.....$ 263 16
Received July 6th, 1863..... 4,293 00
(One-half of the bond.)

The endorsements were made by the Commissioner. The case was referred by the Circuit Court to a Referee to take and report the testimony. He reported the testimony of two witnesses, Susan Blackwell and John Blackwell, and they testified that in January or February, 1863, the defendant had a conversation with Mrs. Blackwell in the presence of the other witness, and the defendant said that he wished to pay up what he owed the plaintiff and settle the whole matter. Mrs. Blackwell declined to receive the money: said that it had so greatly depreciated that it was worthless: that he would not pay when money was good, and now that it had become worthless because of its great abundance he wished her to take it, but that she would not do.

Landon Tucker testified for the defense that in his conversation with Mrs. Blackwell, to which she and her son had testified, he (the witness) had reference to the personal estate; it was that he wished to settle up and pay for in Confederate money.

It further appeared that the payment in July, 1863, was made in Confederate Treasury bonds, and that Tucker said nothing to the Commissioner when he made the payment or at any time before about the conversation with Mrs. Blackwell, which she and her son had testified to or about her refusal to receive Confederate money in payment of the bond to the Commissioner.

His Honor Judge Carpenter decreed that the payment made on the 6th July, 1863, be disallowed and rejected, and that the defend-

*389

*ant do pay the full amount due the plaintiffs on the bond to the Commissioner on or before the 1st of October next. That the plaintiffs had a statutory lien on the lands to secure the payment of the purchase money, and that in default of such payment the lands be sold to satisfy the amount due the plaintiffs.

The defendant appealed on the following grounds:

1. Because plaintiffs, being neither obligees nor legal owners of the bond, cannot maintain this action.

2. Because the defendant, having an equal interest with the plaintiffs in the proceeds of said bond, and having paid half thereof to the obligee, the plaintiffs cannot maintain their action against him.

3. Because Z. W. Carwile, the then Commissioner in Equity for Edgefield, the obligee of the bond, having in his official capacity received and acknowledged the receipt of so many dollars from defendant in part payment thereof, the defendant is thereby discharged, if not entirely, at least pro tanto from payment thereof, and plaintiffs' redress, if any, for any loss or injury sustained thereby is against Carwile and his sureties on his bond as Commissioner.

4. Because, even admitting the liability of defendant, defendant's payment in Confederate currency having been made and received in good faith, any loss incurred thereby should be borne equally by plaintiffs and defendant, and the judgment of the Court is therefore for too large an amount of money.

Youmans, for appellant, with whom was Griffin:

On December 3, A. D. 1860, defendant gave bond to Commissioner in Equity for payment of $7,525, one-half in one year and one-half in two years after date, with interest, on which he paid at the date $263.16, and on 6th July, 1863, $4,293. Of the land sold to secure payment of the purchase money of which this bond was given, defendant was half owner and entitled to half the proceeds of sale.

Upon the pleadings set forth and the report of the Referee the Circuit Judge disallows the payment made by defendant and decrees against him for half of the said bond debt and interest, with order for sale and foreclosure. Defendant appeals.

*390

*1. The plaintiffs are neither payees or assignees of the bond, nor are they entitled to receive proceeds of the bonds when collected, the defendant being entitled to one-half.

2. The defendant not liable to account to plaintiffs for their moiety, having been discharged by his payments.—Meyer v. Mordecai, 1 S. C., 383, and cases cited at 389.

3. The payment in Confederate money having been accepted by the obligee of the bond discharges the obligor.—Austin v. Kinsman, 13 Rich. Eq., 266. Even though the obligee be liable.—McPherson v. Lynah & Gray, 14 Rich. Eq., 121; Wiseman & Finley v. Hunter et al., 14 Rich. Eq., 167.

4. Decretal order erroneous, not containing statement of facts found and conclusions of law as required.—Code, § 291.

Bacon, contra, filed the following points and authorities:

All of the decisions of this State, as well as those of the United States Courts, sustaining payments in Confederate money proceed upon the ground of necessity.

This is true, in especial, of payments made to the Commissioner in Equity (as in this case) by the obligor of bonds given for the purchase of real estate at sales by that officer.

The general opinion of the Court in such cases seems to be that it is hard that the beneficiaries (especially when women and children, as here,) should lose, as it were, the real estate of the testator or intestate because of the inflexible rule of law that payment in Confederate notes by the obligor to the obligee (the Commissioner) is a good and valid payment; and the entire current of the decisions—from Wiseman & Finley v. Hunter et al., (14 Rich. Eq., 171,) to the late case of Pickens v. Dwight, (in 4 S. C., 360,) —go to show that if there is the slightest fraud or circumvention or improper combination on the part of the obligor in making such payment the Court will gladly avail itself thereof in order to avoid the inflexible rule and to deal out even-handed justice.

Thus, in Wiseman & Finley v. Hunter et al., it is said: "If any party in the cause was unwilling for Confederate currency or anything but coin to be received, that was the time to say so," (meaning the time when the plaintiffs presented their claims under the order in the case calling in claimants). "And such an objection would certainly have received attention, for the Court would not have authorized the acceptance of anything

*391

but the legal tender of *the country against the will of any party interested in the fund. None such was made, and it cannot be listened to now, after payment by the debtor in the manner required of him, and in accordance with a proper construction of the order of the Court. The debtor was no volunteer in this matter."

If such an objection as that indicated in the above case would have been noticed and enforced by the Court, how much more so the objection set up and proved in the present case? For here we have the direct testimony that the widow, when approached by the defendant, Tucker, some months before he made payment to the Commissioner, actually refused to receive the Confederate notes in payment, and assigned a good reason therefor—that they were worthless; that when, on a former occasion, she could have gotten a guardian for her children, he (Tucker) would not pay, and now no one would take such money; and that, notwithstanding such refusal on her part and on the part of her oldest son, John, who was present, (he and the rest of the children being then infants,) the said Tucker sought the Commissioner and paid his bonds in the identical Confederate bonds at a later date, when they were still more worthless than when refused by the plaintiffs. Such a transaction indeed evinces intentional and premeditated fraud upon the beneficiaries and upon the Commissioner, and fraud vitiates every transaction. It was not only a fraud, but a base one, towards the plaintiff and her children, and certainly a suppressio veri as to the Commissioner.

And it is remarkable in this case that the said Tucker never testified or pretended that the Commissioner desired to collect the bonds, or even asked for payment. The truth is, the Commissioner had no right to receive the money, as no order had been passed for the collection of the bonds, and the whole transaction shows that Tucker was a volunteer. In fact, it is but fair to presume that Tucker had desired to pay to the Commissioner, who refused to receive, and that he then attempted to get the consent of the plaintiff and her children in order to satisfy that officer.

In Mayer v. Mordecai, (1 S. C., 398,) the Court say: "If the satisfaction of the bonds was the result of a fraud between the debtor and the trustee, or induced by an improper combination, to the prejudice of the cestui que trust, or if the debtor knew of the intended misapplication of the proceeds by the trustee and in any way wrongfully facilitated the accomplishment of that design, the

*392

*instruments would be set up as existing and binding. But no such proof has been made in this case. On the contrary, as to the two principal bonds, the trustee required the payment."

The Court in this opinion seems almost to have anticipated just such a state of affairs

as occurred in the present instance; for Tucker not only acted fraudulently, but did "wrongfully facilitate" the payment of the bonds in the very notes which the widow and children refused to receive from him.

"It is scarcely necessary to refer to authority," say the Court, in Johnson v. Crooke, "to show that what the creditor takes and acknowledges as payment of his debt must be so considered unless some fraud or imposition has been practiced to induce him to receive in lieu of his demands that which was never intended to be accepted as an equivalent for it."—Johnson v. Crooke, 3 S. C., 203.

Surely Mrs. Blackwell, the plaintiff, never supposed that after her refusal for herself and her infant children to receive the Confederate notes from Tucker that he would attempt to make payment therein to the Commissioner, and thereby, in the language just quoted, induce him to receive in payment of the bonds "that which was never intended to be accepted."

In Pickens v. Dwight, (4 S. C., 360,) it is said that "so far as the bill seeks to set up the bond and mortgage against the obligor and mortgagor, Isaac M. Dwight, it is clear that it cannot be sustained, for they were satisfied by the persons having the legal right and title to receive,—the obligee and mortgagee,—and unless there was fraud or collusion between him and the obligor they must be held to have been paid."

The doctrine of fraud, it will be seen, runs through and is alluded to by the Court in all of these decisions, and the opinion is invariably expressed that in such cases as the present the slightest fraud, circumvention, improper inducement or combination on the part of the payee will vitiate the payment.

The case of McPherson v. Lynah & Gray is totally different from this one. In that case Lynah was not the administrator of the intestate, as was Tucker here, and in that case there was an order for the Commissioner to collect the bonds, and no such order here. Further, in Lynah & Gray the Court say: "The transaction between Mr. Lynah and Mr. Gray was perfectly fair on both sides." And Judge Wardlaw, delivering the opinion, says: "Not intending in the least to indicate the

*393

opinion of the Court concerning *suits commenced or even payment demanded by the Master without the order of the Court, we see in the order which we have cited a justification for Mr. Gray's having received payment of Mr. Lynah's bond whenever the latter chose to exercise the right of payment."

It is said also in this case that the Court laid stress upon the fact that the parties interested could have prevented the receipt of the money.

Now, where is there any evidence of fairness throughout this whole transaction on the part of Tucker? On the contrary, he practiced a deliberate and premeditated fraud upon Mrs. Blackwell and her children, and also deceived and misled the Commissioner by a suppressio veri,—one of the worst badges of fraud.

"But where the concealment amounts to a willful suppression of facts by a party for his own benefit and the consequent injury of another, under circumstances which render it his duty to have disclosed those facts to the other party, and in respect to which he could not innocently have remained silent, it is beyond all question that such undue concealment will amount to a case of fraud, against the consequences of which the injured party will be relieved by a Court of equity."—Hill on Trustees, *148.

Justice Story carries the doctrine still further.—See 7 Eq. Jurisp., § 207.

And Chancellor Kent makes it still broader.—See 2 Kent's Com., 482.

And under this head—suppressio veri—in Hill on Trustees, 148, American edition, it is laid down that "where the parties to the transaction stand in a fiduciary relation one to the other," &c., "the obligation to disclose material facts becomes more imperative and the fraud of concealment proportionally more odious."

"Thus, where a party, in treating for the purchase of a reversion after the determination of the estate for life, carefully suppresses the fact of the death of one of the tenants for life, and by these means obtained a much better bargain, Lord Eldon set aside the purchase."—Ibid.

And when the Court remembers that Tucker was the administrator of the personal estate of the intestate at the time of his purchase of the land and at the time of his attempt to induce the plaintiffs to receive the Confederate notes, as also at the time of payment, the case is much stronger against

*394

him—especially when, *as decided in Pickens v. Dwight, the Commissioner was the agent of the parties.

As to the facts:

Only three witnesses were examined before the Referee. Two of them—Mrs. Susan Blackwell and John R. Blackwell—testify in substance that in January or February, 1863, Mr. Tucker proposed to pay to Mrs. Blackwell the "purchase money of the land in question."

She refused to receive it because the "children were all minors, and that money was greatly decreased in value, and she could not get any one to take the money who was at all responsible. It was so plentiful that she couldn't get any one to take it. That she could not get a settlement when she could get good and responsible men as guardians to take good money, and now she would not take it."

"At the time of the conversation in 1863 none of witness' (Mrs. Blackwell's) children were of age."

Tucker "proposed to pay for children, and witness supposes for herself too."

Tucker testified that the conversation alluded to by Mrs. Blackwell and John R. Blackwell "had nothing to do with the bond, but only to the personal estate."

Most certainly the testimony of Mrs. Blackwell and John R. Blackwell must prevail, as against the testimony of Tucker.

Besides that, the Circuit Judge, in his decree, does not hesitate to accept their version of the conversation, and it is useless to refer to authority to shew that this Court will not interfere with the decision of the Circuit Judge upon the facts. The late case of Means v. Feaster (4 S. C.) is exhaustive and conclusive as to this point.

Indeed, if Tucker's own testimony is taken as true, it was sufficient to advertise him that Mrs. Blackwell and her children would not receive Confederate bonds. He admits, in his testimony, that the conversation did occur, but says it was as to the personal estate.

And, certainly, if Mrs. Blackwell refused to receive Confederate money for the personal estate, she would not have received it for the real estate.

*395

*The attention of the Court is also called to the fact that, according to the testimony, Mrs. Blackwell wanted money to send her son John to school, but she even laid aside that wish rather than receive Confederate bonds. It was an objection so decided that it must have made an impression upon Tucker.

"Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in Section 113."—Voorhies, A. C., 88.

Section 113 simply provides that "an executor or administrator, a trustee of an express trust or a person expressly authorized by statute, may sue without joining with them the person for whose benefit the action is prosecuted."

"The common law rule" as to parties "has ceased to exist in this State since the adoption of the Code."—1 Waite's Practice, 88.

"It is a general rule, capable of practicable application, that the party who will be directly benefited by the successful prosecution of an action and who will be entitled to receive the damages recovered is the proper party to be made the plaintiff in the action, whether his title to the note is legal or equitable; whether an original party to the instrument or not is the real party in interest."—1 Waite's Practice, 88; Hasling v. McKinley, 1 E. D. Smith, 273; Savage v. Bevins, 12 How., 166; Creswell et al. v. Ward, Supreme Court of Kansas, Central Law Journal, vol. 3, No. 12, p. 188.

The bonds in which payment was made were the issue not of a recognized government, but of one waging war against the United States.—Warnock v. Austin, 1 S. C., 421.

Carroll, same side, submitted the following additional points and authorities:

1. There was no valid payment ever made by the appellant upon his bond to the Commissioner, Carwile.

(a) The alleged payment thereon in July, 1863, was made not in the treasury notes, but in the bonds of the late Confederate States. On the part of the Commissioner the transaction was nothing else than an unauthorized substitution of securities. As the financial officer and agent of the Court, the Commissioner had no right to accept payment save in lawful money or in some recognized currency representing it, and certainly neither of these included the Confederate bonds received by him.

*396

*(b) The bonds referred to were under the ban and inhibition of the law. They could not, therefore, in any wise be made available by the appellant in payment of his debt to the Commissioner. In Horn v. Lockhart, (17 Wall. R., 580.) it is adjudged by the Supreme Court of the United States that "the bonds of the Confederate States were issued for the avowed purpose of raising funds to prosecute the war then waged by them against the government of the United States," and that any investment in them "was, therefore, a direct contribution to the resources of the Confederate government and an act giving aid and comfort to the enemies of the United States."

2. If the alleged payment upon the appellant's bond were regarded as made in Confederate treasury notes, and if the payment were sustained as between the Commissioner and the appellant, yet, as between the latter and the respondents, it must be held to be ineffectual and void.—Creighton v. Pringle, 3 S. C., 77.

The uncontradicted evidence is, that prior to such alleged payment, the respondent, Susan Blackwell, speaking for herself and on behalf of her children, had rejected peremptorily the appellant's proposal to make payment of their shares of the personal estate, at least of his intestate, in the currency of Confederate treasury notes. Yet some five or six months afterwards the appellant approaches the Commissioner and induces him to accept payment in Confederate treasury notes of one-half the sum secured by his bond, making no disclosure of the fact of his having been forewarned by Mrs. Blackwell on behalf of herself and her children that no payments in that currency would be received by them.

If the appellant had moved in the Circuit Court for an order authorizing the collection of his bond in Confederate currency, and the respondent had objected, "such objection would certainly have received attention; for the Court would not have authorized the acceptance of anything but the legal tender

of the country against the will of any party interested in the fund."—Circuit decree in Wiseman & Finley v. Hunter, 14 Rich. Eq., 167; Circuit decree in Johnstone v. Crooks, 3 S. C., 200. Where, as in this case, the debtor, after proffering to pay his creditor otherwise than in lawful money, and after having had his proffer rejected, makes such payment to his creditor's agent, he being ignorant of his principal having already refused the same, such a transaction, as against the creditor, has all the essential characteristics of a fraud.

*397

*3. The appellant stood in such fiduciary relations towards the respondents as required of him scrupulous integrity and the utmost frankness and fairness in all his dealings and transactions respecting the land sold to him by the Commissioner or the payment of the purchase money for the same.

(a.) Of the land referred to, the appellant and respondents were tenants in common, and the former was in possession of the same. One of such tenants cannot purchase and hold for his exclusive benefit a claim or lien affecting their lands. "It is not consistent with good faith, nor with the duty which the connection of the parties, as claimants of a common subject, created, that one of them should be able without the consent of the other to buy in an outstanding title and appropriate the whole subject to himself."—Van Horne v. Fonda, 5 John. Ch., 407.

In Huson v. Wallace, (1 Rich. Eq., 1,) Chancellor Harper in his Circuit decree, affirmed on appeal, remarks: "I have determined during the present sitting, in the case of Goulding v. Goulding, that the tenant in common possession is a trustee to preserve the estate for the rest." It is no sufficient answer to say that whatever may have been the fiduciary relations between the parties, arising out of their tenancy in common, such relations ceased upon the Commissioner's sale of the land to the respondent. Upon the sale of land under proceedings for partition the purchase money is substituted for the land as the subject of partition.—Ch. Harper's Circuit decree in Gillett v. Powell, Speer's Eq., 150. The interests of the parties in the purchase money after the sale correspond precisely with their interests in the land prior to such sale. The parties, therefore, continued to have an interest in common in respect of the purchase money; and "community of interest," says Chancellor Kent, "produces community of duty."—Van Horne v. Fonda.

(b.) The children of the appellant's intestate were all infants at the sale of the lands to the appellant and at the date of his alleged payment upon his bond to the Commissioner. "The rule laid down in Dormer v. Fortescue (3 Atk., 130,) is that he who takes possession of the estate of an infant holds as bailiff or guardian of the infant."—Harvin v. Riggs, Rich. Eq. Cas., 291.

The very fact of his having purchased the land placed the appellant in a fiduciary relation towards the respondents.

*398

*"When a contract is made for the sale of an estate, equity considers the vendor as a trustee for the purchaser of the estate sold, and the purchaser as a trustee of the purchase money for the vendor."—1 Sugd. Vend. and Purch., 191.

The trust thus assumed by the appellant he claims to have fully and faithfully performed by making payment to the agent of the respondents, and against their declared consent, in a depreciated currency, which has since perished, and was even then worth but a mere fraction of its nominal value.

4. James Blackwell and the appellant Tucker were owners as tenants in common of the lands referred to. The former (Blackwell) died intestate, and thereupon the appellant became his administrator and passed into the possession of his whole estate, real and personal. In the case of Huson v. Wallace, already cited, the lands of an intestate had been sold by the Commissioner at public outcry, under an order of the Court, in a suit for partition of the same, and at such sale were purchased by the administrator at an inadequate price. It was held by the Court that, independently of any charge of unfairness or fraud, the administrator was bound to account for the full value of the land at the time of the sale. Chancellor Harper in his Circuit decree, which was affirmed, remarks: "I am of opinion that McMeekin (the administrator) did stand in such a relation of confidence to the estate and children of Lewis (the intestate) as to throw on him the burden of proving that he gave a full and adequate price for the property, and that on his failing to do so his estate must be charged with the full value. It comes within the rule which applies to a trustee purchasing of his cestui que trust. Nor does it make any difference that instead of bargaining with the persons to whom he stood in the confidential relation he bargained with the officer of the Court who was the agent of all parties in a judicial sale. I should think he came within the rule if there was nothing else but that he was an administrator in possession of the land."

The respondent has gone through the form of a purchase for an adequate price; but, by payment of the purchase money in a depreciated currency to the agent of his cotenants, has, in fact, obtained their land at a price less than the one-seventh part of its actual value. What the law forbids to be done directly it will not permit to be effected by any indirect agency or device.

*399

*July 1, 1876. The opinion of the Court was delivered by

MOSES, C. J. James Blackwell died intestate, and letters of administration on his estate were in due form granted to the appellant, Landon Tucker, who, with the decedent in his lifetime, was seized of equal undivided moieties in three certain tracts of land, which, under an order on a bill filed in 1858 by the respondents, (with two other of the children, since deceased,) his heirs at law and distributees, were sold for partition on the 30th day of December, 1860. Appellant here was a party defendant in the same proceeding, and purchased the said parcels of land at the sale by the Commissioner in Equity for the sum of $7,525, executing his bond on the same day, payable with interest from date in two equal annual instalments. On the day of its execution the bond was credited with $263.16, and on July 6, 1863, the following entry was endorsed: "Received $4,293, one-half of the bond." The payment last made was in Confederate treasury bonds. The present complaint, (by the heirs at law and distributees of the said James Blackwell against the said Landon Tucker,) after stating the facts above recited, charges that prior to July, 1863, the appellant had applied to the said Susan Blackwell, one of the plaintiffs, the widow of the intestate and the mother of her co-plaintiffs, to receive Confederate bonds in payment, and that she had "peremptorily declined to do so." It prays that payment "on the said bond be declared illegal, invalid and fraudulent; that the bond may be set up against the defendant and the statutory lien on the lands enforced." The case was sent to a Referee to take and report the evidence, and, as the Circuit Judge granted the full relief prayed, we are to assume that the facts upon which it was claimed, in his judgment, must have been well sustained by the testimony. Our examination of it leads us to the same conclusion which he reached in regard to it.

It is first objected that "the plaintiffs are neither payees nor assignees of the bond, nor entitled to receive the proceeds when collected, the defendant being entitled to one-half." If the instrument is not made payable to them, it is to the Commissioner, who, as to one-half the amount it was intended to secure, stands to them in the relation of a trustee. They have a direct and exclusive interest in so much of the bond as is substituted for their right and title in the lands which it represents.

*400

*The remaining exception affirms the payment to the Commissioner of the Confederate treasury bonds and his acceptance of them as a full and complete discharge of the appellant from his obligation. This assumes that the payment was made in good faith, and must, therefore, have its intended effect, when the complaint proceeds upon such fraud and imposition on the part of the obligor as, in the view of the plaintiffs, vitiates the transaction and deprives it of all efficacy and validity. To say nothing of the character of the paper tendered, which, according to Horn v. Lockhart, (17 Wall., 580 [21 L. Ed. 657]) having been issued "for the avowed purpose of raising funds to prosecute the war then waged by the Confederate States against the government of the United States," may render doubtful their sufficiency as a consideration to sustain a contract, the credit is resisted because procured in violation of good faith and with a purpose to prejudice the interests of the plaintiffs, who, through the mother, speaking for herself and them, had refused to accept payment in the mode he afterwards imposed on the Commissioner. It averred, however, that, the treasury bonds having been accepted in payment, the obligor is discharged, even though the obligee be liable. This proposition cannot be maintained to the extent which the terms employed would carry it. In McPherson v. Lynah & Gray [14 Rich Eq. 121], Wiseman & Finley v. Hunter et al. [14 Rich. Eq. 167], Mayer v. Mordecai [1 S. C. 383, 7 Am. Rep. 26], Pickens v. Dwight [4 S. C. 360], and that class of cases, where the acknowledgment by the creditor of payment concludes him from an inquiry into the manner in which it was made, the Court has been careful to exclude from the operation of the rule such acts which, though prima facie amounting to satisfaction, have been induced by the fraud of the obligor on the rights of the parties interested in the security.

Nor does it follow from the mere acceptance of the Confederate treasury bonds by the Commissioner, the obligee of the Tucker bond, that they for whose use and benefit it was held are necessarily deprived of all interest in it. In the opinion of the Court in Johnstone v. Crook, (3 S. C., 203,) it is said: "It is scarcely necessary to refer to authority to show that what the creditor takes and acknowledges as payment of his debt must be so considered, unless some fraud or imposition has been practiced to induce him to receive in lieu of his demands that which was never intended to be accepted as an equivalent for it."

*401

*This qualification was but the result of a familiar principle of equity, which avoids all transactions into which fraud or improper inducement enters. Nor is it essential that the fraud should consist of affirmative representations not founded in truth. A willful suppression of a fact which, if disclosed, according to the motives which usually influence human action, would most likely have prevented the result complained of, is as effectual in the consummation of a fraud as unfounded or untruthful declarations. While the object is to promote individual interest to the prejudice of the rights of others, it

may be attained as readily by resorting to the one mode as the other.

While knowledge of the fact that Mrs. Blackwell, in January or February, 1863, when neither of her children was of age, refused to accept Confederate money in settlement of her and their proportion of the bond, or on account of his administration of the personal estate of the intestate, the appellant in the July following, withholding from the Commissioner all knowledge of such refusal, tendered not even Confederate notes, which had displaced all other currency, but Confederate treasury bonds, which had never prevailed as a circulating medium. If he had been a mere stranger, the purchaser of the lands, having no interest in them as a tenant in common with the plaintiffs when they were sold, good faith would have required him to disclose to the Commissioner, whether regarded as their agent or trustee, his knowledge of their refusal to accept in payment the bonds he offered. Willfully withholding it, he induced a consent which probably would not have been yielded with notice of the fact, which the appellant by every moral consideration was bound to impart to the Commissioner. He, however, was contented to remain silent, supposing, as we are now obliged to infer, that by this adroit mode he could best accomplish the design he had in view.

But when it is considered that the appellant was the administrator of the intestate, and, although not vested with the title to the land of which he died seized, yet, according to our decisions, having some control in the care and management of it until possession taken by the heirs, and when it is recollected, too, that in the very bond which represented the land he and the intestate had held as tenants in common, he had an interest of one-half,—that, being the purchaser, he stood as a trustee for the purchase money,—would it not be in violation of every

*402

principle of equity and justice to allow *him to retain and enjoy an advantage secured to him by an attempted sacrifice of the rights of others in regard to whom he held a relation which, to say the least, demanded in the particular transaction the exhibition and practice of good faith and fair dealing? The motion is dismissed.

The time fixed by the order of the Circuit Judge within which the amount decreed to be due must be paid, and in default thereof the lands sold, having expired, the case must be remanded to the Circuit Court for such further orders as may be necessary to give effect to the judgment of that Court now here confirmed. It is so accordingly ordered.

WRIGHT, A. J., and WILLARD, A. J., concurred.

7 S. C. 402

ZEIGLER v. THE NORTHEASTERN RAILROAD COMPANY.

(Columbia, April Term, 1876.)

[*Railroads* ⇐417.]

A railroad train, when crossing an ordinary public highway is not bound, unless special circumstances exist making it necessary, to slacken their ordinary speed, and is, therefore, not chargeable with negligence because they did not slacken it.

[Ed. Note.—Cited in Barber v. Richmond & D. R. Co., 34 S. C. 450, 13 S. E. 630.

For other cases, see Railroads, Cent. Dig. § 1484; Dec. Dig. ⇐417.]

Before Reed, J., at Charleston, April Term, 1875.

This is a new trial of the same case reported in 5 S. C., 221.

The action was to recover damages for negligently running the defendant's train against a wagon in which the plaintiff was riding, breaking the wagon and killing the horse that was drawing the same and injuring the plaintiff. The accident occurred at a place near the city of Charleston, where the defendant's track crosses the public highway, along which the plaintiff was riding in a covered wagon.

The case prepared for this Court set forth in full the evidence given on behalf of the plaintiff and then proceeded as follows:

The defendant, by his counsel, then moved for a nonsuit, on the ground that plaintiff had proved his own negligence, and therefore cannot recover.

The Court refused the motion, and defendant excepted to the ruling. The defendant, by his counsel, then opened his case to the jury. The defendant, then, to maintain the

*403

issues on its part, *introduced evidence going to show that the accident was not due to negligence of defendant, and that plaintiff was guilty of negligence producing the result.

The cause was then summed up by the respective counsel, and the counsel for the defendant prayed the Court that the following instructions be given to the jury:

1. That the railroad company is by law entitled to the use of its track for the purpose of running its trains, at a reasonable rate of speed, under its charter.

2. That in the absence of special circumstances making it necessary, it is under no legal obligation to stop its engine and trains at the crossing of public highways.

3. That travelers on the highway are bound, on approaching a point where a highway crosses a railroad, to look out and to listen for trains that may be at any time approaching, and persons driving vehicles are bound to stop before setting foot upon the railroad track, unless they have ascertained by the use of all their senses that no train is near.

4. That an accident by collision between a vehicle on the highway and a train on the railroad is of itself proof of the necessity of so stopping the vehicle.

5. That neglect by the plaintiff of ordinary care debars the plaintiff from claiming damages from defendant.

6. That the admission of plaintiff that he did not look out from beneath his covered wagon or stop to listen is proof of such neglect in the case.

7. That plaintiff in order to recover must prove both that defendant was guilty of negligence in the use of its track, and also that the plaintiff was clear of neglect on his part contributing to the accident.

The Court declined to charge the instructions, to which defendant excepted.

The Court then charged the jury as follows:

This action is brought by the plaintiff, Gustavus H. Zeigler, against the Northeastern Railroad Company to recover damages for injury done to his person and property by the defendants, which he alleges occurred

*404

several years ago. A great deal of law, *both American and English, has been read to you by counsel, in which there appears to be very considerable conflict; but in making the application of the law to the facts of the case, it will be necessary to govern ourselves by the decision of the Supreme Court of this State, and, as far as it is applicable, it is the law of the case. It seems that on the former trial the presiding Judge charged the jury that the railroad company was liable in any event for whatever damages had occurred.

The Supreme Court say: "The proposition submitted by the charge of the Circuit Judge was that a railroad company is responsible for injuries done to persons and vehicles while passing along a highway, at a point where the track of the railroad crosses such highway, in consequence of being struck by a locomotive belonging to such railroad company, running in the course of its ordinary and lawful business, and under the management and control of its servants, even though such injury was the result of accident alone, without negligence or fault on the part of such company or its servants.

"The case of Danner v. ——— R. R., (4 Richardson, 329 [55 Am. Dec. 678],) while carrying the liabilities of railroad companies in cases of injury to persons other than passengers to the fullest point reached in this country, yet concedes that no such liability results as a consequence of mere accident alone."

It is charged in the complaint, that on the 22d day of December, 1870, while the plaintiff was traveling in a wagon drawn by one horse along the public highway leading into the city of Charleston, which public highway crossed the railroad at a place called the crossing of the Meeting street road, near the place known as the forks of the road, and as the plaintiff had reached said crossing, defendants carelessly and negligently caused one of their locomotives with a train of cars attached thereto to approach said crossing and then and there to pass rapidly over the track of the said railroad, by which means the plaintiff was injured. The railroad company deny the charge as alleged in the complaint.

This decision goes on to say: "It appears from the record before us that the evidence submitted to the jury bore on the question of negligence alone. That of the plaintiff tended to establish negligence on the part of the defendants, and that of the defendants to refute the charge of negligence as against themselves and to establish it on the part of the plaintiff. It was for the jury to say what

*405

*force this evidence was entitled to receive in its bearing on the issue of negligence presented by the pleadings."

I charge you, gentlemen, that it is for you, from the evidence before you, to determine that issue.

The Court continues: "The Circuit Judge was called upon by the nature of the pleading and evidence simply to state the law applicable to a case of alleged negligence. To submit, under such circumstances, the proposition that liability ensued though negligence was not proved, was not only an error in point of law but one operating necessarily to the prejudice of the defendants.

"It remains to consider whether the language of the charge supports the conclusion already stated as to its character. The charge holds that, notwithstanding signals and warning of the approach of the locomotive may have been given, yet if the plaintiff did not see them or hear them, in the absence of proof that such failure to see and hear them was the result of negligence on his part, the company is responsible. This proposition virtually holds that plaintiff may recover although negligence is not imputable to the defendants. In other words, it renders the defendants responsible for mere accident alone, without intermixture of fault on their part or that of their servants.

"The charge assigns as the reason of this rule that the defendants were bound to slacken their speed, so as to prevent an accident occurring. This assumes that there was a legal obligation to slacken the speed of the train at the time and place of the accident. There was no such legal obligation. If they were bound to slacken their speed at that time and place, it was because special circumstances existed rendering that course necessary under the rule of law imposing due and ordinary care upon the defendants.

"As to the existence of such a necessity, it was the province of the jury to determine as matter of fact."

The Court say that there is no legal requirement which compelled the railroad com-

pany to stop their train at that point or anywhere else, or even that they should blow a whistle or ring a bell. But they are bound to run their trains with such care that if, by their neglect, persons or property be injured, they will be held responsible; which care is to be exercised to a greater or less extent, according to the location and the particular surroundings. More care is necessary to be exercised in passing a public street of the city of Charleston or a public high-

*406

way near the city than is *necessary in the country, where but few persons are accustomed to pass.

"Again, the charge holds that it was not necessary for the plaintiff to look out for the train. There is no rule of law absolving a person from looking for the train. He is bound to use ordinary care, and that involves a reasonable use of all his senses."

I charge you that it was incumbent on the plaintiff to make proper use of his senses and use ordinary care upon his part, not only to protect himself, but to avoid any obstruction of defendant's train which might involve the loss of both life and property.

The Court continues: "We must, therefore, conclude that the rule submitted to the jury tended to render the defendants responsible, though the injury was the result of an accident alone.

"It is contended by the appellants that the charge that the defendants were responsible for great care is inconsistent with the rule of ordinary care by which railroad companies are bound under such circumstances. This passage is certainly obscure in this respect.

"It is true that in applying the rule of ordinary care the actual amount of care required under the facts of any particular case is varied according to whether the instrument occasioning damage is readily controllable or in its nature dangerous. So that, in one sense, greater care is demanded from one who runs a locomotive engine than from one who drives a cart."

That is perfectly natural and reasonable, and it is for you, gentlemen, to determine whether there was reasonable care on the part of the plaintiff or defendants, or whether there was negligence with both.

"The rule of ordinary care is, however, equally applicable to both, but must be applied with reference to the nature of the instrument involved. Taking the portion of the charge just considered in connection with the other portions already referred to, and it is clear that if it placed before the minds of the jury an erroneous view of the law of the case it would have been scarcely more erroneous had it charged that the liability of the defendant was that of insurers against accident occurring through want of care on the part of the plaintiff."

Thus, gentlemen, you have the law of this case as laid down by our Superior Court, and if, from reviewing the testimony you are satisfied the defendants were guilty of neg-

*407

ligence in running their *train, whereby the injury complained of happened, then your verdict will be for the plaintiff.

But if, on the other hand, you are satisfied they were using reasonable care and diligence to prevent accidents, you will find for the defendants.

The locality of the occurrence is well known to you. The plaintiff states that he had driven up above the Three Mile House on business, and upon returning stopped at that establishment and took up some passengers who had been attending a cock fight; that on approaching the railroad track in an ordinary trot, he did not look to the rear because of the attention necessary to the management of his horse; he heard no bell, but some one in the rear end of the wagon called attention to a bell, and another of his companions remarked that it was possibly the bell of the Phosphate Works. Was that circumstance sufficient to put plaintiff on his guard? He said he heard no whistle until his wagon was struck by the train, when, of course, it was too late.

Was any whistle blown? The engineer testified that at a point six or eight hundred yards above was a signal post where he was required by the rules of the company to blow his whistle, and added that he did so and moved on down the track at a rate of speed not exceeding four miles an hour.

The plaintiff and some witnesses in his behalf judged the speed of the train was twelve to fifteen miles an hour. If the defendants were running their train upon such a locality at the rate as stated by the plaintiff, were they exercising due care? But if their speed did not exceed four miles, as testified to by the witnesses for the defense, and sounded their whistle in the ordinary way, were they or not still guilty of negligence?

Two other witnesses have corroborated the engineer as to the blowing of his whistle at the point indicated and state that he also rang the bell as usual. The old colored man testified that plaintiff, as he approached the crossing, was driving at a rapid rate parallel with and alongside of the train until both struck the crossing and came into collision.

It was also proved that immediately thereafter there was some conversation among the party who had escaped from the wagon about the cock fight, and inquiry was made as to the safety of the cocks, when some one rescued them from the disabled wagon and exhibited them, to the joy of the party.

*408

*The question of negligence on the part of either the plaintiff or defendant, or both, is for your consideration. If you find that both parties were exercising ordinary care when the collision occurred, it must be re-

garded as per infortuniam, and neither would be responsible to the other; or if both were guilty of rashness, then neither can take advantage of his own carelessness. If you conclude to find for the plaintiff, then you will consider the question of damages. He states that he lost his wagon and horse and paid a medical bill amounting to about eleven dollars, and was compelled for some three or four weeks whilst he was laid up to employ assistance at the rate of nine dollars per week. The complaint demands damages to the amount of $1,500. This is not a case, however, for vindictive damages; but if you conclude that plaintiff should recover, you will determine as to the amount and write your verdict accordingly. Otherwise you will find for the defendant.

To which refusal to charge as requested, and to the instructions granted, defendants, by its counsel, then and there, before the jury had withdrawn, excepted.

The jury having retired returned the following verdict, viz.: "We find for the plaintiff eight hundred and fifty dollars."

The defendants appealed.

Simonton & Barker, for appellants.

Simons & Seigling, contra.

July 1, 1876. The opinion of the Court was delivered by

WILLARD, A. J. The counsel for defendants requested the Court to charge "that in absence of special circumstances making it necessary, it is under no obligation to stop its engines and trains at the crossing of a public highway." The Court declined so to charge, and the counsel for defendants excepted. This proposition is somewhat obscure from the use of the word "stop." To stop ordinarily signifies to cease from some particular motion, although it is sometimes used in a loose sense as equivalent to slackening speed. In either sense the proposition is correct, and if involved in the case ought to have been charged.

The charge of the Court appears to us to be in some respects inconsistent with the terms of the proposition just stated, and to that extent erroneous.

*409

*The Court charged as follows: "The plaintiff and some witnesses in his behalf judged the speed of the train was twelve or fifteen miles an hour. If the defendants were running their trains upon such a locality as stated by the plaintiff, were they exercising due care?" The effect of this charge was clearly to convey to the jury the idea that they were at liberty to consider running at that rate, at that locality, to be in itself negligence. It is possible that the case in their minds may have turned on this proposition. The question is then fairly raised whether such construction was correct.

The evidence shows that at the place in question the railroad crossed a public highway. It does not appear that such crossing was in the compactly built portion of a city. It can only be considered, therefore, as the ordinary case of a highway crossed by a railroad. As to such a locality we said in this case (as reported in 5 S. C., 221, in reference to the charge upon a former trial,) that "the charge assigns as the reason of this rule that the defendants were bound to slacken their speed so as to prevent an accident occurring. This assumes that there was a legal obligation to slacken the speed of the train at the time and place of the accident. There was no such legal obligation. If they were bound to slacken their speed at that time and place it was because special circumstances existed rendering that course necessary under the rule of law imposing due and ordinary care upon the defendants. As to the existence of such a necessity, it was the duty of the jury to determine as matter of fact."

The effect of this decision was that the fact that the servants of the defendants, controlling the motion of the train, were aware that the train was approaching the crossing of a highway, placed them under no legal obligation or duty to slacken the speed of the train from its ordinary speed at other points. Consequently, negligence could not be imputed to them for failing so to do. If, however, it was brought to their knowledge, as they are reasonably chargeable with knowledge, that the train was likely to encounter an obstruction at such crossing for some special reason, then they were bound to use special means in view of such special circumstances; and as to the fitness and reasonable sufficiency of such special means the jury was competent to judge.

The foundation of negligence is some legal duty or obligation. As to the existence of such obligation the Court judges. Where the obligation is of a general nature that may be

*410

satisfied in a *variety of modes. The jury judges of the reasonable propriety of the means adopted for conforming to its requirements. A jury is as much bound to keep themselves within the limits of the law in determining an issue of negligence as in passing upon any other issue of fact, and the Court ought to see that they are instructed as to the nature of the legal duty laying at the foundation of the charge of negligence whenever specifically requested so to do.

There was no evidence in the case that justified the jury in finding that there was negligence in the mere fact of the speed at which the train was running at the time and place of the occurrence. The charge doubtless created an opposite idea in the minds of the jury which may have influenced their conduct, and for this reason there ought to be a new trial.

MOSES, C. J., and WRIGHT, A. J., concurred.

7 S. C. 410

SOUTH CAROLINA RAILROAD COMPANY v. WILMINGTON, COLUMBIA AND AUGUSTA RAILROAD COMPANY.

(Columbia. Nov. Term, 1875.)

[*Trial* ⇐273.]

Where a Judge declines to charge certain propositions submitted by counsel, and it appears by the record that he was apprised of the intention to rely on the propositions advanced by way of exception to the charge, that is sufficient to constitute an exception, though there was no formal request to note an exception.

[Ed. Note.—Cited in Clarke v. Harper, 8 S. C. 258; Coleman v. Heller, 13 S. C. 494.

For other cases, see Trial, Cent. Dig. § 680; Dec. Dig. ⇐273.]

[*Appeal and Error* ⇐272.]

Exceptions must be made before the jury retire to their room or they cannot be heard on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1611–1619; Dec. Dig. ⇐272.]

[*Railroads* ⇐129.]

A and B, two railroad companies, entered into a contract, under seal, by which B was admitted to the permanent use, jointly with A, of a portion of the track owned by A, on certain terms therein expressed. The portion of the track subject to the contract was used by A and B jointly for some time until B, becoming insolvent, its franchise, together with its line of road and all its tangible property, was sold and purchased by C, another and distinct railroad company, and thereupon C used for some time the said portion of A's track, but afterwards abandoned its use: *Held*, That C had become liable to A to perform obligations which the terms of the contract imposed upon B.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 392; Dec. Dig. ⇐129.]

[*Railroads* ⇐129.]

The fact that C did not claim the use of the portion of the road subject to the contract and had given notice that it renounced the benefits of the contract did not discharge C from its obligations under the contract.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 392; Dec. Dig. ⇐129.]

[*Railroads* ⇐138.]

A temporary arrangement between A and B by which for a time the requirements of the contract as to certain matters were not to apply: *Held*, Not to destroy the contract.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 436–439; Dec. Dig. ⇐138.]

[*Railroads* ⇐194.]

C became the purchaser under a decree to foreclose certain mortgages, some of which bore date before the contract between A and B: *Held*, That this did not discharge C from its obligations under the contract.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 650; Dec. Dig. ⇐194.]

[*Trial* ⇐282.]

[It does not follow, in every case, where a party submits propositions with a request to charge, and where the circuit judge charges in certain particulars at variance with such request, that the party making such request is to be deemed as excepting to such charge to the extent of such variance.]

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 695; Dec. Dig. ⇐282.]

*411

*Before Graham, J., at Charleston, March, 1874.

This was an action by the South Carolina Railroad Company against the Wilmington, Columbia and Augusta Railroad Company.

The case will be sufficiently understood from the complaint and answer, the exceptions to the Judge's charge and the opinion of the Court.

The complaint alleged:

I. That in and by an Act of the Legislature of the State of South Carolina, ratified the 18th day of December, 1844, the plaintiffs were authorized to construct a branch of their road to the town of Camden, and that they did shortly after construct a branch of their road from Kingville to Camden. That the lands and rights of way used in and for the construction of said branch were and are owned by the said plaintiffs solely.

II. That the Wilmington and Manchester Railroad Company was a body corporate, authorized, under its charter, to construct a railroad from Wilmington, in the State of North Carolina, to Manchester, in the State of South Carolina, or some point near that place.

III. That on the 22d day of August, 1853, the plaintiffs and the Wilmington and Manchester Railroad Company made and executed the following contract:

"State of South Carolina.

"1st. This agreement, made and entered into this twenty-second day of August, in the year eighteen hundred and fifty-three, between the South Carolina Railroad Company of the one part, and the Wilmington and Manchester Railroad Company of the other part, witnesseth:

"That the South Carolina Railroad Company agrees to admit the Wilmington and Manchester Railroad Company to the joint, permanent and mutual use of so much of the 'Camden Branch' of their road as extends from the junction of the Columbia and Camden branches to the junction of said Camden branch with the Wilmington and Manchester road, upon the terms, conditions and covenants hereinafter expressed of and concerning the same.

"2d. The said Wilmington and Manchester Railroad Company, in consideration of the joint and mutual use of so much of the road

*412

*of the said South Carolina Railroad Company granted them as aforesaid, agrees to pay to the said South Carolina Railroad Company one-half of the estimated cost of the construction of the said road as extends from the said junction of the Columbia and Camden branches to the Wateree River, which cost is hereby fixed and ascertained to amount to $14,000 per mile. And the said Wilmington and Manchester Railroad Company agree to pay to the South Carolina Rail-

road Company one-half of the estimated cost (or $7,000 per mile) in three equal annual instalments, with interest thereon from the time hereinafter mentioned, and to execute and deliver their coupon bonds, with seven per cent. interest thereon, payable in one, two and three years, or at time or times (not exceeding ten years) as the South Carolina Railroad Company may require.

"3d. And the said South Carolina Railroad Company agrees to construct a road through the Wateree Swamp and a bridge over the Wateree River, from the termination of the section of the road above referred to, to the junction of the Camden branch with the Wilmington and Manchester Road, said road to be constructed on the plan of the road through the Congaree Swamp, (this plan to be subject to the modifications of the Superintendents of the two roads hereafter,) the work to be constructed under the direction of the engineer of the South Carolina Railroad Company, who shall be authorized to confer freely with the engineer of the Wilmington and Manchester Railroad Company, in consideration of the joint and mutual use of the said road so to be constructed by the South Carolina Railroad Company, as well as the joint and mutual use of their existing road through said swamp. The said Wilmington and Manchester Railroad Company agrees to pay to the South Carolina Railroad Company one-half of the cost of said work, including the bridges, the payment to be made from time to time as the work progresses, in such manner as to meet one-half of the payments which the South Carolina Railroad Company may be required to make in providing for the construction or execution of said work. It is also agreed that the iron to be used on said road or trestle shall be of the compound 'U' form, weighing seventy pounds to the yard, unless the engineers shall determine on a different pattern and weight.

"4th. The road from the junction of the Columbia and Camden branches to the junction of the Camden branch with the Wilmington and Manchester Railroad to be under a superintendent and a party of hands direct-

*413

ed by the engineer of the South Caro*lina Railroad Company, who shall purchase all material for the repairs of said road. And all expenses and charges for the superintendence and keeping up and repairs of that portion of the premises embraced in this agreement from the Western bank of the Wateree River to the junction of the Camden branch with the Wilmington and Manchester Railroad shall, from this date, be at the joint and equal expense of the parties to this agreement, and the like expenses for the other portion of the said premises, to wit: from the Western bank of the Wateree River to the junction of the Columbia and Camden branches shall be joint and equal betwixt the parties to this agreement from the commencement of the joint use of said premises herein provided for.

"5th. A station building (for the joint and mutual use of the two roads, as now embraced in this agreement,) three hundred feet long and forty feet wide, with a platform, on brick pillars, equal to twelve thousand superficial feet (these dimensions to be subject to modifications by the engineers of the two companies hereafter) to be erected at the junction of the Columbia and Camden branches, said building and necessary turnouts to be constructed under the direction of the Superintendent of the Wilmington and Manchester Railroad, who shall be authorized to confer freely with the engineer of the South Carolina Railroad Company: the cost of such construction and the expenses incident thereto to be paid by the two companies in equal portions.

"6th. Each of the parties of the first and second parts to pay to the other one-half of the amount received from the transportation of passengers and mails on the premises embraced within this agreement, said amount to be at the same rate per mile as charged the same passengers on each road, each party to pay the other for each car load of freight they may transport on the same premises two dollars and fifty cents. The road between the two junctions aforesaid to be used by each party, without hindrance or obstruction, according to the following conditions, viz.: All the road between the junction of the Wilmington and Manchester Railroad and the Camden branch and the junction of the Camden and Columbia branches, (being the premises embraced in this agreement,) to be used each alternate hour by the parties to this agreement, except with passenger trains, which are allowed to follow within a half mile of each other, and provided there shall be no delay to passenger trains of either party, freight trains in all cases to

*414

keep out *of the way of passenger trains. The times of running of all trains to be regulated by schedule and a clock at each station.

"7th. Each company to offer every facility for the transportation of passengers and freight, and to be provided with baggage crates for through baggage, which shall be checked by each company over the road of the other, and each company to sell tickets over the road of the other if required; the arrangements for baggage freight on crates to go into effect as soon as the Superintendents of the two companies shall determine.

"8th. It is also covenanted and agreed that the arrangements for running the freight and mail and passenger trains on that portion of the Camden branch of the South Carolina Railroad, herein provided for, from its junction with the Wilmington and Manchester Railroad to the junction of the Cam-

den and Columbia branches of the South Carolina Railroad shall commence so soon as the Superintendents of the two roads shall determine, and the interest on the bonds herein provided to be given by the Wilmington and Manchester Railroad Company in the second clause of this agreement, as well as the interest on the fourth of the estimated cost of the road from the Wateree River to the junction of the Wilmington and Manchester Railroad, (the estimate to be made by the Superintendents of the two companies,) shall commence running and be paid by the said Wilmington and Manchester Company to said South Carolina Railroad Company so soon as the joint use of said section of road herein provided for shall commence, and the divisions of receipts specified in the sixth section of this agreement do commence likewise and take effect from the said commencement of the joint use of said section of road as aforesaid.

"Witness the signatures of the Presidents of the South Carolina Railroad and of the Wilmington and Manchester Railroad Companies, and the corporate seals of said companies respectively.

["S. C. R. R. Co. Seal.]

"John Caldwell,

"President S. C. R. R. Co.

"Witnesses: J. R. Emery.

"John Samuel Bee.

["W. and M. R. R. Co. Seal.]

"W. W. Harllee,

"President W. and M. R. R. Co.

"Witnesses: D. K. Davis,

"C. F. Godbold."

IV. That all the matters and things reciprocally to be performed by each of the said contracting parties have been performed by

*415

the *South Carolina Railroad Company and were performed by the Wilmington and Manchester Railroad Company until the property, powers and privileges of the said corporation were transferred to and vested in the defendants, under the name and style of the Wilmington, Columbia and Augusta Railroad Company.

V. That the railroad constructed and owned by the Wilmington and Manchester Railroad Company terminated at or near Manchester, and that the connection of the said corporation with the South Carolina Railroad, and with railroads South and West, and the location of the terminus of said road at Kingville, were solely under and by virtue of the foregoing contract and the rights thereby acquired, and that the rights and interests thus acquired and held were essential to the use and enjoyment of the corporate franchises granted to the Wilmington and Manchester Railroad Company.

VI. That on or about the day of , William F. Walters, Benjamin F. Newcomer and D. Willis James, for themselves, and as trustees for others, under decrees of sale for the purpose of foreclosing the various mortgages made by the Wilmington and Manchester Railroad Company, became the purchasers of all and singular the estate, property and effects of said company, and all the rights, privileges and franchises of said company connected with and relating to said railroad or the construction, maintenance or use thereof between its Eastern terminus at Wilmington and its Western terminus at Kingville, and subsequently, by Act of the Legislature of South Carolina, approved March 1, 1870, the said purchasers were incorporated as a body politic and corporate under the name of the Wilmington and Carolina Railroad Company, "or by such other name as a majority in interest of the persons who are purchasers as aforesaid may designate and adopt at their first meeting after the passage of this Act." And at the first meeting after the passage of said Act a majority in interest of the purchasers adopted the name of the Wilmington, Columbia and Augusta Railroad Company as the style and name of the corporation.

VII. That among the rights, privileges and property of the Wilmington and Manchester Railroad Company thus sold and purchased was the interest of the said company in the above recited contract, and the nine miles of road embraced therein, and under and by virtue of said sale and said Act of incorporation the Wilmington, Columbia and Au-

*416

gusta Railroad Company became the *successors and assignees of the Wilmington and Manchester Railroad Company, and substituted for them in all the rights which the Wilmington and Manchester Railroad Company had in said nine miles of railroad between Camden Junction and Kingville, and entitled to all the benefits and privileges of the contract above recited, and liable for all the duties and obligations to be performed under the contract by the party using and enjoying the privileges and benefit of said contract.

That after the sale and incorporation aforesaid, the Wilmington, Columbia and Augusta Railroad Company assumed, exercised and enjoyed, up to the first of January, 1872, all the benefits and privileges of said contract in like manner and to the same extent as the Wilmington and Manchester Railroad Company, and also have, up to a recent period, to wit, the first day of December, 1871, performed all the obligations of said contract in like manner and to the same extent as the same were performed by the Wilmington and Manchester Railroad Company, and by reason thereof and the purchase and incorporation aforesaid the said Wilmington, Columbia and Augusta Railroad Company became, and are, parties to said contract above recited.

VIII. That in and by the contract hereinbefore recited it is provided that the repairs

of the railroad from the junction of the Columbia and Camden branches (Kingville) to the Camden junction shall be made under the direction of the South Carolina Railroad Company, its officers and agents, and that the expense thereof shall be jointly and equally borne by the parties to said contract; that, in pursuance of said contract, the plaintiffs have repaired the railroad embraced in said contract, and have incurred expense therefor to the amount of $3,005.35, as appears by the bill of items hereto annexed; that said expenses are, by the contract, equally to be borne by the plaintiffs and defendants; that the plaintiffs have demanded payment of the one-half thereof from the defendants, but the defendants have refused to pay the same.

Wherefore the plaintiffs demand judgment against the said defendants for the sum of fifteen hundred and two dollars and sixty-seven cents, ($1,502.67,) with interest and costs of this action.

The answer stated:

1. Denies that they are indebted to the plaintiff in the sum of money set forth in the complaint or in any part thereof, or that they have ever undertaken to pay the same or any part thereof.

*417

*2. For further defense, the defendant alleges that the said defendant is and always has been an entire stranger to the estate, right or title of the plaintiffs or of any other person in the land, railway or franchises set forth and described in the contract alleged in the complaint to have been made between the plaintiff and the Wilmington and Manchester Railroad Company, and that they never have claimed and do not now claim any right, interest or estate therein, or in any part thereof.

3. And for further defense, the defendant alleges that on the 5th January, 1870, W. T. Walters, B. F. Newcomer and D. W. James, trustees, purchased at a sale at public auction, made under decrees regularly made by the Courts of North and South Carolina, under foreclosure of mortgage, all that, the railroad extending from Wilmington, in North Carolina, to Wateree Junction, near Manchester, in South Carolina, together with the rolling stock and franchises of the Wilmington and Manchester Railroad Company, and that the same were duly conveyed to the said trustees under the authority of the said Courts. That afterwards by an Act of the Legislature of South Carolina, approved March 1st, 1870, the said purchasers and their associates were incorporated and made a body politic and corporate, under such name as they might choose to adopt; that they have adopted the name and style of Wilmington, Columbia and Augusta Railroad Company, by which they are now known; and that no part of the railroad or corporate franchises so conveyed or granted to the defendant extends over or includes any portion of the railroad described in the contract alleged in the complaint to have been made between the plaintiff and the Wilmington and Manchester Railroad Company.

4. And for further defense, the defendant alleges that when possession was taken of the Wilmington and Manchester Railroad by the said purchasers and by this defendant, they found that portion of the railroad belonging to the plaintiffs which lies between Wateree Junction, near Manchester, and the junction of the Camden and Columbia branches, in possession of the officers, section masters and hands of the Wilmington and Manchester Railroad Company, and used by them for the transportation of their cars between Wateree Junction, near Manchester, and the said junction; that they were informed that the said South Carolina Railroad Company, finding their Camden branch unprofitable, had permitted the Wilmington and Manches-

*418

ter Railroad Company to have the *use of said portion of road for their own convenience as long as they would keep it up at their own expense; that the defendants thereupon continued to use the road in the same way without any contract with the plaintiff, keeping up and running the road at their own separate expense until the 23d November, 1871, when the defendant received a note from their Vice-President in the following words:

Columbia, S. C., November 23, 1871.

J. C. Winder, Superintendent, Wilmington, N. C.:

Dear Sir: We will terminate the arrangement between Mr. McRae and Mr. Peake, by which you maintain the nine miles of our track between Manchester Junction and Kingville, on the 1st proximo, and, resuming possession thereafter, operate the road according to the original contract.

Yours truly,

Alfred Tyler, Vice-President.

To which the defendants, on 30th of the same month, replied that they claimed no right to interfere with the management of its own road by the South Carolina Railroad Company, and that the defendant has made no contract with the South Carolina Railroad Company, and is under no obligation to it in any way whatever in relation to the nine miles of its track between Manchester Junction and Kingville; that from the date of the said notice by the plaintiffs the defendant ceased making any use of the portion of the road aforesaid belonging to the plaintiff, and has never claimed and does not now claim any right or interest therein.

5. And for further defense, the defendant alleges that the sale made to the said W. T. Walters and others, trustees, was under decrees to foreclose certain mortgages duly ex-

ecuted by the Wilmington and Manchester Railroad Company, as follows: On 1st May, 1851, to Edward Sanford, to secure $600,000; to the same, on the 1st March, 1853, to secure $200,000; to George W. Dargan, on 12th April, 1855, to secure $200,000; and to M. K. Jessup, on 7th May, 1866, to secure $2,000,000; and each of the said mortgages was duly recorded within thirty days from the date thereof; that the contract alleged in the complaint to have been executed between the plaintiff and the Wilmington and Manchester Railroad Company bears date subsequent to the two first mortgages, and that at the time of the purchase by the said W. T.

*419

Walters and others, *trustees, and until the 23d November, 1871, the defendant had no notice of the said alleged contract.

At the hearing a number of witnesses were examined on both sides, but the testimony it is unnecessary to give. The following proceedings, as stated in the brief, then took place:

The defendant's counsel moved the Court to instruct the jury as follows:

1. That the written contract between the South Carolina Railroad Company and the Wilmington and Manchester Railroad Company imposes no obligation on the defendant to perform the same as purchasers of the said Wilmington and Manchester Railroad.

2. That the said contract, even were it held to be a real covenant running with the land, could only bind a party claiming the use of the nine miles of road constructed under such contract, and that, inasmuch as defendants claim no right in said nine miles, they are not bound by said contract.

3. That even were the contract held to be a real covenant, running with the land, the defendants, being entitled to the benefit, are entitled to renounce the same, and having made such renunciation, they are no longer bound to perform the duties charged by the contract on the other party, to wit, the Wilmington and Manchester Railroad Company.

4. That the new arrangements made between the two roads during the war discharged the obligation of the original contract so far as the defendants are concerned, and such obligation could not be revived by Mr. Tyler's notice.

5. That some of the mortgages under which the sale to the defendants was made, being prior in date to the contract between the plaintiff and the Wilmington and Manchester Railroad Company, the purchase by the defendants takes precedence of any lien or obligation created by the said contract, and the defendants are not bound to perform the said contract.

6. That the plaintiff cannot in this action claim any recovery for a breach of the condition imposed by the State on the Wilmington and Manchester Railroad.

By the Court: Gentlemen—I had made up my mind to charge the jury in a certain way, so that you could except to the charge, because I see grave questions arising out of this case which can hardly be settled in a Court below.

*420

*Gentlemen of the jury: I intend to charge you to this effect: that if you find that the Wilmington, Columbia and Augusta Railroad Company had by any act of theirs endorsed this contract, sanctioned this contract upon which the South Carolina Railroad Company sues, then they are liable under that contract. That is a question of fact for the jury. I intended to further charge you that if the Wilmington, Columbia and Augusta Railroad Company acted under this contract or endorsed or sanctioned it, that they had the right to rescind it. But I won't make that charge to you at all. I will say that in case they endorsed or accepted this contract or acted under it, then they are liable for the amount claimed by the plaintiff; and let the case go up upon that charge. That is what I say to you. And if they did not sanction it or did not act upon it, then I don't think they are liable.

By Mr. Connor: Your Honor does not charge upon the question of rescinding?

By the Court: No; I think that properly comes up in another way.

The jury found the following verdict:

We find for the plaintiff fifteen hundred and two 67-100 dollars, with interest from 29th February, 1872.

Whereupon defendant's counsel gave notice of exception:

I. Because His Honor erred in charging the jury that if they were of opinion that the defendant had in any way sanctioned the contract of August 22, 1853, they should find for the plaintiff. Whereas the defendant then insisted, and now insists, that as the contract created an uncertain interest in land, and was not to be performed within the year, the law required that before it could be deemed a contract as between the South Carolina Railroad Company and the defendant it should have been in writing.

II. Because the contract of 22d August, 1853, was in no respect obligatory on the defendant, and the Judge erred in charging the jury that they might find a verdict thereon against the defendant.

The defendant gave notice that it appealed on the following grounds:

*421

*1. Because the jury have found a verdict setting up the contract on other than evidence in writing, when the law requires that the particular contract set up shall be in writing, duly signed by the party or his authorized agent.

2. Because the evidence before the jury was not sufficient to authorize the verdict.

Memminger, Pinckney & Jervey, on a motion to dismiss the appeal made by the plaintiff, filed the following points and authorities:

I. "That no exceptions whatever were taken to the charge and rulings of the Judge before the jury left the bar."

We deny that exceptions were necessary to be taken under the circumstances of the case, and maintain that the refusal of the Circuit Judge to charge in accordance with a specific prayer is a sufficient notice of exception on which to base an appeal.—Fox v. Railroad Company, 4 S. C., 543; Madsden v. Phœnix Insurance Company, 1 S. C., 29; Abrahams v. Kelley & Barrett, 2 S. C., 237; Potter ads. Chadsey, 16 Abb., 146; Chitty's Gen. Prac., Vol. 3, 914.

II. "That the errors now alleged in said charge were not made the subject of specific prayer for instruction, and, therefore, there are no errors of law properly before the Court for correction."

We admit, as a proposition of law, the necessity of a specific prayer for instructions, but submit that such prayer was made and refused by the presiding Judge.

III. "An appeal does not lie from the order of a Circuit Judge granting or refusing a new trial for error of fact in the verdict."

We deny that our motion for new trial was based on error of fact, but on error of law.

"The Supreme Court shall have exclusive jurisdiction to review upon appeal * * * an order affecting a substantial right made in an action when such an order, in effect, determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, and when such order grants or refuses a new trial."—Code, § 11.

New trial for error of law is a matter of strict right and not discretionary with the Court.—Grah & Walter, Vol. 1, 262, 267; Potter ads. Chadsey, 16 Abb., 146.

*422

*Questions of strict right are appealable.—Tracy v. First National Bank of Selma, 37 N. Y. Rep., 523; Byrd v. Smalls, 1 S. C., 388.

And innumerable cases excepting discretionary orders from appeal.—e. g., Tanton v. Grah, 8 Abb., N. S., 385; Forrest v. Forrest, 25 N. Y., 501; Briggs v. Vanderburg, 22 N. Y., 467.

Motion for new trial no waiver of appeal. —United States v. Dashiel, 4 Wall., 182.

And, upon the exceptions, contended that the case presented by the pleadings asserted that the defendants were liable, as assignees, to perform a written contract made between the plaintiffs and the Wilmington and Manchester Railroad Company on the 22d August, 1853. The defendants denied their liability, and the case went to trial on that issue.

The Circuit Judge charged the jury as follows:

Gentlemen of the jury: I intended to charge you to this effect: That if you find that the Wilmington, Columbia and Augusta Railroad Company had, by any act of theirs, endorsed this contract, sanctioned this contract, upon which the South Carolina Railroad Company sues, then they are liable under the contract. That is a question of fact for the jury. I intended to further charge you that if the Wilmington, Columbia and Augusta Railroad Company acted under this contract, or endorsed or sanctioned it, they had the right to rescind it. But I won't make that charge to you at all. I will say that in case they endorsed or accepted this contract, or acted under it, then they are liable for the amount claimed by the plaintiff; and let the case go upon that charge. That is what I say to you. And if they did not sanction it or did not act upon it, then I don't think they are liable.

This charge substantially sustained the defense of the defendant, and ruled that they were not liable as assignees on a covenant running with the land; but it presented an entirely new case, namely, whether a new contract, express or implied, had not been made by the defendant.

On this new issue the defendants insisted that they were not liable in this action, and that they could not be made liable in any event, unless the new contract was proved to be in writing, signed by the defendant, according to the requirements of the Statute of Frauds.

The provisions of that statute bearing on the subject are contained in the first and fourth Sections, Rev. Stat., 479, 480.

*423

*The first Section of the statute enacts that all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to or out of any messuages, manors, lands, tenements or hereditaments made or created by livery or seizin only, or by parol, and not put in writing by the parties so making or creating the same, or their agents thereto, lawfully authorized by writing, shall have the force and effect of leases at will only, and shall not, in law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making such parol leases or estates or any former law or usage to the contrary notwithstanding.

The fourth Section enacts that no action shall be brought upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged

therewith, or some other person thereunto by him lawfully authorized.

The interest created by the contract made with the Wilmington and Manchester Railroad, and which it was claimed that the defendant had assumed, is clearly an uncertain or indefinite interest in the hereditament or right of way of the South Carolina Railroad. There was no agreement in writing between the South Carolina Railroad Company and the Wilmington, Columbia and Augusta Railroad Company. So that whatever interest they took was clearly given by parol. Under the provisions of the statute such an interest could take no greater force than a lease at will. Such a lease would have been determined by Mr. Tyler's notice and the acceptance thereof by the defendant, and, consequently, after that date there was no further contract existing between the two companies. The Circuit Judge therefore erred when he declined to charge the jury that the defendants had the right to rescind.

Upon the fourth Section of the statute two questions arise:

1. Was this action brought upon a contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, within the meaning of that clause of the fourth Section?

2. Was the action brought upon an agreement that was not to be performed within the space of one year from the making thereof?

*424

*First. As to a contract or sale of an interest in lands, tenements and hereditaments.

The plaintiff contends that the defendant undertook to pay one-half the expense of bridging and keeping up the section of railroad. But upon what consideration? Upon a contract that the defendant should have the permanent use thereof. But the only contract in writing produced is a contract with the Wilmington and Manchester Railroad. There is no evidence of any contract with the defendant, except by parol. The defendant, therefore, has no right which he can assert to the occupation of the road. There is, therefore, no contract between them which the law will recognize.

This principle of law is very clearly put by Mr. Batten in his treatise on specific performance. He says: "The consideration must flow from both parties; a promise to pay money does not make a contract, unless there be reciprocal obligation. In contracts everything requisite ought to concur, as the consideration on the one side and the promise or sale on the other side. In fact, although the consideration is generally spoken of as being the motive for the party's agreeing to do or not to do a particular act, yet in the eyes of the party who supplies that motive, it is the agreement of the other party. But not only is it the principle of law that both parties must receive a benefit from the contract, but it is also the rule that the law only considers that as a benefit, in cases of contracts purely executory, which it can assure to the other party. Each party at law must be bound to confer a benefit on the other or there is no agreement at law. It is always an answer to a bill for specific performance of an agreement by one party, that if the defendant were to seek specific performance of the same agreement against the plaintiff he could not obtain it; both parties must be bound, otherwise there can be no valid agreement."

These doctrines are amply supported by the authorities cited by Mr. Batten, and we are brought to inquire how the defendant could claim a permanent interest in the lands and tenements of the plaintiff, where that plaintiff has made with him no contract in writing. The mutuality is destroyed, and the result is that no legal contract has been made.

But the evidence in the case carries this objection even further. The only contract proved between the plaintiff and defendant is that implied from the use of the road by the defendants after their purchase. This contract was terminated by the notice of Mr.

*425

*Tyler to the defendant, and the defendants had thereafter no rights whatever in the road, as they expressly disclaimed any connection with the contract of August, 1853.

In Thompson v. Gregory, (4 John., 61,) it was held that the right of erecting mill dams on another's land, and overflowing land for the use of mills, being an incorporeal hereditament, could pass only by deed: and that the assignment of such an interest, since the Statute of Frauds, must be in writing.

In Mumford v. Whitney, (15 Wend., 380,) an agreement that a party may abut and erect a dam for the creation of a water power for the use of mills was held less void if made by parol. The Court say "all the cases agree that a permanent interest in the land can be transferred only by writing." The Court proceeds to discriminate between a temporary and permanent interest. "A license, say they, is an authority to enter upon the lands of another and do a particular act, or series of acts, without possessing any interest in the lands; it is founded in personal confidence,—is not assignable, and is valid, though not in writing. But the conferring of a right to enter upon lands, and to erect and maintain a dam as long as there shall be employment for the water power thus created is more than a license; it is the transfer of an interest in lands, and to be valid must be in writing.

Second. This is a contract not to be performed within a year from the making thereof.

Its very terms show beyond a doubt that it was to continue for years.

The famous Boydell's Shakespeare case

shows that such a contract must be in writing.—Boydell v. Drummond, 11 East, 143. The rubric of that case reads thus:

"If it appear to have been the understanding of the parties to a contract at the time that it was not to be completed within a year, though it might and was in part performed within that time, it is within the fourth clause of the Statute of Frauds, and, if not in writing, signed by the party to be charged, it cannot be enforced against him."

The words of Lord Ellenborough, on page 156, are very significant: "It has been argued that an inchoate performance within a year is sufficient to take the case out of the statute; but the word used in the clause of the statute is performed, which, ex vi termini, must mean the complete perform-

*426

ance or consummation of *the work. Therefore, to exclude perjury and to perpetuate the true terms of contracts which were not to be performed within a year, there is no doubt that the statute meant a consummate performance within that time."

Brasegirdle v. Heald, (1 Barn. and Ald., 723,) was an action for breach of a verbal contract made on 27th May for a year's service to commence on 30th June following: Held, That there could be no recovery, as the contract must be in writing and came within the fourth Section of the Statute of Frauds.

So, in Drummond v. Burrell, (13 Wend., 307,) where a party contracts by parol to work for another for the term of two years, and quits the service at the end of six months, the contract is void, not having been reduced to writing.

But it is objected that no formal exception was made to the Judge's charge, and therefore it is now too late to make these exceptions.

But it will be seen that the Judge had no such idea, for he expressly says: "let the case go up upon that charge." Now, could it go up unless excepted to? and if the Judge understood that his charge was excepted to, was it necessary to repeat what was already understood? The case made on the pleadings was a case of written agreement with another party, which agreement, it was claimed, bound his assignees. That was the case which the defendants expected to meet and upon which their counsel had prepared exceptions in writing. But upon the trial the issue was changed to a new agreement by parol. To this the defendant objected the Statute of Frauds and fully argued his objections. The Judge ruled substantially for the defendant on the case in the pleadings, but ruled against him on the parol contract, saying: "let the case go up upon that charge." Surely there was no surprise, and there was full notice of exception allowed by the Judge.

But, to avoid all embarrassment from this objection, the defendant's counsel immediately moved for a new trial on the ground that the jury found a verdict setting up the contract on other than evidence in writing, when the law required that the particular contract set up should be in writing duly signed by the party or his authorized agent. This motion raised the present question now before the Court, and, being a purely legal question, is now regularly before this Court upon appeal from the ruling of the Judge refusing a new trial.

*427

*The appellant, therefore, respectfully submits that he has been held liable upon a contract to which he never was a party, and by evidence which was insufficient to establish the contract, and that a new trial should be ordered.

Conner, contra:

That there was a definite written contract fixing the rights of the parties.

That under the charter, the Eastern terminus of the Wilmington and Manchester Railroad Company was Wilmington, and its Western at Manchester, nine miles from Kingville.

That under the contract, and by virtue of it alone, the Wilmington and Manchester Railroad Company ran their trains from Manchester to Kingville.

That when the Wilmington and Manchester Railroad was sold under foreclosure, it was sold with all the rights and privileges thereto appertaining. (See advertisement and deed of post conveyance.)

That among the rights and privileges was the right to run their trains from Manchester to Kingville.

That when Messrs. Newcomer, Walters and others purchased the Wilmington and Manchester Road they succeeded as owners to the property, franchises and rights of the former stockholders or owners. There was a substitution of ownership. The corporation remained unchanged. The new owners took the corporate property, its franchises, privileges and obligations, exactly as they had been held by the former owners—the debts covered by the mortgage proceedings excepted, for these were extinguished by the sale.

That subsequently the purchasers applied for direct Act of incorporation, and by Act of 1870, 14 Stat., 389, the corporators were described as purchasers of the property of the Wilmington and Manchester Railroad Company, "together with all the rights, privileges and franchises of said company connected with and belonging to said railroad, or the construction, use or maintenance thereof between the Eastern terminus, at Wilmington, and its Western terminus, at Kingville."

It would be difficult to find words to express more clearly the idea of a purchase by Newcomer, Walters & Co. of this contract or privilege of the Wilmington and Manches-

*428

ter Railroad, not *only "connected with" and

belonging to said railroad, but absolutely essential to the use and maintenance thereof between the two termini of Wilmington and Kingville.

And the corporators, the purchasers, were incorporated "to keep up, maintain, use and operate the aforesaid line of railroad," viz., the line of railroad between Wilmington and Kingville.

There was not only a purchase of the contract, but the incorporation of the privileges and benefits of that contract into the charter which created the present defendants.

With this contract, the purchase and the Act of incorporation of 1870, could the South Carolina Railroad have prevented the Wilmington, Columbia and Augusta Railroad Company from running its trains through to Kingville? Could it have stopped the latter at Manchester, in the swamp, and shut it off from connection with the great railway lines of the West and South? Clearly not. Because the contract based on valuable consideration stipulated for joint, mutual, permanent use of the nine miles, and as long as the obligations of the contract were performed the South Carolina Railroad Company could not withhold the benefits.—Pollard v. Maddox, 28 Ala., 325; Pierce v. Emory, 2 Redfield's Ruling Cases, 639, 640.

But the contract is not unilateral—binding on one only. He who takes the benefit takes the burden.

The jury have found by their verdict that the defendants endorsed and accepted this contract, and acted under it and sanctioned it, and I apprehend that it is not necessary to go into any examination of the testimony to support their finding.

The acceptance and endorsement of it makes it the contract of the Wilmington, Columbia and Augusta Railroad Company as fully as if they had originally made it, and they are, therefore, bound by its provisions.

But it is said that the contract created an uncertain interest in the land, and is within the Statute of Frauds, and must be in writing.

To this we reply:

1. That the point, although made in the ground of appeals, is not contained in the prayer for instructions, and unless matter of law is specifically brought to the attention of the Judge and he requested to charge thereon, his omission to do so cannot be assigned as error.—See Fox v. R. R. Co., 4 S. C., 544.

*429

*2. That the contract is not within the Statute of Frauds; that it does not create any interest in lands whatever.—Swartz v. Swartz, 4 Barr. (Penn.,) 358; Great Northern R. R. v. Manchester and Sheffield R. R., 10 E. Law and Eq., 15.

The complaint avers that "the lands and rights of way used in the construction of said branch (from Kingville to Camden) were and are owned by the plaintiff solely."

And the contract is only for the use of the track and not for an interest in the land.

The defendant further claims in his argument that, although no exceptions were tendered, still, as he raised the legal issue in the motion for new trial, the question is now properly before this Court.

To this we reply that it must appear that some question of law was involved which influenced the decision of the Judge, (Byrd v. Small, 2 S. C., 388,) and the record shows no such question.

It does not appear on the record that the defendant objected to the introduction of the evidence or that the objection was overruled, or that exception to such ruling by the Judge was taken, and all three of these essentials must have occurred on the trial in order to raise a question for this Court.

1. Graham v. Waterman, on new trial, marginal, page 179.

2. Graham v. Waterman, on new trial, 656, 657, 658.

Nor can the omission to take exception at the proper time be cured by embodying in a motion for a new trial the points which should have been raised and decided on the trial. Not taken then, they are waived.—Ibid.

Any other conclusion would confound the well-founded distinctions which exist in the powers and functions of the Appellate and Circuit Courts.

March 15, 1876. The opinion of the Court was delivered by

WILLARD, A. J. The objection that there are no exceptions to the charge of the Circuit Judge is not well taken. It appears that the defendants requested the Judge to charge certain propositions of law; that the Judge not only declined to make such charge, but forebore from making any comment upon the propositions advanced by the defendants, on the ground, as would seem from his charge, that such question could properly come up in some other way for review. It appears clearly that the propositions relied upon by the defendants, as stated in their request to

*430

charge, were brought to the *attention of the Court, and that in making the charge the Judge understood and intended that the defendants would have the right to be heard as to such matters upon appeal. This is all that is required to constitute an exception, although in point of form a request to note an exception, after the Judge had determined not to charge as requested by the defendants, was the strictly regular course. It does not follow in every case where a party submits propositions with a request to charge, and when the Circuit Judge charges in certain particulars at variance with such request, that the party making such request is to be deemed as excepting to such charge to the extent of such variance.

It should appear by the record that the Court was apprised that the party intended to rely on the propositions advanced by way of exception. In the present case that fact appears by the language of the charge itself, and there is a substantial compliance with the rule in question.

But the exception must be limited to the matters embraced in the request to charge. Only those exceptions that were made before the jury retired to their room can be heard by us.—Fox v. Railroad Company, 4 S. C., 543.

The memorandum contained in the brief, as follows: "Whereupon defendants' counsel gave notice of exceptions," must be regarded as referring to some act performed after the rendition of the verdict. "Whereupon" must be regarded as relating to something done subsequent, in point of time, to the event last stated, which was the finding of the jury.

Under these circumstances the exception appears to that part of the charge that directed the jury to find the amount claimed by the plaintiff, in the event that they found as matters of fact that the defendants had voluntarily assumed the benefits or submitted to the obligations of the contract on which the plaintiff sued. It is not a question before us, then, what the proper remedy upon the contract in suit was, but whether there was anything in the law of the case that rendered the charge improper in omitting to lay before the jury the propositions embraced in the request to charge. All that appears to have been actually charged is as follows: "I will say in case they (defendants) endorsed or accepted this contract, or acted under it, they are liable for the amount claimed by the plaintiffs; and let the case go upon that charge. And if they did not sanction it nor act upon it, then I don't think they are liable."

*431

*In order to understand the bearing of the defendants' proposition, it is necessary to look to the nature and effect of the contract on which the plaintiffs brought their action.

Prior to the date of that contract, the plaintiffs had constructed, owned and operated a line of railroad called the Camden branch, that included nine miles, extending between Kingville and a point near Manchester, the terminus of the road of the Wilmington and Manchester Railroad Company. The last named company, an incorporation distinct from the present defendants, desiring to obtain the use of that nine miles for the purpose of making Kingville a terminus of their road, made a contract with the plaintiffs for the purchase of such right. The contract was in writing under the seals of the respective corporations, and bore date August 22, 1853. The object of the contract is stated as follows:

"That the South Carolina Railroad Company agrees to admit the Wilmington and Manchester Railroad Company to the joint, permanent and mutual use of so much of the Camden branch of their road as extends, &c., * * * upon the terms, conditions and covenants expressed of and concerning the same."

These covenants and conditions embraced the considerations, past and future, upon which the respective parties covenanted together. The Wilmington and Manchester Railroad Company, "in consideration of the joint and mutual use of so much of the road of the South Carolina Railroad Company granted to them as aforesaid," agree to pay the plaintiffs "one-half of the estimated cost of the construction of the said road," ascertained by the contract at the sum of $14,000 per mile. All expenses for maintaining the road between the points indicated to be equally borne by the parties. Each party to use the road for the conveyance of passengers and freight under regulations for mutual convenience and safety. Each party to pay the other a certain proportion or amount of its receipts for the conveyance of passengers and freight earned upon the line jointly occupied.

The contract certainly transferred to the Wilmington and Manchester Railroad Company a servitude in the land in the nature of a right of way jointly with the plaintiffs, if it did not become the means of transferring to that company a recognizable interest in the land itself. It will not be necessary to fix the full extent of interest that passed thereby to the Wilmington and Manchester Railroad Company, and it is premature to

*432

establish the full right of *the parties under the contract, these rights not having been submitted to us or discussed by counsel, in view of the very limited influence of the contract on the questions brought before us by the defendants' exceptions. As it regards the superstructure, including bridges and the iron, the position of the parties is the same as if they had united with a common fund in their original construction under a contract for joint uses.

The present defendants were incorporated March 1, 1870.—14 Statutes, 389. The Act recites the fact that the parties incorporated had become purchasers, under various mortgages executed by the Wilmington and Manchester Railroad Company, "of all and singular the estate, property and effects, including the entire line of railroad, the engines, rolling stock, machinery, machine shops, depots and other tangible property and effects hereafter belonging to said company, connected with or related to said railroad, or the construction, maintenance or use thereof, between its Eastern terminus at Wilmington and its Westerly terminus at Kingville, South Carolina." The Act confers corporate pow-

ers upon the purchasers of such property and their associates.

The mortgages are not set out in the brief. A memorandum of the terms of the Referee's advertisement and of a portion of the deed of conveyance is appended to the brief and argument.

It is in proof that the only access that the Wilmington and Manchester Railroad Company had to Kingville was by means of the right of way secured to that company by the contract in suit, and that the defendants under their charter used and occupied their right of way after they had constructed a line to Columbia, independent of that portion of their road that connected with the Camden branch.

The fact of claiming under and occupying the right of way in question under the terms and recitals of their charter must be regarded as at least prima facie proof that the defendants became the purchasers from the Wilmington and Manchester Railroad Company of the rights, whatever they may be, that the last named company acquired under the contract in suit.

The first proposition, namely, that the contract imposed no obligation on the defendants as purchasers to perform the same, could not properly have been charged as stated, for it would have led the minds of the jury to an erroneous idea of the law. While it may be true that the contract did not di-

*433

rectly bind any other *persons than the contracting parties, yet, indirectly, it did, in virtue of certain transactions based upon it, giving rise to relations referred by operation of law to the contract itself for the purpose of making them certain.

The second proposition is based on the idea that the defendants do not claim the use of that part of the road in dispute. This fact is of no legal importance. They are, as matter of law, invested with the right conferred by the contract, and the plaintiff's title in the land and railroad is limited, encumbered by the rights held by the defendants. The rights granted by the contract are not alleged to have been removed or lost by nonuser with lapse of time, nor can a disclaimer by plea affect the right of recovery for transactions occurring before it is pleaded.

The third proposition claims that the defendants, even if bound by the contract, have availed themselves of the right to renounce that which the contract confers and thus escape its obligations. There is no proof that the rights acquired by the defendants have been restored to the plaintiff or parted with in any manner; for all that appears, either the defendants or their creditors might make the right of way granted by the contract available if they sought to do so.

The fourth proposition alleges that a temporary arrangement made by the parties by parol and terminable at the pleasure of parties, by which, for the time being, the requirements of the contract as to certain particulars were not to apply, had the effect to destroy the contract. The answer to this is the same as to the last considered. While defendants are in a position to assert at any moment the right in and upon the lands in question conferred by the contract, the term that entered into the consideration upon which the right was granted must be deemed in force.

The fifth proposition alleges that certain of the mortgages under which the defendants claim title were prior in date to the contract, and the mortgagees and those desiring their title under them stand upon a prior right to that of the contract. This proposition is not true, when, under the mortgage, the mortgagees have appropriated and disposed of the rights conferred by the contract. Having asserted their mortgage against rights called into existence subsequent to their mortgages, they must take such rights cum onere.

*434

*The sixth proposition is not applicable to the case in hand. The verdict included nothing, as far as appears, subject to the objection made in this proposition.

The additional objection stated in the notice of appeal was not taken in time; but under the view we take of the case it is unimportant, as we do not rest the right of the party upon any parol contract.

The motion must be refused.

MOSES, C. J., and WRIGHT, A. J., concurred.

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7 S. C. 434

ROACH v. IVEY.

(Columbia. Nov. Term, 1875.)

[*Partnership* ⇐311.]

On the dissolution of a partnership and the formation of a new firm by taking in a new member, a statement of the assets and liabilities of the old firm was made, showing a considerable excess of assets over liabilities, and the old partners were credited on the books of the new firm with their shares of the excess. The new firm was shortly afterwards dissolved, and A, one of the old partners, brought an action to recover his share of the excess: *Held*. Upon the proofs, which showed that the statement was erroneous, that it was a mere approximate estimate of the assets and liabilities, and that A could not recover thereon, and that he could only recover upon an account to be taken showing a balance in his favor.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 723; Dec. Dig. ⇐311.]

Before Mackey, J., at York, April Term, 1875.

This was an action by John J. Roach against James M. Ivey, Allen Jones and R. Thomas May, to recover the sum of $3,077.66,

alleged to be due by the defendants to the plaintiff upon a state of facts substantially the same as that set forth in the case herein stated.

The case is as follows:

On the 10th August, 1869, the plaintiff formed a mercantile copartnership with James M. Ivey and R. Thomas May.

On the 1st of January, 1871, Allen M. Jones was taken into the firm as a new partner. An estimate was then formed of the assets and liabilities of the firm and a statement thereof made, which is as follows:

*435

*Jan. 1, 1871.	Amount of stock		$20,000 00
	Amount of accounts		15,180 64
	Amount of notes		3,294 00
			$38,474 64
	Liabilities	$17,000 00	
	Credit J. M. White, half profits on cotton	1,000 00	$18,000 00
	Profits		$20,474 64
	One-fifth interest	$ 4,094 92	
	One-fourth interest	5,118 66	
	J. M. Ivy	11,261 06	$20,474 64

The plaintiff's interest being one-fourth of the estimated balance of the assets, amounting to $5,118.66, was credited to him on the books of the new firm. On the 1st of January, 1872, the plaintiff and R. Thomas May retired from the firm.

After the dissolution on the 1st of January, 1871, it was ascertained that the statement made on that day was erroneous, and that the liabilities of the firm exceeded the amount of the assets by near $100.

The defendants refused to pay the plaintiff, and thereupon, on the 22d July, 1872, this action was brought to recover from the defendants the sum of $5,118.66, less the sum of $2,049 due by the plaintiff to the firm. The case was referred to a Referee, who reported that R. T. May, when he retired from the firm, was discharged from all liability for the debt claimed by the plaintiff to be due to him and all other debts of the firm. He also reported the facts of the case, and held that the plaintiff was not entitled to recover.

The plaintiff filed the following exceptions to the Referee's report:

Because it is submitted that said Referee has erred in this, to wit:

1. That he decided that there was nothing due the plaintiff, as claimed in his complaint.

2. That he decided that the statement made, as in Exhibit A, of the interest of each partner in the firm of J. M. Ivy & Co., was wholly erroneous and unreliable.

*436

*3. That he thereby decided that the settlement had between the parties on the 1st of January, 1871, was not final and conclusive and binding on all the parties to the same.

4. That there was no mistake in said final settlement such as to justify the finding of said Referee upon the testimony submitted.

5. That there was misrepresentation and concealment on the part of James M. Ivy, the defendant, to the plaintiff, and that said defendant could take no advantage of the same; and the Referee erred in giving the said defendant the benefit of said misrepresentation and concealment.

6. That the Referee erred in deciding that the statement of the assets and liabilities of the firm of J. M. Ivy & Co., formed in August, 1869, and dissolved in January, 1871, and the ascertainment of the interest of each partner at the latter date was not the inducement held out by James M. Ivy to the plaintiff to become a member of the new firm, formed on the 1st of January, 1871; and that, therefore, the former was bound by the same.

7. That the Referee erred in deciding that the alleged error in the final settlement and declaring the interest of each partner could be rectified after so long a period and after the dissolution of the firm.

The decree of the Circuit Court is as follows:

Mackey, J. This case was heard by me at the York Court, April Term, 1875. The hearing was on the report of the Referee and exceptions thereto by the plaintiff. In arriving at a decision, I do not think it necessary to consider the first two grounds, strongly maintained by the learned counsel for the plaintiff, to wit, that the defendants have taken credit for debts of the firm, which were covered by drafts on B. R. Smith & Co., for which drafts they also take credit; and that no allowance has been made by the Referee for the large sum drawn out of the assets of the firm by J. M. Ivy over and above his proportionate share. The determination of the case does not require that I should consider these grounds; and, moreover, they are not consistent with the main position taken by the plaintiff, viz., that all parties are concluded by the adjustment made January 1st, 1871, and their long acquiescence therein. If this position were not tenable, then it would be important to inquire into the alleged errors in the statement of the account between the parties.

*437

*It appears from the evidence that Ivy, May and Roach entered into a copartnership, in August, 1869, with the firm style of J. M. Ivy & Co. That these copartners had an accounting, January 1st, 1871, of the assets and liabilities of the firm, for the purpose of forming a new partnership, into which the defendant, Allen Jones, was to be admitted. This accounting was had by Ivy, May, Jones and the plaintiff, they taking an inventory of the stock; by Ivy furnishing a statement of the cotton business, and by a schedule of liabilities, which appears in the handwriting of Allen Jones. The defendant, Ivy, testifies

that the plaintiff "had nothing to do with the books—that they were entirely under defendant's control."

At the settlement under consideration, therefore, Ivy and Jones being the best versed in the art of book-keeping, attended to the statement of the accounts, notes and liabilities. All engaged in this accounting were pecuniarily interested therein—the members of the old firm and Allen Jones—the latter because he was about to become a member of the new firm, composed of members of the old firm and himself. During the year 1871, Allen Jones attended to the keeping of the books and was an expert book-keeper. On this accounting, a balance was struck and the net assets of the firm were stated to be $25,864.38. Thereupon, the defendant, Ivy, stated the proportionate share of the plaintiff at $5,118.66, and the plaintiff was accordingly given credit for that amount by an entry on the books of the firm. The plaintiff testifies that he was induced to enter the new firm by the statement of the result of the accounting above set forth. The new partnership, under the firm title of J. M. Ivy & Co., continued during the year 1871, and was dissolved January 1st, 1872, by the retirement of Roach and May, the remaining partners, Ivy and Jones, continuing the business on their own account. On retiring from the firm, Roach demanded a final settlement, and was then informed for the first time that an enormous error had occurred in the accounting of January 1st, 1871, and instead of the firm having been worth then $25,864.38, as the stated result of that accounting, it was, in fact, worth nothing at that date, but, on the contrary was insolvent, its liabilities exceeding its assets by the sum of $85.86. Roach had been kept in ignorance of the discovery of this alleged error during the entire year 1871. It appears from the evidence that the entry in the books whereby Roach was credited with the sum of $5,118.66 as his proportionate share of the profits

*438

was erased therefrom with*out his knowledge or consent by Ivy and Jones, after January 1st, 1872. Ivy and Jones both had ample opportunity during 1871 to discover any error in the statement of the accounts, especially one of so great a magnitude as that now alleged by them, involving as it did the solvency of a firm of high commercial standing and engaged in large and widely-extended business operations. The defendants, Ivy and Jones, allege, however, that the accounting had on the 1st January, 1871, and the statement based thereon were not intended as a final settlement between the members of the firm, and that the result as stated was only "an estimate." It does not appear to me that this view is supported by the evidence. The entry of a new member into a firm is ipso facto a dissolution of the old firm, and the former partnership as between its members ceased to exist from that instant.—Parsons on Partnership, § 407. The legal relations of the parties, as well as their mutual interests, required a final settlement on the formation of the new firm; and I must therefore conclude, in the absence of positive evidence to the contrary, that they intended to do what was necessary to be done in the premises. Any accounting not intended to strike a settled balance, as between the firm and its respective members, was superfluous and meaningless. The plaintiff does not allege fraud on the part of the defendants; yet the entire transaction on the part of the latter bears many of the indices of fraud and wears upon its face features that usually express bad faith. I am of the opinion that while the defendants would have been allowed to correct mistakes in the accounting of January 1, 1871, within a reasonable time, they cannot be allowed after more than a year has elapsed to set up such mistakes,—they having been, during that period, the special custodians of the books and papers of the firm, having every facility for the quick discovery of any error in the settlement and accounting. Their claim of exemption from liability is divested of all force in law or equity when it appears that the plaintiff was induced to continue in a profitless business upon the assumption that the accounting of January 1, 1871, was correct. This view is amply sustained by the authorities, among which I refer to the following adjudicated cases: Brown v. Howe, 2 Barb., 594–5; Taylor v. Fleet, 4 Bart., 96; Dowes v. Durfee, 10 Bart., 215; Lockwood v. Thom, 11 N. Y., 173–4; Thomas v. Barton, 48 N. Y., 193; Hager v. Thompson, 1 Black, 93 [17 L. Ed. 41].

*439

*The law upon the matter under consideration is also very ably laid down by the Supreme Court of this State in the late case of McDow v. Brown, 2 S. C., 105, and post.

In support of my view herein, I also refer to 1 Story, Eq., 159; Penny v. Martin, 1 Johns. Ch., 366; Burden v. McElmoyle, Bailey Eq., 375; Gilchrist v. Martin, Bailey Eq., 492; Pratt v. Weyman, 1 McC. Ch., 156; Murrell v. Murrell, 2 Strob. Eq., 148 [49 Am. Dec. 664]; Durham v. Wadlington, 2 Strob. Eq., 258; 2 Parsons on Contracts, 793.

The plaintiff admits that the defendants are entitled to a credit of $2,049. This would leave a balance of $3,069.66 due the plaintiff on the first day of January, 1872. I have not considered the questions as to the plaintiff's share of the profits for the year 1871, for that question is excluded from the present case by the plaintiff having brought another action against J. M. Ivy, individually, to recover a stipulated sum on Ivy's guaranty.

The defendant, May, has retired from the firm, and all his liabilities have been assumed by the other defendants.

I do, therefore, adjudge and decree that the plaintiff do recover of the defendants, J. M. Ivy and Allen Jones, the sum of three thousand and sixty-nine dollars and sixty-six cents. ($3,069.66.) with interest thereon from January 1, 1872, and the costs of this action, to be taxed by the Clerk.

The defendants appealed on the following grounds:

1. In that His Honor held that the statement in Exhibit A was a final settlement and that there was an absence of positive testimony to the contrary.

2. In that His Honor held that defendants cannot be allowed to correct mistakes therein after more than one year had elapsed, and that they were concluded by said statement.

3. In that His Honor states that the plaintiff had been "kept in ignorance of the discovery of the alleged errors" during the entire year 1871, whereas the discovery was not made by the defendants until 1872.

4. In that His Honor held that the plaintiff was induced to continue in a profitless business upon the assumption that the accounting of 1st of January, 1871, was correct, and the defendants therefore liable.

*440

*5. In that His Honor decreed that plaintiff recover of the defendants the sum of $3,069.66 and interest from 1st January, 1872, and costs.

6. In that said decree is contrary to law and the evidence.

Brawley & Wilson, for appellant:

Contended upon the facts that the alleged settlement of January, 1871, was not intended to be final, and that the evidence conclusively established that it was erroneous. The statement, therefore, was neither an account stated nor an account settled; it was merely a rough estimate not intended to bind and not in law binding upon any of the parties. It follows that the statement cannot be made the basis of a recovery in this action.

Before there can be a recovery an account must be taken, and then, if there appears to be a balance in favor of the plaintiff, he may be entitled to judgment therefor. The following authorities were cited: Story Eq. Pl., § 798; McDow v. Brown, 2 S. C., 105; Chappedelaine v. Dechenaux, 4 Cranch, 306; Foub, vol. 1, p. 15; Story, §§ 521, 140; Marshall v. Collet, 1 Y. & C. Exch., 238; Kerr on Mistake, p. 415; Kelly v. Solair, 9 M. & W., 54; Townsend v. Crowdy, 8 C. B., N. S., 477; Gregory v. Pilkinton, 8 D. M. & G., 616; Shand v. Grant, 15 C. B., N. S., 324; Kerr on Fraud and Mistake, 369; Story Eq. Jur., § 110; Jerrimy Eq. Jur., 2 Bk., 358; Roche v. Morgell, 2 Sch. & Lef.; Salkeld v. Science, 2 Besey, 107; Gist v. Gist, Bailey Eq., 348; Story Eq. Pl., § 801; 2 Adob. Ellis, 292; Pickard v. Spears, 6 Ad. & El., 475; Brewer v. Boston, 5 Met., 478; Swan v. North B. Co., 2 Hurl. & C., 175; Bank of Ireland v. Trustees of Louis Charities, 5 L. C.; Taylor v. Fleet, 4 Barb., 96; Lockwood v. Thorne, 11 N. Y., 171; Thomas v. Bartow, 48 N. Y., 193; Hager v. Thompson, 1 Black, 80; Penny v. Martin, 4 John. Ch., 566; Burden v. McElmoyle, Bail. Eq., 375; Gilchrist v. Martin, Bail. Eq., 492; Pratt v. Weyman, 1 McC. Ch., 156; Durham v. Waddington, 2 Strob. Eq., 258; Story's Eq., §§ 521, 146, 155, 161; McRae v. Hollis, 4 DeS., 122; Brownwell v. Brownwell, 2 Bros. C. C., 62.

Hamilton & Rion, contra:

Contended that the statement was intended to be, and was, final and conclusive, and it was so decided by the Judge below as a

*441

question *of fact. They cited: McDow v. Brown, 2 S. C., p. 95; 1 Fonb. Eq., p. 117; Duchess of Kingston's Case, 2 Smith Lead. Cas., 544 to 561; Pickard v. Sears, 6 Ad. & El., 475; Stephen v. Baird, 9 Cowen, 274; Dewey v. Field, 4 Met., 384; Presb. Congregation v. William, 9 Wend., 147; Bushnell v. Church, 15 Cowen, 419; 2 Parsons on Cont., 793; 1 Green. Ev., 234; Butler v. Ardis, 2 McC. Ch., 71; Warden v. Betts, 2 McC. Ch., 73; Dowe v. Durfee, 10 Barb., 215; Bruen v. Howe, 2 Barb., 594; Willis v. Jernegan, 2 Atk., 251; Lockwood v. Thorn, 11 N. Y., 173; Taylor v. Fleet, 4 Barb., 96; Murry v. Murry, 2 Strob. Eq., 148; Chubbuck v. Vernon, 42 N. Y., 437, 438; Huger v. Thompson, 1 Black, 1 U. S., 80.

March 15, 1876. The opinion of the Court was delivered by

WILLARD, A. J. This being an action by a partner against his copartners, upon the copartnership agreement, the usual course was the statement of the copartnership account, either at large or to the extent demanded by the nature of the plaintiff's claim. It does not appear by the record that either party specifically demanded the taking of such an account. It seems to have been assumed that the right of the plaintiff to recover anything depended upon the construction proper to be put upon a statement made between the parties in January, 1871, by which the assets of the firm at that time are stated at $20,474.64. If this statement is to be regarded as a final accounting between the parties, then the plaintiff is entitled to recover something, to be ascertained. If, on the other hand, it was intended as merely a rough estimate subject to correction, then the right of the plaintiff to recover must fail altogether.

The occasion of making the statement in question was a change of copartnership theretofore existing between the parties to this suit by the admission of a new member, who is not a party. It is evident in the face of the statement that it was intended as an estimate alone. Two of the most important items, viz., the stock and liabilities, are put in

round numbers. The stock is stated at $20,000 and the liabilities at $17,000. In addition, the accounts due to the firm appear to be stated without deduction for bad or doubtful. The evidence does not contradict this inference, apparent on the face of the statement.

*442

*The Circuit Judge in stating that errors appearing in the partnership accounts could not be corrected after the lapse of a year has stated too broad a proposition, and one wholly inapplicable to the case. It does not appear to be a question of error in the statement in question. That statement appears to have been merely an approximate estimate made for the purpose of representing on the books of the new copartnership the assets of the old firm as capital stock to the new one. It was a matter of course that as these assets were realized by the new firm they should go on the books at the amount realized, and that the members of the old firm should be debited with any deficiency or credited with any excess of value realized over the estimated value. There was, therefore, no correction to be made of the amount credited to the old firm as capital stock on the books until the stock and accounts were finally disposed of, or until their actual value was ascertained in some other way. This does not appear to have been done.

The judgment of the Circuit Court must be set aside and an account taken, if either party demands it, to be conformed to this judgment.

MOSES, C. J., and WILLARD, A. J., concurred.

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7 S. C. 442

ROSE v. IZARD.

(Columbia, Nov. Term, 1876.)

[*Partnership* ⇐183.]

In 1856 A, B and C purchased a rice plantation, with all the slaves, stock, implements and other personalty belonging thereto, each paying one-third of the purchase money. The title was taken in the name of A for the use of himself, B and C, and their heirs; and they then made an agreement for the cultivation of the plantation for their common benefit. This was done for a number of years, and debts were contracted, some of which A paid with his individual funds, and B and C each gave a mortgage of his interest in the plantation to secure the payment of a debt contracted by himself individually: *Held*, That a partnership for the cultivation of the plantation for their common benefit existed between A, B and C, and that the equity of creditors of the partnership, of whom A was one, was superior to that of the mortgages of the individual shares of B and C.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 330; Dec. Dig. ⇐183.]

Before Graham, J., at Charleston, May, 1874.

These were two bills in equity—one filed July 18, 1867, by James Rose, Henry Gourdin

*443

and William C. Bee, executors of *Thomas Alston Coffin, deceased, against Joseph A. Huger, Arthur M. Huger, Allen S. Izard, James R. Pringle and James Rose Coffin, to foreclose a mortgage given by Joseph A. Huger to George M. Coffin, deceased, and James R. Pringle, of his one undivided third portion of plantation called "Clydesdale;" the other filed July 22, 1869, by Charles T. Lowndes against Arthur M. Huger, A. S. Izard, James Rose, H. Gourdin, L. McLain, W. C. Bee and James R. Pringle to foreclose a mortgage given by Arthur M. Huger to Richard H. Lowndes of "his one-third interest in the plantation called 'Clydesdale.'"

The two bills were tried together, and the case, briefly stated, is as follows:

"The property known as Clydesdale consisted of a large rice plantation lying on the Savannah Back River, in Beaufort County, South Carolina, a number of slaves, stock, implements and other personalty necessary for the cultivation of rice. It was formerly owned by the Hon. D. E. Huger, who, by his will, empowered his executors (Daniel E. Huger, John M. Huger, Joseph A. Huger and Arthur M. Huger) to sell the same. On the 8th day of January, 1856, the said executors sold Clydesdale, with all the slaves, stock, implements and appurtenances thereto belonging, to J. Allen S. Izard, who purchased for the joint benefit of himself and the said Joseph A. Huger and Arthur M. Huger. The purchase money was paid by the three purchasers, each paying one-third thereof out of his separate and individual funds. No conveyance of the property was made until the 1st day of March, 1858, when the four executors executed an indenture whereby they conveyed it to the said Allen S. Izard, "to have and to hold the real estate to him, his heirs and assigns," and the personal estate to him, "his executors, administrators and assigns, to the following uses, that is to say: all the estate, real and personal, hereby conveyed, or intended so to be, to the use of the said Allen Smith Izard, Joseph A. Huger and Arthur Middleton Huger, parties to these presents, and to their heirs, executors and administrators, according to the nature of the several estates, forever."

The mortgage of George M. Coffin and James R. Pringle bore date the 9th day of February, 1860, and was given to secure the payment of three bonds of same date in the aggregate sum of $25,000. The bill in this

*444

case alleged that the bonds were given *for moneys loaned by Coffin and Pringle to Joseph A. Huger, who applied the same to the payment in part of his portion of the debt due for Clydesdale.

The mortgage of Arthur M. Huger to Richard H. Lowndes bore date the 6th day of November, 1865. It was given to secure the payment of a bond for $10,000, bearing the

same date, and it was alleged in the bill of the complainant, Charles T. Lowndes, that the said bond and mortgage were given in lieu and as a substitute for another bond and mortgage given in March, 1856, which had been lost or destroyed in the city of Columbia, February, 1865.

The allegations of the bill of C. T. Lowndes and the rest of the case will be sufficiently understood from the answer of Allen S. Izard to the bill of C. T. Lowndes. It is as follows:

"That in the first days of the year 1856, or just before, he agreed with his brothers-in-law, Joseph A. Huger and Arthur M. Huger, to enter into a joint adventure and join with them to purchase a large and valuable estate, real and personal, consisting of one hundred and forty negro slaves, a valuable plantation, "and all the stock, utensils and everything of the nature of personal estate used with or attached to the said plantation," situate on Savannah Back River, St. Peter's Parish, Beaufort District, South Carolina, and known as the "Clydesdale Estate," belonging to the estate of the late Hon. Daniel Elliott Huger, the father of his said associates, and also the father-in-law of this defendant and of the complainant, Charles T. Lowndes. The purpose and object of their association and enterprise was to plant, cultivate, produce and send to market and sell for profit, crops of rice.

"That the purchase of said estate was completed on the 8th day of January, 1856, the same having been knocked off to this defendant as the highest bidder at auction, and sold to him all together in one parcel and lump, or, as it was called at the time, "en bloc," for the sum of one hundred and eighty-eight thousand dollars, ($188,000.) On the next day they agreed among themselves as follows:

"Articles of agreement between Allen S. Izard, Joseph A. Huger and Arthur M. Huger, joint owners of Clydesdale plantation and negroes, Savannah Back River, Beaufort District, South Carolina:

"Joseph A. Huger to be charged with the management of the plantation.

*445

*"Messrs. William C. Bee & Co., factors, of Charleston, under the advisement of Arthur M. Huger, to be charged with the management of the accounts and supplies. All connection with the city of Savannah, Ga., to be avoided as far as practicable; if resorted to from necessity, the transactions to be always on the cash basis. On all points involving the management or general interests of the concern, Allen S. Izard will be required to act as adviser, and in case of difference between the other parties, to be umpire.

"Charleston, 9th January, 1856."

"Soon after the said purchase, personal property to the amount of $40,000 was purchased for account of the joint adventure and became a part of it; and this amount, with the purchase hereinafter referred to, amounting to $26,000, increased the joint property to the value of $254,000 or more, of which the greater part in value at that time was personal property.

"One of the said executors being absent from the State was specially represented in the negotiation of this transaction, and in the administration and settlement of said estate, by the complainant, Charles T. Lowndes. Of this joint purchase, the intent and purpose of it, and the motive power inducing it, the complainant had as full and complete knowledge as this defendant, he being at the time the confidential friend and adviser of the parties; and as to the above recited agreement, this defendant thinks he has understood, and that it will so appear, that the complainant himself was consulted and prepared or framed the same. But this defendant does not allege this as of his own knowledge.

"This defendant and his associates in this joint enterprise each had, besides, his respective separate estate or business, to the management of which his attention and services were directed, Joseph A. Huger's property being next adjoining to "Clydesdale," the joint property.

"The enterprise being thus started and in successful operation, this defendant went abroad and was absent from the United States in 1857 and 1858, during the seasons in which the crops of those years were made.

"During his absence, he has understood and believes that on the first day of March, A. D. 1858, more than two years after the purchase, "the purchase money aforesaid having been in due form secured to the uses of the testator's will," the executors of the

*446

late *Daniel Elliot Huger did, by way of and in the form of an indenture of bargain and sale, prepared by the late Mr. Petigru, representing all parties, between them of the first part and this defendant of the second part, bargain and sell to him the whole of said estate, together consisting of the aforesaid Clydesdale plantation, one hundred and forty (140) negro slaves, and all the stock, utensils and everything of the nature of personal estate used with or attached to the said plantation, in trust for the use of himself and his associates, the other parties to the above recited agreement of 9th January, 1856, viz., Jos. A. and Arthur M. Huger, that is to say, as this defendant understands it, to the uses of their association, contemplated by the informal agreement of 9th January, 1856. The said indenture, he has understood, was duly recorded, and without his becoming a party thereto; nor has this defendant, to the best of his recollection, knowledge or belief, ever become a party thereto by any formal act or deed of his own, or by the act of any one duly authorized in his name. If it is understood that the conveyance in said deed is to

the use of the association formed and agreed upon between himself and Joseph A. and Arthur M. Huger, at and before the purchase, and upon the faith and inducement of which the purchase of the 8th January, 1856, and the subsequent purchases were made, then this defendant is well content to be a party thereto. This defendant does not believe that Mr. Petigru, nor any one in the absence of this defendant for him, ever contemplated that he was to accept a title to said property in trust for any other purpose than as he has indicated and understood. It was never, he believes, intended that he should be held liable for the debts incurred for the property held in trust by him while the property itself should be applied to the relief of the outside individual debts of his partners.

"And this defendant further says that, during his said absence, and without the opportunity to advise with him, in 1858, a large debt, to the amount of twenty-six thousand dollars, ($26,000.) was contracted by his associates or copartners for the purchase of negro slaves on a credit of ten years, which slaves were put on the Clydesdale estate and became a part of the joint property. This defendant has always felt that if he had been present he would not have advised said purchase, and he especially regretted the long credit taken thereon, which he deemed, as it certainly was, unnecessary, and especially so as to himself. Whether the complainant was

*447

con*sulted as to the policy and advisability of this transaction, and whether he advised it, this defendant cannot undertake to say; but that the complainant had full notice of it cannot be doubted, because he, the complainant, Charles T. Lowndes, became one of the sureties on the bond given in this defendant's absence for said purchase, which said bond fell due in 1868, and this defendant has been compelled to pay the same, amounting to about thirty-three thousand dollars, ($33,000.) But this defendant succeeded in making a very advantageous arrangement, by which about one-third of the amount was saved to the partnership, and the partnership is still indebted to him for the amount he did actually pay or caused to be paid.

"And this defendant further says that, besides the aforesaid debt, he has been compelled to pay and has paid, or caused to be paid, other debts of the joint concern or partnership, amounting in all to the sum of about and not less than the sum of $25,000, and there is still a small amount due, not exceeding the sum of $2,000, which he is liable for and expects to pay, making an aggregate of about $50,000 due by the partnership and chargeable upon partnership property, which property he is advised and believes neither he nor any of his partners had or have any right to divert from or apply to any other purpose than the payment of these partnership debts. That having paid them he is advised he is entitled to stand in the place of the original creditors, and, upon a statement of a partnership account, which he is at all times ready to make and establish, it will appear, as above stated, that he is largely in advance to the joint concern, which said advances are chargeable upon the joint property in his possession. That all the personal property was destroyed and lost during the war, and at its close there only remained the lands. That the personal property now thereon and necessary to their cultivation has been contributed by this defendant. That the first year of cultivation after the war, namely, 1866, the property was very unfortunately and unsuccessfully managed and fell greatly in debt. That the whole present debt, except that first referred to, contracted in 1858, was created by expenses during the war and losses since, but chiefly by losses incurred during the year 1866. That the last year was comparatively successful, and the present year will, this defendant hopes, somewhat reduce the debt when the crop shall be sent to market and sold.

*448

*"This defendant believes that under good management, and with prices for crops such as have generally ruled since the war, the partnership debt can be paid entirely, and the remaining capital saved from the war, namely, the lands, restored to the partners, to be applied to payment of their private or individual debts.

"He is confident in the belief that, under skillful or fortunate management since the war, the whole debt might have been paid for by or before this time.

"He admits it to be true, as alleged, that one of his partners, Joseph A. Huger, has become bankrupt, and his rights and interests have passed to his assignee. The other partner is unable to pay his debts, but is devoting his time and services, in conjunction with this defendant, to the management of the partnership affairs and estate, in the rational hope thereby to retrieve his fortunes and pay all his just debts.

"This defendant, further answering, says: That as to the alleged borrowing of the sum of $10,000 by his co-defendant, Arthur M. Huger, from Richard H. Lowndes, and the guaranty thereof by the complainant, he does not doubt the same to be true; but when it was borrowed, and whether the money thus borrowed was used to make up his co-defendant's share of the capital put into the Clydesdale adventure, and applied to payment of that purchase, this defendant is ignorant and cannot answer; nor does he understand that it is of any consequence to this defendant, or to any one else to be known, unless to entitle the said R. H. Lowndes, or the complainant in his place, if he be substituted to his rights, to come in as the owner of so much capital contributed, and thereupon claim his share of the partnership rights, benefits and bur-

dens, a proposition to or from which this defendant need not assent or dissent in any great haste. This defendant does not doubt that the complainant has, as he alleges, paid the several sums of money in behalf of his co-defendant, Arthur M. Huger, but it is not within his personal knowledge.

"As to the making of the mortgage of 1865, now attempted to be set up and foreclosed, this defendant had no notice or knowledge of it till after it was made, nor did he before that time have any notice or knowledge of the alleged prior mortgage said to have been advised and prepared by the late Mr. Petigru, and alleged to have been executed in March, after the purchase of Clydesdale, which was in 1856, and believed by complain-

*449

ant to have been *recorded and afterwards lost or destroyed at Columbia in February, 1865, and for which prior mortgage the new mortgage of 1865 is the alleged substitute.

"This defendant has lately heard a different account of this alleged prior mortgage, but, as he cannot answer from any knowledge of his own, he prays that strict proof may be made of the making, of the date, of the contents, of the execution, of the witnesses thereto, of the recording, and of the loss of the said prior mortgage.

"This defendant, further answering, says: That it is true the late Mr. Petigru was, in all the transactions connected with the sale and purchase of Clydesdale, and the arrangements thereabout between this defendant and his associates, the solicitor and confidential advisor of the executors of Judge Huger, two of whom were Joseph A. and Arthur M. Huger, and of this defendant and of the complainant, Charles T. Lowndes; that he was not only, as alleged, a person of great learning in the law, and most cognizant in that respect of the title of Arthur M. Huger, but also a man of singular personal honor and professional punctilio; that he was also the solicitor and friend of the trustees of Mrs. Hamilton, to whom the debt of 1858 for the purchase of negroes was made, and of this defendant and his partners, and represented all the parties to that transaction. And these things considered, it is not easy to believe that, thus representing all parties, he did, soon after January 8th, 1856, more than two years before there was any title therein, or that after the 1st March, 1858, the date of title, suggest, aid and influence Arthur M. Huger to mortgage his share of the joint enterprise, unless subject to the results thereof, regardless of the interests and rights of some of his friends and clients, and in favor of one only of them.

"And this defendant, further answering, says: It is true, as alleged, that he does set up and claim that his association with Joseph A. Huger and Arthur M. Huger was a partnership, and the purchase of Clydesdale was a partnership adventure, and the business carried on by himself and his associates in planting, cultivating, producing, sending to market and selling for profit crops of rice was and is a partnership business, the liabilities and burdens of which the law will not allow him to escape from, and the protection of which the law will not take from him; that the capital put in by each partner was the one-third part of Clydesdale, by

*450

*which this defendant means, in this place and elsewhere that he has used or may use the term in this his answer, not only the land, but also the personal property of whatsoever nature, just as it was bargained and sold and has been and is held in one undivided parcel. That he is and has been made to be liable for debts contracted for the concern by his partners, whether with or without his knowledge or consent, and for losses made and debts contracted thereby under the management of his partners, in which he did not participate, and for which debts and losses, as he has before stated, he is now out of pocket or liable for about the round sum of $50,000. It is quite true that he does claim that while, and so long as, his partners may, in the management of the partnership, commit him to liability for losses and debts, they cannot, without his consent, lawfully withdraw or mortgage their capital, to apply and pay it or secure it to the payment of their respective private or personal debts, leaving the partnership debts and losses unpaid and unprovided for. And all this he does, pretends, sets up and claims, not of his own judgment of the effect in law of his agreement and dealing in respect of Clydesdale, but because that when called upon to pay the whole losses, where he had supposed he was only liable for his equal share, he has been advised and convinced by lawyers of long experience and standing in their profession, both in the State of Georgia and in this State, that he could not escape liability, and also that he would be protected, to the extent of the partnership property, to save him from more than his share of loss.

"This defendant, in joining in the joint adventure, did precisely what he intended to do, but he did not know or understand the effect thereof in law, or what name or what liability in law would attach to such transactions.

"He desires nothing, and would not have knowingly anything, that is unfair or unjust, or even hard upon any one; and if it were a question of hardship only, and not of law only, between the complainant and himself, this defendant ventures to believe that the complainant himself would admit that his case presents, all the circumstances being considered, the greater hardship of the two.

"This defendant is advised and believes, and he claims that when the complainant shall have established his alleged first mortgage alleged to have been lost or destroyed

and his alleged second or substituted mortgage, he will then only have established a lien (to which this defendant does not object

*451

and never has objected) upon *whatever Arthur M. Huger would be entitled to or what would remain to him of the partnership property after payment of partnership debts; that the complainant is not and cannot be in any better position than if he had taken an assignment, by way of security, of the whole of Arthur M. Huger's capital or interest in the partnership, instead of a mortgage of his interest in a part only,—that being all Arthur M. Huger could lawfully assign or mortgage, and, as this defendant is advised, all that by a fair construction of his deed he has mortgaged. And as to the allegation of the complainant that he never knew nor heard of any copartnership in this respect until 1867, this defendant ventures to think there is some mistake or misapprehension therein, because that the complainant was, as this defendant has already stated, fully cognizant of all the facts of the transactions and agreements between this defendant and his partners, in pursuance of which he bought "Clydesdale" for himself and them jointly in 1856, and the title of March 1, 1858, was made thereto, and, as a gentleman of foremost sagacity and experience in business, he was better prepared to understand, and it is believed did better understand and judge of the effect in law of those transactions, than this defendant, who has no such claims to give value to his judgments of business or law, and who for many years greatly relied and rested upon the opinions of the complainant in such matters.

"And as to what the complainant did in fact think, some aid may be obtained from the single fact that in writing to this defendant, informing him of his successive alleged liens of mortgages from Arthur M. Huger to himself, he also clearly recognized the association of this defendant and Joseph A. and Arthur M. Huger as and by the name of a "copartnership." This defendant, as he has already said, did not then or previously so well understand the effect in law of his position with his associates, Joseph A. and Arthur M. Huger, as he has been taught it by the experience of the heavy and disastrous burdens it has cast upon him.

"This defendant further says that he understands and believes and hopes to prove that the accounts of the factors of the said "Clydesdale" partnership were kept in the name of "Clydesdale Plantation" on their books, and that the drafts drawn by Joseph A. Huger, the managing partner, were in the name of and signed "Izard & Hugers," or "Hugers & Izard," and said factors were so well convinced and assured of the partner-

*452

ship and all of its *incidents and liabilities, that for advances made to and dealings with it they looked to this defendant's liability and to his funds in their hands for their protection and safety on the "Clydesdale Plantation" account.

"And this defendant does not admit that there ever was such a mortgage lien from Arthur M. Huger to the complainant as is alleged by the bill to have been made in March, 1856, soon after the purchase of Clydesdale, and said to have been recorded; and, if there ever was such a mortgage, he never had any notice thereof till he had notice of the alleged substitute executed at Greenville the 6th of November, 1865, now existing and set up; and he is constrained to deny that there was such a mortgage, because he has lately heard and believes that the paper referred to was in fact an informal instrument in the nature of an agreement, declaration or promise by Arthur M. Huger, without seal or witness, whereby he agreed generally to indemnify or secure the complainant against loss by reason of his large liabilities for him at that time, or some such like paper, and that it is a mistake to believe it was recorded, because a witness or witnesses and proof of execution by them or one of them would have been necessary before it could be recorded.

"And this defendant admits it to be true, as alleged, that the debt of Arthur M. Huger to him was, as is alleged by the complainant, created after the execution of his alleged substituted mortgage at Greenville as aforesaid. Said mortgage purports and is alleged to have been executed and delivered on the 6th day of November, 1865, and it is alleged, no doubt truly, that the same was duly recorded in the office of the Register of Mesne Conveyance for Beaufort District on the 9th day of August, 1866; and by reason of these alleged facts, and the law in such case made and provided, the said mortgage, even if otherwise it might be, cannot now be set up and prevail against a subsequent creditor, such as this defendant is charged to be and in fact is.

"And as to the allegation that this defendant stood by and allowed the complainant to deal with Arthur M. Huger and become liable for, or credit him upon, the security of his interest in Clydesdale, without giving notice of the partnership, the same has already been fully answered and denied hereinbefore, and is here repeated, namely: 1st, this defendant had no notice beforehand of his said dealings, liability and credit upon the security of Clydesdale; and, 2d, the complainant had as full, particular and complete knowledge

*453

*as this defendant had of each and every fact constituting the partnership, and he had, as has been seen, a much earlier correct judgment of the effect in law of these facts than this defendant.

"And as to the allegation that the complainant's rights in Clydesdale were the subject of treaty and communication between

him and this defendant, and that this defendant, on such occasions, always treated the said mortgage as a valid mortgage of one-third of Clydesdale, not subject to any co-partnership equity between him and his partners, Arthur and Joseph Huger; and that as late as December, 1866, this defendant requested the complainant to submit to a partition of Clydesdale and the allotment to Arthur Huger of a divided (sic) third part of the said Clydesdale.

"This defendant says that if any one or more or all of these allegations be true, the same,—namely, the treaty and communications, the treatment of the mortgage as free from all partnership equities, the request to submit to partition and allotment,—were all in writing, and not otherwise, and it is only necessary to produce the same and have the full benefit thereof, so far as the complainant may appear to be entitled to any benefit thereby, but this defendant by no means admits that it will so appear.

"And this defendant further says that when, about the same time, that is to say as late as or later than December, 1866, the complainant wrote to this defendant, informing him, he thinks for the first time, of the mortgage of Arthur M. Huger to him, the complainant, and while the complainant did, in fact, then already seem fully to understand that Clydesdale was "common property," and the contracts for and in its behalf "united" and "copartnership" obligations, this defendant was then of the opinion, so far as he could have any opinion upon a point he never had occasion to consider seriously, that he was only liable for one-third part of the debts, and no more, and that each of his associates was in like manner liable for one-third part of the debts, and no more; that each one's share of the property was liable and bound for his share of the debts only and for no more; in short, that there was no partnership.

"This defendant does not hesitate to admit, but he especially avows, that such was his view, and he maintained it till, without hope of success, he submitted, as already stated, under advice, to accept the burdens of a co-partnership and began to claim the correlative protection incident to his case.

*454

*"The reciprocal change of opinions by the complainant and this defendant will not change or bend the law for or against either of them. All this defendant expects or hopes is the due administration and application of the law to his case and a cheerful submission to the result.

"As to the allegation that there is a mortgage by Joseph A. Huger of his share now held by the executors of the late Thomas A. Coffin, who are also made parties defendants, this defendant says that he has already some time since answered to the bill of the said executors heretofore filed and now pending in this honorable Court, wherein they set up such a mortgage against him and his just rights, and he need not here make further answer in that respect.

"And as to the prayer of the bill, this defendant says that upon a statement of the partnership account between himself and his partners each of them will owe him, he believes, about the sum of sixteen thousand dollars on partnership account, and he cannot with any certainty estimate the value of the partnership property, but he hopes and believes that it is fully equal to the amount of the debts, and more; and Arthur M. Huger's one-third interest mortgaged to the complainant is one-third of the partnership estate which may remain after payment of the debts, and the sale of this he does not object to, nor does he object to the sale in behalf of Arthur M. Huger of one-third of the property itself and the application of the sale money to the payment of one-third of what may be found due to this defendant by the partnership in the first place and the payment of the balance thereof to the complainant, or as this honorable Court may order and direct.

"This defendant was, before this suit, willing to go on with the partnership business until the debts should be paid—a result not difficult to accomplish, he thinks,—and after that to close partnership, his partners being thus enabled to pay the private debts charged by them upon their resulting shares or interests respectively. His judgment of the true interests of all concerned, and his distaste for and his aversion to law suits and conflicts of this sort, led him to greatly prefer such a course, so that through the labor and responsibility it imposed upon him he might aid in the payment of all the just debts of his friends and partners.

"He does not complain, but he does regret, that the complainant has taken a different view of his interests, and has chosen the chance of a contest for the establishment of

*455

his alleged rights, at *the close of which one or the other must lose, rather than the better chance that both should be paid in full after a while by the practice of some patience and forbearance.

"If this defendant could have had his choice, if it had been submitted to him to choose, he would have promptly chosen that the complainant and himself should both be paid their just demands without contestation or conflict. To assure this he was willing, and began to practice forbearance, patience and devotion of labor to the true interests of the complainant, of himself, of Arthur M. Huger and of all his creditors. This was the only necessity to assure the satisfaction of all. But he had no choice. He was only called on to yield his just rights and accept a disastrous loss. The complainant selects the uncertain chances of a little earlier payment through this Court at the expense of this de-

fendant. He neglects and rejects the peaceful and well-grounded hope of payment for all without the stirring of disturbing questions. As this defendant has already said, not complaining, but regretting this, he comes here to meet the issue, which in vain he has avoided, and he has fully answered thereto."

Much evidence was given at the trial of the case which it is unnecessary to state. The decree of His Honor the Circuit Judge is as follows:

Graham, J. These cases, as involving very nearly the same facts and points of law, were consolidated and ordered to be heard together. The facts are:

On the 8th of January, 1856, Clydesdale plantation, with the negroes, farming utensils, &c., was sold by Daniel E. Huger, John M. Huger, Arthur M. Huger and Joseph A. Huger, the executors of the late Judge Huger, to Allen S. Izard, a defendant in these cases, who purchased on behalf of himself and the said Joseph A. and Arthur M. Huger. The price was paid by the purchasers from their separate funds, one-third each. Some difficulties arose about this sale, and on proceedings had in the Court of Equity in the case of Huger v. Huger (9 Rich. Eq., 232,) the sale was confirmed, and the title to Clydesdale plantation and the negroes, &c., was decreed to be vested in the purchasers. On the 9th of January, 1860, the last instalment of the purchase money was paid in full. On the 9th January, 1856, the day after the purchase, the purchasers entered into the following articles of agreement:

*456

*"Articles of agreement between Allen S. Izard, Joseph A. Huger and Arthur M. Huger, joint owners Clydesdale plantation and negroes, Savannah Black River, Beaufort District, S. C.:

"Joseph A. Huger is to be charged with the management of the plantation. Messrs. W. C. Bee & Co., factors of Charleston, under the advisement of A. M. Huger, to be charged with the management of the accounts and supplies. All connection with the city of Savannah to be avoided as far as practicable; if resorted to from necessity, the transactions to be always upon the cash basis. On all points involving the management or interest of the concern, Allen S. Izard will be required to act as adviser, and in case of difference between the other parties, to be umpire. Charleston, 9th January, 1856."

The original has been lost, and the copy produced and that set forth in Mr. Izard's answer are unsigned, but the testimony is that it was signed by the parties. On its execution it was delivered to Mr. Bee and by him deposited in his tin box and never taken therefrom, and has been destroyed in Columbia. There is no pretense that it ever was recorded, and no notice of it was brought home to either of the mortgagees in these cases.

On the 1st March, 1858, the executors of Judge Huger, among whom were Arthur M. and Joseph A. Huger, executed a title deed to Allen S. Izard of Clydesdale plantation and many negroes, the habendum and tenendum being, as usual, different as to each class of property, and the whole being to the said Allen S. Izard, "to the use of the said Allen S. Izard, Joseph A. Huger and Arthur M. Huger, and to their heirs, executors and administrators, according to the nature of their several estates, forever." This deed was recorded in the Secretary of State's office at Columbia on May 1st, 1862, more than four (4) years after its date, and was never recorded in the R. M. C. office for Beaufort District, where Clydesdale plantation is situated. Mr. Izard, however, knew nothing of this deed until after the war.

On the 9th January, 1860, Joseph A. Huger borrowed $25,000 from Coffin & Pringle and to secure the same executed three bonds and mortgaged to them "the one-third (undivided) portion owned by me, the said Joseph A. Huger, of all that plantation or tract of land known by the name of Clydesdale plantation, which said plantation is jointly owned by and was conveyed by the executors of the late Hon. Daniel Elliott Huger to me, Joseph

*457

A. Huger, *A. M. Huger and Allen S. Izard by a conveyance of date the day of , 185 ." Mrs. Huger renounced her dower on the mortgage on 6th February, 1860, and it was recorded in the R. M. C. office for Beaufort District on 11th February, 1860, and re-recorded there on the 4th May, 1867.

Before the war, viz., between 1856 and beginning of 1859, or perhaps even later, A. M. Huger gave to C. T. Lowndes a mortgage of his one-third of Clydesdale plantation, to secure him against liability incurred by him on behalf of A. M. Huger. There is no proof that it ever was recorded, and it was lost during the war. On the 6th November, 1865, A. M. Huger mortgaged to C. T. Lowndes "all my (his) one-third interest in the plantation on Savannah River, and known as Clydesdale." It contains this clause: "It is further understood, that this obligation is given not as any new or additional security given for the purpose stated in these presents, but in lieu of an instrument of same tenor and effect which was destroyed by fire in the destruction of Columbia in February, 1865." This mortgage was recorded 9th August, 1866, and actual notice of it given to Mr. Izard about the 1st January, 1867. The bills are filed to foreclose these mortgages respectively, and, among other things, pray for the partition of Clydesdale plantation and sale of the respective parts mortgaged, or, if it cannot be partitioned in kind, for the sale of the entire premises. Mr. Izard objects, and contends that Clydesdale is partnership property and responsible for partnership debts, of which there are some

outstanding, before being responsible for these mortgage debts. Mr. Izard testified that till 1867 he had no idea of the existence of this alleged copartnership, and the declarations and acts of Joseph A. Huger and A. M. Huger show that till after this case arose they had equally little idea of its existence.

This renders it certain that as between themselves a partnership, the very basis of which is intention, never existed. The animus coeundi is wanting. But had there been one, the evidence satisfies me that no partnership as to Clydesdale plantation ever existed, and, if it did, it would not avail Mr. Izard. The legal title to the one undivided third part each was vested respectively in Joseph A. Huger, A. M. Huger and Allen S. Izard, and neither Coffin & Pringle nor C. T. Lowndes had notice of the alleged copartnership. As bona fide purchasers for value and without notice, they dealt with the holders of the legal title, and this pro-

*458

tects them. As *regards the objection to Mr. Lowndes's mortgage not being recorded as required by the Act of 1843, relating to the recording of mortgages, I am of the opinion that as to the debts of A. M. Huger to Mr. Izard created between the date of the first mortgage and the 9th August, 1866, Mr. Izard is a subsequent creditor without notice. On the 9th August, 1866, the mortgage to Mr. Lowndes was recorded, and I hold now, as I have done in a previous case, that Mr. Izard had notice in law from that date. Mr. Izard had notice of it in fact on the 1st January, 1867. The debt of Mr. Huger to Mr. Izard created after the 9th August, 1866, cannot, under the Act of 1843, prevail against Mr. Lowndes's mortgage.

The solicitors of Mr. Izard moved to file the answer of Mr. A. M. Huger in the first named case. The facts in regard to this matter are:

The bill was taken pro confesso against Mr. Huger in his lifetime, and his solicitor applied to the complainant's solicitor to withdraw the order pro confesso and let the answer be filed. This was done, but the answer was never filed. With Mr. Huger's death the consent also died, according to the understanding of both solicitors. The executor and sole devisee of A. M. Huger were after his death made parties to these proceedings, but have filed no answers, and a judgment of pro confesso exists against them. The solicitors neither of the late Mr. Huger nor of his executor and sole devisee (his widow) asked that the answer be filed, and I overruled the motion. This answer and the answer of A. M. Huger, in the case of Huger ads. King, and also the letters of Mr. Huger to Mr. Herckenrath, of date 26th September, 1859, and of Mr. Lowndes to Mr. Izard, of date 26th February, 1856, were offered as testimony by Mr. Izard and objected to.

To the letters the objection was subsequently withdrawn. The testimony, as was also some of Mr. Lowndes's, was taken subject to objection. Both bills are pro confesso against A. M. Huger and his executor and sole devisee, and they do not raise the objection. I have decided that Mr. Izard was not a copartner of A. M. Huger, and hence he is not a survivor and the rule has no application to him. But whether Mr. Lowndes's testimony of conversation between A. M. Huger and himself were admissible or not by itself, it clearly becomes so if the declarations of A. M. Huger are put in evidence by Izard; and though, as a matter of law, the answers of A. M. Huger, as being declarations made post litem motam and with-

*459

out the *privilege to the other party of cross-examination, is inadmissible, yet as the argument discussed the entire testimony, and this view is most favorable to Mr. Izard, I have admitted them and considered the case as if the entire testimony were properly before the Court. It is, therefore, ordered and decreed that all the parties defendant to these actions claiming an equity of redemption or other interest in Joseph A. Huger's one undivided third part of Clydesdale plantation be barred and foreclosed thereof, and that the complainants holding the mortgages thereof are entitled to the same and all the right thereto appertaining prior to any claim of Mr. Izard's thereto as a partner. It is further ordered, decreed and adjudged, that all the parties defendant to these actions claiming an equity of redemption or other rights in A. M. Huger's one undivided third part of Clydesdale plantation be barred and foreclosed thereof, and that the plaintiff, C. T. Lowndes, is entitled by his mortgage of said one-third of Clydesdale to the same and all the rights appertaining thereto, in priority to all claims of Mr. Izard except the debts of A. M. Huger to Mr. Izard created between the date of A. M. Huger's mortgage to Mr. Charles T. Lowndes and the date of the record of said mortgage, viz., the 9th day of August A. D. 1866. It is ordered that the case be referred to Samuel Lord, Esq., as Special Referee, to take an account of and report the amounts due upon the bonds held by the plaintiffs, also of the rents, mesne profits and other proceeds derived from Clydesdale plantation since the filing of the bill in the first named cause, and more especially of the crops made on the said plantation and of the sales thereof, and of all expenses connected therewith, stating this account in such a way that whether it shall begin from the said date or the date of bankruptcy of Joseph A. Huger, or the filing of Mr. Lowndes's bill, the Court may use the same without further reference. He will also report the personalty on the

said plantation and whether it is more advantageous to all concerned to divide the said plantation in kind or to sell the same as a whole.

It is further ordered that he do report the debts of A. M. Huger to Allen S. Izard created between the date of the first mortgage of A. M. Huger to C. T. Lowndes, which is uncertain, and which date the Referee is directed to ascertain and report, and the 9th August, 1866; and to avoid the necessity of a further reference, he will also report the debts of A. M. Huger to Allen S. Izard created between the 9th August, 1866, and the 1st January, 1867.

*460

*It is further ordered that the plaintiffs have leave to apply for a writ of partition or order for sale, or any further order necessary to carry this judgment into effect.

Allen S. Izard appealed on the following grounds:

Sec. 1.—As to the Question of Partnership.

1. Because the association of Allen S. Izard, Joseph A. Huger and Arthur M. Huger in the purchase and cultivation and management of the business of the Clydesdale estate was essentially and substantially a partnership transaction, and they held and managed the said Clydesdale estate as partnership property, and neither of them had any other estate or interest therein than such as a partner has in partnership property, that is to say, an equal share in the surplus remaining after all debts of the concern are paid, as is plainly shown by all the facts and circumstances as proved in this case by the testimony.

Between the Parties Themselves.

1. The conception of the purchase was a joint adventure in which each obliged himself to put something in common in order to make therefrom in common a lawful profit.

2. The nature of the subject matter purchased, the union of land and negroes and agricultural implements as a whole, as one property and estate without any discrimination of interests.

3. The bid by one common agent, in the name of Mr. Izard only, for one price for the whole.

4. The liability of each one of the three in solido for the whole price and liability of the whole property for the whole price.

5. The written agreement made immediately upon the purchase is essentially a copartnership agreement, declaring the respective positions of each partner in its management.

6. The payment of the cash part of the purchase money by one agent without any indication of the manner in which it was contributed.

7. The positive testimony of the common agent,—who was from the beginning charged with the negotiation for the property at private sale, employed to bid at the public sale, with whom the written agreement was immediately deposited, who made every payment,—that it was a partnership, and that

*461

he always so con*sidered it: and this corroborated by the production of his letters, written long before the controversies in this case, expressing the same view.

8. The testimony of A. M. Huger, uncontradicted by Joseph A. Huger, and the fact that both so represented their association with Izard to Cohen in 1866.

9. That Mr. Lowndes must have been so informed by the Messrs. Huger, when they purchased the Hamilton negroes, to warrant what is said in his letter of 2d January, 1866–1867.

As to third persons:

They were also recognized and dealt with as copartners in Savannah by persons dealing with them in reference to their Savannah River property, even when nothing but the plantation remained, as is proved by Cohen's testimony; and in Charleston by their factors, William C. Bee & Co., as is proved by Mr. Bee from first to last; and by Coffin & Pringle, factors of the testator; of the executors of his estate, and of Joseph A. Huger, as is proved by their entries in their books, and by Mr. Lowndes, in their purchase of the Hamilton negroes in 1858, on the faith and knowledge of which he became the surety to the bond to the trustees of Hamilton and wife.

Sec. 2.—As to the question of the mortgagee's titles:

II. That whether they were copartners or not, all who knew of the circumstances of their association were in equity bound to recognize that all the joint debts of the association should be paid before any one of its members could apply any part of the property to the payment of his individual debts.

III. That the parties who took the mortgages in these cases were fully aware of all the facts and circumstances which constituted the partnership or were necessary to a recognition of the equity that all the debts of the concern should be paid out of the common property before either of the associates could appropriate any part of it himself.

IV. The complainants, in order to establish their several and respective mortgages, are bound to show that they dealt with the mortgagors upon clear legal titles produced by them, or which they could have produced, and this neither of them has done or can do.

1.—As to the mortgage of Coffin & Pringle:

This mortgage expressly describes the title thus: "which said plantation is jointly owned by and was conveyed by the executors

*462

*of the late Daniel Elliott Huger to the said Joseph A. Huger, Arthur M. Huger and A. S. Izard, by a conveyance of date the

day of January, in the year of our Lord one thousand eight hundred and fifty-six," yet no such conveyance has been produced or proved ever to have existed.

That had they referred to the conveyance mentioned in the decree in this cause by his Honor the Circuit Judge, it would have appeared by the recitals of this imperfect instrument that the defendant became the purchaser, at a public sale, at the price of $188,-000, on account of himself and of Joseph A. Huger and Arthur M. Huger, parties to the said conveyance, and that the purchase money had been secured in due form to the uses of the testator's will. And, further, that the said conveyance had not then been recorded anywhere, and that the said conveyance, although purporting to be an indenture between the executors of D. E. Huger of the first part, and the defendant, A. S. Izard, of the second part, had never been executed or in any manner whatever acknowledged or recognized by the grantee, and therefore had never been operative or effectual as a conveyance of the title.

2d.—As to the mortgage to C. T. Lowndes:

This mortgage is entirely consistent with a partnership and with the equity growing out of the joint purchase and employment of the estate, as it is only of the mortgagor's "one-third interest in the plantation," as that interest must be the surplus after all joint or partnership debt or debts of the association have been paid; and to this defendant can make no objection, as the true intent of the original paper drawn by Mr. Petigru.

Lowndes, the mortgagee, however, claims that this "interest" is an estate in fee in one undivided third part of the land itself. This title he must deduce from the decree in Huger v. Huger, or from the indenture referred to in his Honor the Circuit Judge's decree. The decree in Huger v. Huger was made 27th January, 1857, and gave a lien upon the whole estate, in solido, for the purchase money, and only confirmed the sale upon the execution of a bond by the executors, who had purchased (the mortgagors in this case) within sixty days from that decree, and no proof whatever is offered that such a bond was ever given. This certainly was not a clear legal title upon the face of it.

If Lowndes claims under the indenture, it is liable to the same objections as stated in reference to the title of Joseph A. Huger when he gave his mortgage to Coffin & Pringle.

*463

*V. Give the benefit of both decree and indenture to both the mortgagees, and still no clear legal title in fee to one undivided third part of Clydesdale is shown in either of them.

The bill in the case of Huger v. Huger was by all the executors against all the legatees and devisees of Judge Huger, C. T. Lowndes answering and admitting the allegations respecting the purchase of the plantation, agreeing with the recitals and conforming to the design of the indenture, but with more particularity in the statements of the bill.

1st. That the auctioneers set down "the Savannah River plantation, with all the negroes, stock and things of the nature of personal estate belonging to the premises, including seed rice not exceeding four thousand bushels," to A. S. Izard, at the sum of $188,-000 he being the only bidder.

2d. That he, A. S. Izard, bid for the property on behalf of himself and the said mortgagors, two of the executors, complainants in said cause, Joseph A. Huger and Arthur M. Huger.

3d. That the complainants in that cause, executors of Daniel Elliott Huger, were willing to convey the said Savannah River property to a trustee for the use of the purchasers, to which the indenture conformed.

4th. The Circuit decree (in Huger v. Huger) was "that the said sale be confirmed on the parties who were purchasers paying to the parties who were not purchasers their respective shares, with the accruing interest, according to the terms of the sale;" and it was further "ordered and decreed that the said Savannah River estate, as also the Wateree estate, stand pledged for the payment of the purchase money of each respectively and the accruing interest," which decree, upon appeal, was modified by the Appeal Court by decree announced 26th January, 1857, as follows: "It is therefore ordered that the said executors, the mortgagees, Joseph A. Huger and Arthur M. Huger, purchasers at their own sales as in the bill stated, do, within sixty days from the announcement of this decree, execute a bond to the Ordinary of this District, where the property is situate, for the purchase money as required by the Act, the lien given by the Circuit decree to remain the same as therein expressed."

5th. No proof whatever was before the Court that the requisite bond was ever given, and the legal title has never passed to the

*464

*purchasers, whatever equity they may have to have such title, and the indenture does not recite that such a bond was ever given, but only that "the purchase money aforesaid has been in due form secured to the uses of the testator's will," without any reference to the decree or to anything but the powers in the will.

VI. That His Honor erred in decreeing that defendant should account for rents and profits in favor of mortgagees.

VII. That His Honor erred in decreeing a writ of partition, with leave to sell the whole, upon recommendation of commissioners in favor of mortgagees against a joint owner of the fee.

Finally:

Whatever doubts may be on other points,

the following are established without dispute:

1. That Izard, through the agency of Bee, bought at auction the Clydesdale estate, real and personal.

2. That the purpose of the purchase was a joint concern between Izard and his brothers-in-law, the Messrs. Huger, for the cultivation of rice crops for market, of which concern Bee & Company were to be and were the agents.

3. That subsequently other large joint purchases were made of personal property and added to the Clydesdale estate.

4. That at first the joint concern was very successful, and, through the agency of Bee & Co., the original purchase and the largest part of the subsequent purchases were paid for with joint funds, the product of the joint property and efforts of the joint concern. That afterwards the concern was unfortunate and fell in debt, by the failure of crops, for the cost of cultivation, and failed also to pay for one of the additional purchases of personal property.

5. That the questions now made here are, whether the property purchased for the joint concern and paid for as above should go to pay its joint debts or to pay the individual debts of the parties. What are the rights of creditors?

6. That neither of the parties nor the joint concern have ever had a legal estate or title in or to the original purchase nor anything more than an equitable estate therein, and neither could mortgage more than he had nor that which he had not.

Wherefore, it follows that the extreme force that can be given to the mortgages is that of assignments of the equitable inter-

*465

ests of *the parties in the joint concern, and such assignments are subordinate to the rights of the creditors of the concern.

The complainant, C. T. Lowndes, also appealed from so much of the decree of the Circuit Court as holds that his mortgage has not priority over the debts of A. M. Huger to Allen S. Izard created between the date of the first mortgage of A. M. Huger to C. T. Lowndes and the 9th August, 1866, and directs an inquiry as to the date of the said first mortgage and as to the said debts on the following grounds:

1. That effect should be given to the mortgage of Mr. Lowndes as of its date, viz., the 6th November, 1865.

2. That as to debts of A. M. Huger to A. S. Izard created previous to the 6th November, 1865, Mr. Izard is not a subsequent creditor in relation to Mr. Lowndes's mortgage, and that such debts are not a proper subject of inquiry by the Referee.

3. That it is to be presumed as a matter of law that the first mortgage given by A. M. Huger to C. T. Lowndes was duly recorded.

The defendant, James R. Pringle, also appealed from so much of the decree of the Circuit Court as omits the debt due to the defendant and for providing for its payment in the same manner as the debt due to the plaintiffs is provided for.

The case was first argued in the Supreme Court at November Term, 1874, and by order of the Court was reargued at November Term, 1875.

The arguments were too voluminous to be inserted here, and a vast number of points and authorities were submitted to the Court.

Campbell, McCrady, for Izard.

James Lowndes, for C. T. Lowndes.

Young, Wm. Alston Pringle, B. H. Rutledge, for the executors.

April, 5, 1876. The opinion of the Court was delivered by

WILLARD, A. J. The complainants in the respective bills above entitled seek to foreclose mortgages respectively given by Joseph A. Huger and Arthur M. Huger on a tract of land and plantation called Clydesdale; A. S. Izard, defendant, claiming that complainants have a mere equity, subject to a superior equity in himself.

*466

*Izard, in behalf of himself and Joseph and Arthur Huger, bid in Clydesdale plantation at an executor's sale and it was struck off to him.

The sale was for part cash and part credit. Immediately after the bid was made an agreement was made between the three to plant Clydesdale as a rice plantation. This agreement was carried into operation. On the completion of the purchase a deed was executed by the executors to Izard for the joint use of Izard and Joseph and Arthur Huger.

The title continued to stand in this form at the time the present suits were commenced. Izard and the Hugers incurred in connection with this joint business two debts, which Izard has been compelled to pay. Izard contends that whatever rights the complainants may have acquired under the mortgages they were subject to the liability of the property for partnership debts.

The first question to be considered is, what right it was competent for Joseph and Arthur to convey to third parties as it respects their interest in Clydesdale during the existence of the joint agreement and previous to the payment of the business debts. If it should appear that they could convey no more than an equity, subject to the payment of partnership debts, then the defendant, Izard, will be entitled to have preference over any demand that the complainants may be entitled to make to Clydesdale. This question depends upon the force and effect of the joint agreement, viewed in connection with the nature and situation of the property, the character of the joint business and the effect

of the conveyance of the legal title to Izard, subject to trusts in favor of Joseph and Arthur. The purchase of the property by Izard, and the formation of the joint business, must be considered as concurrent events, embodying different parts of the same intention. The agreement was as follows:

"Articles of agreement between Allen S. Izard, Joseph A. Huger and Arthur M. Huger, joint owners of Clydesdale plantation and negroes, Savannah Back River, Beaufort District, South Carolina: Joseph A. Huger to be charged with management of the plantation. Messrs. Wm. C. Bee & Co., factors, of Charleston, under the advisement of Arthur M. Huger, to be charged with management of the accounts and supplies. All connection with the city of Savannah, Ga., to be avoided as far as practicable: if resorted to from necessity, the transactions to

*467

be always on the cash *basis. On all points involving the management or general interests of the concern Allen S. Izard will be required to act as adviser, and, in case of difference between the other parties, to be umpire.

"Charleston, 9th January, 1856."

The proof of this agreement is questioned on the ground of the uncertainty of the secondary evidence offered in regard to it, but it is conceded that there was an agreement, and the testimony does not show any conflict of memory as to its provisions. It must therefore be regarded as sufficiently proven. The agreement sets forth the plan of conducting the business and does not assume to define the relations of the parties any further than to fix their relative duties as it regards the conduct of the business.

It is of little importance to examine critically the force of particular words used in this instrument in order to discover the intention of the parties as to their general relations to the business. It was not in the mind of the parties to set forth any such general definition, and their selection of words and phrases was not made with any such view. The question as to whether a partnership was intended must be indirectly arrived at from the nature of the intended business and the mode in which it was to be carried on.

It is correctly argued that the question of partnership is one of intention. That does not mean, however, that the parties must have directly and distinctly in mind the various legal consequences attending the existence of partnerships relations; but having adopted the means fitted to carry on their business, the law will look to the nature of those means as an expression of the general intention of the parties and declare accordingly whether the relation of partners exists between them.

The question of the existence of a partnership is complicated by the fact that a scheme of business sometimes omits one or the other of the fixed characteristics of a partnership.

But when all are present, as in the case under consideration, no difficulty exists requiring any elaborate examination of the cases.

The ordinary elements of a partnership are a common stock, an intention to prosecute, unitedly, one or more branches of industry, and authority, power, mutually interchanged or specially delegated, to manage and control the common stock for the common benefit. The last named feature may be regarded as the leading characteristic of a partnership. Where property passes into a common stock by the consent of its owner, the power of control over it is necessarily modified, in order to secure the purposes of a common stock.

*468

*Something must be taken away from the power of independent control that each of the several owners possessed previous to its passing into the condition of a common stock. Either the parties must interchange as among themselves equal powers over the common stock, or they must place that power of control in some specialized hand or hands. In either case the power resulting from such an arrangement is representative, its peculiar characteristic being in the nature of a power of attorney of all to each or of all to some definite managing agency. A partnership in this respect closely resembles a corporation, but differs from it in another important respect, namely, that the power of control over the common stock of a partnership flows directly from the owners of such common stock, whether regarded as contributed to or created by the corporation; the powers over the common stock flow from the law of the corporation and indirectly from the corporators by the acceptance of that law. When these elements are all brought into distinct existence by the agreement, there can be no doubt of the intentions of the parties to unite as partners. Sometimes, however, the last named of these elements can only be made out by implication. This happens when the agreement develops the object of the partnership rather than the means of their attainment. In such cases it is very common to look into the intention of the parties as it regards community of profit and loss for the means of supplying such intention. The abstruse learning of the cases elaborately discussed by counsel is of importance where the intention of the parties is left to inference, but inapplicable to the present case, where that intention is covered by definite expressions. In the present case a common stock was created, which, leaving out of view any intent to impress that character upon the real estate, consisted of personal property, such as slaves, implements, &c. A business was indicated, namely, planting. Rice planting is known to have been intended from the nature of the

plantation and the business subsequently pursued by the parties under agreement. The agreement expressly communicated to the several parties power over the common stock different from what each as an individual owner could have possessed. One was clothed with authority to manage the agricultural department of the business, which implied power to manage and control the whole common stock so far as might be required to carry out that branch of the business. Another was clothed with authority to control

*469

the mercantile part of *the business and a corresponding authority over the common stock. The third was to fill the important post of adviser to the others and of umpire between them in case of difference. More complete evidence of an intent to confer on the several parties representative powers, although of different kinds and classes as affecting the whole common stock, could not be afforded by any partnership agreement. We must conclude that the parties intended copartnership in planting Clydesdale by the use of the property purchased in the name of Izard, and such as should be otherwise contributed or produced, and by means of the credit of the copartnership. The last conclusion is necessarily implied from the clause prohibiting the use of credit in Savannah, clearly implying that credit was intended to be employed elsewhere; the motive for the exclusion of Savannah being, doubtless, local merely.

That which existed as common stock at the making of the agreement was the bid of Izard, in behalf of himself and his partners, for the real and personal estate constituting Clydesdale. The parties took possession, looking to the completion of title under the bid. It will not be necessary to go into the details of the proceedings to make title under the bid of Izard. A deed was made by the executors to Izard for the use of himself and his partners. It is said that Izard never in form accepted this deed; but it was executed and delivered for Izard's benefit, was in conformity to the terms of the purchase as far as appears, and possession was had of the property conveyed in conformity with it. At all events, assuming Izard's title to be derived through the deed presents the question in as favorable a light for the complainants as any other view that can be taken of the transaction, and conforms to their view of the case. In any case, if Joseph and Arthur ever obtained legal title, it was through either a use existing in their favor or under the operation of an estoppel, and in either case the result would be the same as it regarded the question to be considered.

It must be concluded that Joseph and Arthur considered the deed to Izard as a conveyance of the property and mortgaged accordingly. They do not appear to have made any effort to obtain from Izard a conveyance of the property, or such an instrument as would put them in possession of clear evidence of their occupying the position of tenants in common with Izard.

The fact just mentioned ought to be considered in connection with the fact that Clydesdale was not merely land and its ap-

*470

purte*nances, but land and personalty united for the purpose of a particular business, and that it possessed in itself the means and appliances, hydraulic and mechanical, for rice culture, the value of which would be materially impaired by a partition. For the purpose of the business intended, it must remain a unit. Alienation by either of the partners of a part of the plantation would, we must assume, have broken up the basis of the business and defeated the object of the partnership agreement. A mortgage by one of them was placing power in the hands of a third person that might destroy the partnership business, without regard to the sufficiency of the partnership property to pay partnership debts. While the title was in Izard, as trustee for himself and his partners, the objects of the partnership were comparatively secure. No motive can be assigned for leaving it in his hands in such complete harmony with the conduct and known motives of the parties as that of maintaining a trust impressed with the objects and purposes of the copartnership.

It is true that the primary motive in making the deed one of trust in the name of Izard was probably this fact: that the names of Joseph and Arthur appeared in the deed as executors conveying to Izard, occasioning a seeming impropriety in making them grantees, so that they would appear to convey to themselves directly as individuals; but still the fact that the title was allowed to remain in Izard, without his being called upon to transfer it to them, is unexplained, except in the manner already pointed out.

The facts and circumstances manifest an unmistakable intention to leave the trust in existence to subserve the uses of the partnership. This being the case, the trust would continue to subsist while the partnership continued, and cannot be regarded as a naked trust liable to become executed under the statute.

Under this view of the case, Joseph and Arthur never had more than an equity, and could not convey by way of mortgage more than the equity so held, and the mortgage could only take the equity as it was in the hands of the mortgagor, impressed with the characteristics established by the agreement of the parties. In other words, the mortgagees could not claim to stand in the position of purchasers of the legal title without notice of an equity affecting it, but, with or without notice, would take such equity only as it stood in the hands of the mortgagor.

*471

*It remains, then, only to consider whether, according to the intention of the parties to the agreement, the equities of Joseph and Arthur were subject to partnership debts.

Much learning and ability has been displayed by counsel in presenting the law as applied to cases where land is sought to have impressed upon it the equitable character of assets for the payment of partnership debts; that doctrine is applicable to the present case. Its difficulties arise from the fact that it is an attempt to raise an equity against the clear right of dominion conferred by law on him who has the legal title to land. To create such an equity requires the presence of certain distinct elements that are not requisite where the parties have created the equity by their own act and a Court of equity is called upon to declare what characteristics and incidents were impressed upon it by such act of creation.

The whole question here is simply one of the intention of the parties, and is to be solved by keeping in mind the principles applied by equity in drawing such conclusions, prominent among which is the invariable assumption that parties intended to do that which was equitable. It was manifestly right and agreeable to equity that the interests of the partners should, in the first instance, stand as a fund to pay partnership debts, and that neither should, by any form of alienation, diminish the common fund for the payment of the common debts.

It is manifest, taking the whole evidence together, that the parties taking the securities set forth at the time when the obligations were incurred for which such securities were given did not intend to occupy the position of withdrawing from the common stock anything applicable to the payment of its debts.

That the planting interest was then prosperous and the individual interests of the partners in the common stock, over and above all partnership liabilities, was considered adequate security.

The evidence does not establish the claim that the consideration of the mortgages in either case was either an advance for the benefit of the partnership or for the payment of the land.

The creditors whose demand Izard satisfied were in equity entitled to go upon the whole common stock, embracing the equitable rights of Joseph and Arthur, and the mortgagees were subject to that right. Izard having advanced his own funds to pay the creditors is clothed with their equity.

*472

*The judgment must be set aside and the case remanded for an account of the partnership debts remaining unsatisfied, embracing the amounts actually paid by Izard in the settlement of the copartnership debts set forth in his answers and for a decree establishing priority in Izard and all other partnership creditors to the assets of the copartnership.

MOSES, C. J., and WRIGHT, A. J., concurred in the result.

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7 S. C. 472

FEATHERSTON v. NORRIS.

(Columbia. Nov. Term, 1875.)

[*Jury* ⇐14.]

An action by the heirs of a decedent to recover from the surety of a late Commissioner in Equity proceeds of land sold by him for partition is an equitable action and properly triable by the Court.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 70; Dec. Dig. ⇐14.]

[*Equity* ⇐398.]

Where an outgoing Commissioner has turned over to his successor a deposit book, regular in form, of a bank in which he was required by law to deposit money officially received by him, wherein the balance to the credit of such Commissioner was more than sufficient to pay the amounts received by him for a certain estate, in an action against the representatives of such Commissioner to recover the moneys received for said estate, such book, in the absence of any evidence contradicting the presumption that the moneys belonged to said estate, is sufficient evidence to relieve the defendants.

[Ed. Note.—Cited in State ex rel. Van Wyck v. Norris, 15 S. C. 255.

For other cases, see Equity, Cent. Dig. §§ 862, 863; Dec. Dig. ⇐398.]

[*Equity* ⇐117; *Parties* ⇐96.]

An objection that a proper plaintiff has been omitted from the complaint comes too late after a failure to make the objection by demurrer or answer.

[Ed. Note.—Cited in Fraser & Dill v. Charleston, 13 S. C. 543.

For other cases, see Equity, Cent. Dig. § 288; Dec. Dig. ⇐117; Parties, Cent. Dig. § 170; Dec. Dig. ⇐96.]

Before Cooke, J., at Anderson, February, 1875.

This was an action by Ida J. Featherston, Emma E. Young, Helen H. Williams and Ella L. Latimer, plaintiffs, against J. C. C. Featherston, Frances C. McDavid and Ezekiel Norris, defendants.

The plaintiffs are the children and legatees of J. W. Featherston, deceased. The defendant J. C. C. Featherston is a legatee and executor, and the defendant Ezekiel S. Norris is a surety on the official bond of A. O. Norris, deceased, late Commissioner in Equity for the County of Anderson, given in December, 1861.

The object of the action was to recover from the defendant Ezekiel S. Norris a sum of money which A. O. Norris had received as Commissioner in Equity.

The case was as follows:

I. A. O. Norris, late of Anderson County, was Commissioner in Equity for said Coun-

ty prior to December, 1861, and then gave a
*473
*new bond as Commissioner for four years, upon which Ezekiel S. Norris was one of the sureties.

II. In 1859, the executors of J. Wesley Featherston had filed a bill in equity, under which the estate was ordered by the Court to be sold by the Commissioner, and it was sold by A. O. Norris, January, 1860, upon a credit of one, two and three years.

III. In July, 1861, the Chancellor ordered that, "as fast as the proceeds of sale should come into the hands of the Commissioner he should apply the same in payment of outstanding demands against the said estate," &c.; but beyond the payment of debts, no order was made as to the distribution of the proceeds of sale.

IV. The books of the Commissioner show that the bonds were paid as they fell due, and that in 1861, 1862 and 1863, and January, 1864, so much of the fund as was necessary to pay debts was so paid under the aforesaid order of Court. After the payment of debts, there was left in the hands of A. O. Norris the sum of $12,059.42, which there was no order to pay out, and as to which this litigation arises.

V. A. O. Norris remained Commissioner until his successor, W. W. Humphreys, went into office in 1866, when he turned over to such successor the books and papers of his office, and among them his bank book, purporting to contain evidence that, as Commissioner, he had deposited in the Branch Bank of the State, at Columbia, (as was his duty under the Act of 1840,) the aggregate sum of $63,913.23, which, as alleged, included the funds of the Featherston estate, $12,059.42.

VI. In his final report on estates, June, 1866, sworn to and filed, A. O. Norris also reported that the said money of the Featherston estate ($12,059.42) had been deposited as aforesaid. His successor then took charge of the office and of said bank book, and nothing has been recovered upon the said deposit, the Bank of the State and its branches having ceased to exist.

VII. A. O. Norris died in the Spring of 1873 intestate and insolvent, and in August, 1873, the Featherston legatees, under the will of J. Wesley Featherston, commenced this action on the official bond of 1861, against Ezekiel S. Norris, one of the sureties, alleging that said surety was liable for the official default of A. O. Norris, "who wholly failed to keep and deposit the said money as required by law," which is the only breach assigned in the complaint.
*474
*VIII. His Honor Judge Cooke, against objection by defendant, heard the case without a jury, and "adjudged and ordered that the surviving executor of the will of J. Wesley Featherston have leave to enter judgment for the penalty of the bond, and to issue an execution thereon for $12,299.42 and his costs and disbursements, etc. The surviving executor, J. C. C. Featherston, was a defendant in the action and prayed no relief.

IX. From this decision Ezekiel S. Norris appealed, and urged in this Court the following objections:

1st. That the trial was ordered prematurely, before defendant's evidence was taken and without notice of trial or the case being docketed as required by law.

2d. That the action on the bond was for money only, and the defendant was entitled to a jury, which was denied him, and the Judge tried the case against his objection.

3d. That a nonsuit should have been granted upon the following grounds:

(a) Because the plaintiffs failed to prove the only breach of bond assigned, offering no evidence at all upon the subject of deposit.

(b) Because the action was brought upon an official bond without leave to sue.

(c) Because the action was not brought in the name of the State, the payee, but by all the legatees united, in their own names.

(d) Because the action was brought without any order declaring the right of these parties to the fund or demand for it.

4th. That the appellant, Ezekiel S. Norris, offered affirmative proof that the fund had been deposited according to law, and that, supporting the presumption of law that "he had done his whole duty," the decision should have been in his favor.

5th. That the excess of receipts over payments must have been in Confederate currency, and, in any event, the value of such currency should limit the recovery.

That in any possible view it was error to adjudge the penalty of the bond in favor of one who was a defendant in the case and prayed no affirmative relief.

[For subsequent opinion, see 14 S. C. 624.]

McGowan, with whom was Whitner, for appellant, upon the questions whether the action should not have been brought in the name of the State, the payee of the bond,
*475
and whether the deposit *book of the Bank of the State of South Carolina contained sufficient evidence to relieve the defendant Norris from liability, submitted the following points:

The exceptions insist that the Circuit Judge should have granted a nonsuit, and it was error to refuse it.

1. The action was for the penalty of an official bond of a deceased Commissioner in Equity, against a surety on the bond, and the action should have been in the name of "the State," the payee and custodian of the bond.

1. Section 134 of the Code, requiring "actions to be brought in the name of the real party in interest," does not include actions on official bonds. "Bonds taken in the name of the people should be prosecuted in the

name of the people and not in the name of the party in interest."—Waite's Code, p. 126; Voorhies' Code, 97; Annel v. Kerr, 28 How., 324; People v. Clark, 21 Barb., 264; People v. Norton, 9 N. Y., 176.

2. This bond was given to a trustee for the benefit of many, like an administration bond, which must always be brought in the name of the Judge of Probate.—Thomas Jordan v. Searle, 2 Mass., 152; Glover v. Heath, 3 Mass., 252; 4 Mass., 74; Robbins v. Heywood, 16 Mass., 524.

3. Before the Code that was the law of South Carolina, for the good reason that no one could sue for penalty but the payee; and when one judgment was given for the penalty, that stood for the benefit of all claimants under the bond.—Treasurer v. Bates, 2 Bail., 362; Treasurer v. Clowney, 2 McM., 512; State v. Bird, 2 Rich., 100.

4. The law of 1866, relied upon, does not touch the point at all. That was simply a provision that a certified copy should be evidence of the bond. "If any person be aggrieved by the default of the said District officers, and desire to sue upon the bond, it shall not be necessary for such person to obtain a certified copy of the bond from the Treasurer of the State; but such certified copy from the Clerk of the Court shall be sufficient," &c.—13 Stat., 382.

5. The law of 1840 had substantially the same provision in regard to the copy: but in 1866 the law had been changed making one State Treasurer instead of two, and it was necessary to make a corresponding change as to who should give the certified copy. This is all that Section of Act of 1866 does.—11 Stat., 109.

6. But both those Acts are repealed, and substantially the same provision is inserted in the General Statutes in these words: "The

*476

*bond of any public officer may at all times be sued on by the public, any corporation or private person, for which purpose the officer with whom such bond shall be filed shall deliver a certified copy," &c.—Gen. Stat., 215.

7. But it is said the objection comes too late at the trial, as, under the Code, "objection to parties must be made by demurrer."

This defect is radical and cannot be waived.—Waite's Code, 241; Burnham v. DeBevorse, 8 How., 160.

"If the wrong plaintiff sue, or, in other words, if the facts stated in the complaint show no cause of action against the defendant in favor of the plaintiff, the defendant may demur under the sixth head. If the objection is not raised by demurrer it may be raised upon the trial and the complaint will be dismissed as to plaintiff in whose favor no cause of action is shown."—1 Waite's Prac., 120; Palmer v. Davis, 28 N. Y., 242; Ritchenberger v. Ritchenberger, 50 Barb., 50.

II. Although a party, upon payment of the fees, is entitled to a certified copy of the bond, he cannot sue on an official bond without leave granted.

"When a bond is given to the people of this State the action must be in the name of the obligee, and an assignee cannot sue on the bond in his own name unless the assignment is authorized by statute."—Waite's Code, 126; 1 Waite's Prac., 196; Coachman v. Hunt, 2 Rich., 452; Cuddeback v. Kent, 5 Paige, 92.

III. The nonsuit should have been granted for want of proof. The only breach charged was "that Norris wholly failed to keep and deposit the sum (money) as is required by law in such cases," and there was absolutely no evidence whatever of the fact charged.

1. What is the law referred to? In the Act of 1840, then of force, it is required as follows:

"The Commissioners in those Districts where no branch of the said bank (of the State) is or may be established shall likewise annually, within one month after their respective Courts, deposit in the said bank, or in some of its branches, all moneys officially in their hands as aforesaid, and which have remained in their hands unclaimed for twelve months; and all moneys shall be deposited by the said Commissioner, not in his private name, but in his official name, and the same shall be transmissible to his successors in office in trust for the said persons or estate. And every Commissioner shall exhibit his bank book containing the entries of all de-

*477

posits *as aforesaid when required; but it shall not be necessary to make monthly returns," &c.—11 Statutes, 113.

There is no proof that Norris did not conform to the law. The plaintiff offered no proof whatever upon the subject of depositing, the only breach alleged.

2. The only proof offered by the plaintiff was that Norris received the money (his office book) and then rested, claiming that, having charged Norris with the receipt of the money, it was incumbent on the defendant to discharge him, and that the plaintiff could presume that he had not deposited it.

Two things must not be forgotten; first, that this money was received by Norris officially; and, second, that he being dead this is an action against his surety. If A. O. Norris was sued, proof that he received the money might make it necessary that he should discharge himself, but not so as to the surety. As to him the breach must be proved as alleged. It is no breach for a Commissioner to receive money under the order of Court; it must further appear that he did not pay it out or deposit it, and until the plaintiff proves that he did neither no breach is shown and surety is not liable.

"The breach must be proved as it is alleged."—2 Starkie's Evidence, 344, and authorities.

3. But it is said it is not incumbent on the

plaintiff to prove a negative, although he alleges it.

The general rule is that the burden of proof rests on the party pleading the affirmative.—2 Waite's Pr., 117.

"But there are some exceptions, one of which includes these cases, in which the plaintiff grounds his right of action upon a negative allegation, and where, of course, the establishment of this negative is an essential element in his case."—1 Greenleaf on Evidence, § 78, and authorities.

"Whenever the law presumes in favor of the affirmative, it lies on the party who denies the fact to prove it, although it may be a negative. For instance, on a note the law presumes consideration; if the defendant denies that there is any consideration, he must prove it."—2 Waite's Pr., 109; 1 Starkie Ev.; Gilbert's Ev., 148; Williams v. East India Co., 3 East., 192; Munk v. Butler, 1 Roll, 83; Lord Halifax's case, Buller N. P., 298.

4. Public officers are presumed to do their duty. "Omnia presumuntur rite esse acta." —Best on Presumptions, 69; 3 Starkie, 396; Phillips, 151.

*478

*As that a Sheriff selling horses had levied on them. As that entries made in public books were made by the proper officer.—3 Cowan & Hill, note 460, and many authorities.

"When an officer is bound to do a certain act, the omission of which would be a culpable neglect of duty, the performance of it will be presumed unless the contrary is proved."—Hartwell v. Root, 19 John., 345; March v. Lawrence, 4 Cowan, 461; Hickmam v. Calvin, 14 John., 182.

"Upon an information against Lord Halifax for refusing to deliver up the rolls of the Auditor of the Exchequer, the Court of Exchequer put the plaintiff upon proof of the negative, viz., that he did not deliver them, for a person shall be presumed duly to execute his office until the contrary appear." —Buller N. P. 298.

"In a suit for tithes, the defendant pleaded that the plaintiff had not read the 39 Articles, and the Court put the defendant to prove it though a negative, for in this case the law will presume that the parson had read the articles, and when the law presumes the affirmative then the negative has to be proved."—Monk v. Butler.

It being necessary to prove breach as alleged, it must be proved by the best evidence which the nature of the case will admit.—3 East., 200.

5. The decision admits the presumption. It says: "This, however, is a bare presumption and only holds as to third parties." (29.) What is meant by third parties? As to the official acts of an officer, is not his surety a third party?

But it is denied that this is a true construction of the law. In the case of the Exchequer roll, Lord Halifax himself was sued. And in the case of the 39 Articles the parson himself sued for tithes.

This is most emphatically a case for the application of the rule. Norris was a public officer. It was his duty under the law to deposit. He is dead and not here to speak, and the bank in which it was his duty to deposit has ceased to exist, and its officers dead or scattered we know not where. It is not a case where the subject matter of a negative averment lies peculiarly within the knowledge of the defendant.

IV. The 12, 13, 14, 15 and 16 exceptions allege error in the decision, finding as matter of fact that the money was not deposited in the Branch Bank of the State, the evidence that it was so deposited being competent and entirely uncontradicted.

*479

*1. "Where the Judge finds a material fact which is wholly without evidence to sustain it, it is an error of law, and, upon due exception thereto, may be reviewed in the Court of Appeals."—Waite's Code, 517; Webster v. DeWitt, 36 N. Y., 345; 35 Bar., 215; Ball v. Loomis, 29 N. Y., 412; 24 How., 76; Marrow v. Lord, 40 N. Y., 477; Fellows v. Northrop, 39 N. Y., 119.

"If there is no competent evidence to sustain conclusions of fact arrived at by the Judge, or if the undisputed evidence establishes the contrary it then becomes a question of law and the Courts are at liberty to examine it."—Kirkland v. Cureton, 4 S. C., 122.

The decision of Byrd v. Small, (2 S. C., 388,) holding that this Court is "a Court for the correction of errors at law," was a case where the facts were submitted to a jury. Here the Judge, like a Chancellor, decided both law and facts, and there is no remedy unless this Court reviews the case. We insist that the relief sought was not equitable and the Judge should not have heard the case, but, having heard it as an equity case, this Court has the right to review it.—Kirkland v. Cureton, 4 S. C., 122.

"It is held that the Supreme Court may review even in a law case if some question of law was involved which influenced the decision of the Judge."—Byrd v. Small, 2 S. C., 388; 2 Means v. Foster, 4 S. C., 249.

2. Here we have in favor of the deposit:

First. The presumption of law.

Second. No proof contradicting it.

Third. The "Reports on Estates" of A. O. Norris, made according to law, and sworn to and filed by order of Chancellor Johnson, 1866, at the first Equity Court held for Anderson after the receipt and deposit of the money. (24.)

Fourth. The "bank book" of Norris, bearing the unmistakable marks of a genuine bank book, showing acknowledgment of deposits in Branch Bank of the State at

Columbia for $64,813.23. Norris dead, the Bank of the State and its branches no longer in existence and its officers scattered, under the peremptory order for trial we were not able to prove the handwriting of the Cashier. But there is no allegation of forgery, and the book had been turned over to Humpreys, the successor of Norris, and is now in his possession. (23.)

Fifth. The perfect agreement of the account of Norris, the bank book and "the report on estates." The latter says: "Balance

*480

of *$12,059.42 on deposit in the Branch Bank of the State at Columbia, included in the sum of $63,913." (25.)

The bank book purports to contain evidence of deposits to the precise amount of $63,913. (23.)

3. This was the best proof attainable under the circumstances, not conclusive, but certainly "prima facie." Like the returns of an executor or administrator, good until disproved. No one believes that Norris forged receipts of deposit. The Cashier receipts are not in his handwriting. They are in a business hand in the usual bank book. How did he get the book? Who wrote the receipts? Is not this proof uncontradicted, enough to satisfy any reasonable mind that the book is genuine and that the deposits were made as stated?

4. The argument of this decision is palpable error. It states "if the bank book be competent evidence, it is impossible from these facts taken from it that these deposits were legally made on behalf of the Featherston estate." (30.)

What facts? Look at them: "No money was received for the Featherston estate after January 20, 1864, whilst in 1865 the sum of $2,392.50 was paid out." (30.)

What does that signify? This could not be paid until called for and was then paid under the order of the Court to creditors. That was rightly paid and is not claimed in this suit. But further: "From 30th October, 1863, to January 17, 1864, $64,813.23 were deposited." In this argumentation the decision makes a mistake of one month. The date of the deposit, according to the bank book, is February 17 and not January. (23.) As it stands, it is precisely right. Received in January, 1864, $7,278.11, and deposited in February, 1864, $12,537.43. The deposit manifestly includes the Featherston money as stated in the report. The argument built on the mistake of a month utterly fails!

5. But it is said the deposits were not legally made because not at precisely the right time. That the Equity Court, by law, sat at Anderson in July of each year, and that these deposits should have been made "within one month of the adjournment of their respective Courts." That is to say, should have been deposited in the month of August, 1864, instead of the October and February previous.

This is error for at least three reasons:

First. The words of the Act (1840) as to time are not of the essence of the matter, but

*481

are declaratory merely. Even if there *had not been an exact compliance to the day, the irregularity would not be fatal unless injury resulted from the variation, which is not pretended.—2 Story S.

Second. But Norris was strictly within the law, which only fixed a limit "within which" the money should be deposited. He was not required to deposit until he had the money "unclaimed for twelve months." Within that time he might deposit without regard to the "adjournment of the Court." Norris committed no offense except to anticipate the limit. He received in October, 1863, and January, 1864, and deposited immediately February, 1864! This is the head and front of his offending.—See receipts and deposits.

Third. If we are to construe the Act so as to limit deposits exclusively to "one month after the adjournment of the Court," there was no necessity for Norris to deposit in 1863, '64 or '65, for in these years no Court of Equity sat for Anderson, and, of course, there could be no "adjournments." But Norris did right not to rely upon any such quibble of words, and, construing the Act according to its sense and purpose, deposited the money soon after it was received.

What was he to do? The money was all due. He was the payee. The Court assumed that the money would be collected—impliedly at least directed it—ordered so much as was necessary to be paid to creditors. What remained was "unclaimed." The Court did not meet to make orders, and, as a good officer, Norris could do no more than deposit it, which he did! It was not his fault that the bank no longer exists. Is it possible that justice can be so twisted as to make his surety pay that money? It surely cannot be.

Murray, contra:

An appeal from an order dissolving an injunction does not operate as a supersedeas and continue the injunction in force.—Hoyt v. Carter, 7 Howard, 140; Stone v. Carlan, 3 Code Rep., 103; 1 Van Santvoord's Equity Practice, 374; same, p. 663.

That ignorance of law furnishes no excuse for the breach of a contract or for an omission of duty.—Story's Equity Jurisprudence, § 111, et seq.; Storrs v. Baker, 6 Johns. Ch. R., 169, 170; Emmet v. Dewherst, 8 Eng. L. and Eq. R., 83.

The order of reference in this case to take testimony was granted on the 5th day of November, 1873, and the trial had on the 5th

*482

*day of February, 1875, affording ample time to take all the testimony; and if the defendant was taken by surprise, it was his

own fault, having been informed that a trial would be insisted on.

A creditor's suit will not lie on the official bond of an officer; sueing creditors come in ratably by an order of consolidation, and to obtain such an order they have no right to hinder or delay another creditor whose case is ready for trial.—Mitchell v. Laurens, 7 Rich. Law, 109; Treasurer v. Bates, 2 Bailey's Law Reports, 380; 4 Strobhart's Reports, 262.

The cause was considered in open Court as docketed more than twelve months before the trial and an order taken therein and proceeding had upon said order. The law which required notice of trial was a part of the lex fori and had been repealed before the trial and no notice was necessary. But even if notice of trial had been necessary, the defendant admitted in open Court that he had received from the plaintiff both verbal and written notices more than fourteen days previous to the meeting of the Court that a trial would be insisted on.—Acts 1873–4, p. 498, § 13.

That the cause was placed on Calendar No. 1 at the instance of the defendant, in opposition to the plaintiff's motion to have it put on No. 2, and, therefore, was ready to be called and disposed of by the Court.

That the consent order of reference in open Court is binding on the parties and was a waiver of the right of trial by jury, if any such exclusive right existed.—Waterman v. Waterman, 37 Howard, 41.

Where an action is referable in its nature, and, either by reason of a conflict of proofs or otherwise, it is doubtful whether the examination of a long account is involved or not, a Judge may exercise his discretion in the premises and his order is final and cannot be reviewed on appeal.—Waite's Practice, 328; Thompson v. Selmer, 40 Howard's Prac. Rep., 246; Batchelor v. Albany City Insurance Company, 6 Abbott, (N. S.,) 240; 37 Howard, 65; same, 399.

The bond of a public officer may be sued on by any person aggrieved by the misconduct of such officer.—Revised Stat., Title 7, Ch. 28, § 11.

The real party in interest the proper one to sue.—Rev. Stat., Title 5, Chap. 122, § 134; 7 Rich. Law, 109.

*483

*The right of a party aggrieved to sue on an official bond accrues when there is a breach of the condition of the bond.—Vaughn et al. v. Evans et al., 1 Hill's Chancery, 428.

The Commissioner charged and credited himself in his account with the estate of John W. Featherston, deceased, with the amounts received by him and paid out, showing a balance due said estate of $12,059.42 wholly unaccounted for, which ought to have been deposited in bank to the credit of said estate.—Pickens v. Dwight, 4 S. C., 362. His failure so to do is a breach of the condition of his official bond.

The bank book of A. O. Norris, Commissioner, was a private memorandum book and cannot be evidence in his favor.

That if the bank book of A. O. Norris, while in his possession, was not competent evidence in his favor, the receipt of his successor in office for said book could not make it evidence.

The report of A. O. Norris on estates, filed 25th June, 1866, is not evidence in his favor.—5 Rich. Eq., 51. And even if admitted as evidence, is too general and indefinite to establish any deposit in the Featherston estate; and if it did establish a deposit, it does not show, much less prove, that such deposit was in accordance with law.

The law which required Commissioners in Equity to deposit all moneys received officially by them within one month after the adjournment of Court had relation to the term of the Court as fixed by law. The Court, having failed to meet at the required time, stood adjourned to the next regular term, and such adjournment was an adjournment in purview of the Act of 1840.

That J. C. C. Featherston paid to A. O. Norris, Commissioner, on 21st March, 1862, on his bond to the estate of J. W. Featherston, the sum of two hundred dollars, which was not accounted for by said Commissioner, and could not have been deposited by him.

That said Commissioner wholly failed to account for and deposit the sum of thirty-two dollars and forty-eight cents received by him from Wiley Mitchell on account of the Featherston estate.

The breach of the bond complained of is the official misconduct of the Commissioner in not depositing money received by him as required by law. The relative value of the currency received does not enter into the case, and the defendant cannot set up the defense that the Commissioner received a worthless or depreciated currency in payment of the bonds.

*484

*The parties principally interested in this case are not those who paid their bonds, but minors who have never received anything.

The interests of the defendants in this case are severable in their nature, and judgment may be entered either for or against any one or more, or against some and in favor of others of such defendants, according to the proof upon the trial.—2 Whittaker's Practice, 540.

J. C. C. Featherston is the surviving executor of the will of J. W. Featherston and one of the defendants in this action, and, as the representative of the estate of J. W. Featherston, the proper party to enter up judgment.

April 11, 1876. The opinion of the Court was delivered by

WILLARD, A. J. The main question is whether there was evidence sufficient in law

to support the judgment below. It was contended that the action is to be regarded as one of law, the proper mode of trial being that by jury, and this Court limited to reviewing errors at law. The plaintiffs cannot maintain this position, for the judgment which they seek to uphold was given in form in favor of a party made a defendant by them as representing their rights for that purpose. This fact stamps the right of the plaintiffs with the character of an equitable claim. It follows that in considering the sufficiency of the ground on which such judgment rests, this Court cannot be excluded from looking into the determinations of fact as well as law.

We think that the Circuit Judge erred, as it regards the nature of the presumptions arising out of the character of the proofs, considered with reference to the nature of the issues, and such error prejudicially affected his conclusions of law and fact.

It appeared that A. O. Norris, now deceased, as Commissioner in Equity, sold real estate belonging to the Featherston estate, under an order of the Court for partition, and received the proceeds of sale, and made disbursements thereupon from time to time. It further appears that at the end of his term of office he delivered to his successor in office a book, purporting to be a bank book of the Branch Bank of the State of South Carolina, Columbia, containing what purported to be an account with A. O. Norris, Commissioner in Equity, Anderson District. That by such account there appeared to be on deposit in that bank a sum of money, more than sufficient to cover the balance, in the

*485

Commissioner's hands from *the Featherston estate. Both sides argue that it was the duty of the Commissioner to deposit the moneys claimed in this action in the bank in question. A bank book containing proper credits was the proper evidence of such a deposit, to be delivered by the outgoing Commissioner in Equity to his successor. From this state of facts it is very clear that a presumption arises in favor of the regularity of the proceedings of the Commissioner that must be removed by plaintiffs before they can establish a breach of the official bond in suit.

When a public officer, who is ordinarily presumed to have done his duty, delivers to his successors in office vouchers in the customary form, expressing on their face a compliance with the requirements of his office, while it does not follow that such vouchers may not be impeached, yet it must be assumed that they show a due discharge of official duty until the contrary appears on the part of those alleging against him.

In applying this proposition it will be hardly necessary to say that if the book was other than what it purported to be, or the balance standing to the credit of the Commissioner at the time of the transfer to his successor was not sufficient to cover all the demands against it that would exist, on the assumption that the proceeds of the Featherston estate were included in it, such facts could hardly fail to become disclosed to his successor. It certainly could not be required of one retiring from office to search the records and memory of his successor for evidence to avert suspicion that his official proceedings, correct in form, were false in fact.

After a failure to demur to the complaint or to take such objection by answer, an objection comes too late that a proper plaintiff is improperly omitted from the complaint, nor is that failure to object cured when a cause of action is subsequently established in which the plaintiff has an interest.

The conclusions arrived at render it unnecessary to consider the subordinate questions discussed.

The judgment and conclusions of fact and law must be set aside and the cause remanded for such proceedings as may be rendered proper in order to conform to the foregoing conclusions.

MOSES, C. J., and WRIGHT, A. J., concurred.

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7 S. C. *486

*REYNOLDS v. TIMMONS.

(Columbia. Nov. Term, 1875.)

[*Judicial Sales* ⇐19.]

A purchaser at a sale under the decree of an Ordinary for partition is not discharged from his liability by transferring his bid to a third person. Payment alone discharges him.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 45; Dec. Dig. ⇐19.]

[*Judicial Sales* ⇐19.]

If the Ordinary takes security from the transferee of the bid, that may increase the sources to which the parties entitled may look for payment, but it does not discharge the bidder.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 45; Dec. Dig. ⇐19.]

[*Judges* ⇐37.]

Where an Ordinary became the purchaser at a sale made under his own decree for partition, and afterwards transferred his bid, and the transferee complied with the terms of sale: *Held*, That the Ordinary and the sureties on his official bond were liable for the amount of the bid.

[Ed. Note.—Cited in Finch v. Finch, 28 S. C. 169, 5 S. E. 348, 13 Am. St. Rep. 665.

For other cases, see Judges, Cent. Dig. §§ 174–177; Dec. Dig. ⇐37.]

[*Creditors' Suit* ⇐32.]

An order for injunction under a creditor's bill restraining creditors from suing and calling them in to prove their claims in that case is subject to the entire control of the Court which made the order, and does not invalidate a decree made by it establishing a claim in an-

other cause which could have been proved under the order.

[Ed. Note.—Cited in South Carolina & G. R. Co. v. American Telephone & Telegraph Co., 65 S. C. 479, 43 S. E. 970.

For other cases, see Creditors' Suit, Cent. Dig. § 130; Dec. Dig. ⟹32.]

Before Townsend, J., at Marion, March, 1873.

This was a bill in equity by Melinda A. Reynolds, Sophia E. Reynolds and Henry S. Reynolds, the two last named being infants of tender years, by next friend, against W. B. Timmons and J. F. Pearce, executors of J. Gadsden Gregg, deceased, Dr. E. Miller, Asa Godbold, Jr., administrator of Asa Godbold, deceased, and E. B. Ellerbe, G. Berry, E. J. Moody, Asa Godbold, Jr., and J. H. Moody.

The case is as follows:

Samuel M. Reynolds died intestate some time in the year 1858, leaving as his heirs at law M. A. Reynolds and two children, Sophia E. and Henry S. Reynolds, infants of tender years. Intestate left some personal estate and a tract of land containing eleven acres, with dwelling house, office and other outbuildings upon it. Administration of the personalty was committed to Robert L. Singletary, a brother of Mrs. Reynolds, who properly discharged his trusts as such.

On the 5th day of January, 1863, Melinda A. Reynolds, one of the present plaintiffs, filed her petition in the Court of Ordinary for Marion District, praying that a summons in partition might issue against her two infant children, supposing that the land did not exceed in value $1,000. The prayer of the petition was granted, and accordingly a summons in partition was issued by Asa Godbold, then Ordinary, in the usual form.

*487

*William J. Singletary, another uncle of the infants, was appointed guardian ad litem for the infants, and his acceptance of the trust was endorsed upon the summons, over his own signature; also his acceptance of service of the summons and consent for a sale of the land in question; upon which an order of sale was made on the 12th of January, 1863, by the Ordinary, directing the Sheriff, in the usual way, to sell the lands described in the petition, on the following sale-day, to wit, 2d February, 1863, on the following terms, to wit: cash sufficient to pay the expense of the proceeding and of the sale; the balance on credit of twelve months with interest from day of sale, to be secured by bond and personal security, and a mortgage of the premises, if deemed necessary.

Between the making the order of sale and the time of sale, R. L. Singletary, the administrator and brother of Mrs. Reynolds, spoke to Asa Godbold, the Ordinary, and authorized him (the Ordinary) to bid for the land for him (Singletary) as high as one thousand dollars. At the sale the defendant, Dr. E. Miller, and J. Gadsden Gregg, the testator of the defendants, Timmons and Pearce, were present, and, according to the pleadings and the evidence, they were bidders; the land was bid off by Asa Godbold, the Ordinary, at $1,100, and was so certified by the Sheriff on the back of the order of sale.

On the 7th February, 1863, the bid of Asa Godbold is said to have been transferred to Dr. E. Miller, (though no transfer was produced in evidence at the hearing,) to whom a title was made, and the terms of sale were complied with by J. Gadsden Gregg giving his bond, with R. J. Gregg as surety, for the credit portion of the sale, payable on or before the 2d day of February, 1864, with interest from the day of sale, in consideration of one hundred dollars advance upon the bid.

A few days before the bond fell due, to wit, about the 14th or 15th January, 1864, the obligor came over to the Ordinary's office and wanted to pay the bond. Godbold hesitated to receive the money because it was not due; that R. L. Singletary, who, it was supposed, represented in some way the parties in interest, might not be willing to take the money. It was finally agreed that Godbold should take the money and Gregg the bond; that Godbold should see or hear from Singletary in eight or ten days, as Gregg alleges; and if Singletary refused to take the money, that Gregg was to return the bond to the

*488

Ordinary's office, and Godbold was to re*turn him (Gregg) his money. The principal and interest on the bond up to 2d February, 1864, was paid.

On the 15th of August, 1864, the Ordinary, after having seen Singletary, and Singletary's refusing to take the money, wrote to Gregg of Singletary's refusal to take the money, and demanded a restoration of the bond to his office. Gregg declined to do so, alleging that he was to be notified of Singletary's refusal in eight or ten days, and if he did not hear in that time he might consider the bond paid. In the meantime, about 1st of April, 1864, Godbold, in obedience to Act of the Confederate Congress, had funded the money in four per cent. Confederate certificates for the benefit of the estate of Samuel M. Reynolds.

About the 1st of January, 1867, the plaintiffs filed their bill in the Court of Equity against J. Gadsden Gregg, to compel him to restore the bond to the Ordinary's office, or to pay its amount, principal and interest.

To this bill J. Gadsden Gregg put in an answer, denying his liability, and setting up the conditional agreement with Godbold, the Ordinary, as a defense. In February, 1867, the case was heard by Chancellor Carroll, and in 1868 he rendered a decree, ordering Asa Godbold, the Ordinary, to be made a party defendant, without deciding the issues presented by the pleadings.

In October, 1868, J. Gadsden Gregg died, leaving a will, and the defendants, W. B.

Timmons and James F. Pearce, qualified as executors thereto.

On the 13th January, 1869, Asa Godbold died intestate, and the defendant, Asa Godbold, Jr., obtained letters of administration upon his estate soon after the death. That afterwards, it appearing that the estate of Asa Godbold was insolvent, and one J. D. Kirkpatrick, and perhaps other creditors of the intestate, Godbold, brought suit against the administrator for the recovery of their claims, the said administrator filed what is generally called a creditor's bill against the said Kirkpatrick and others, praying for an injunction, etc.; and accordingly, on the 18th February, 1871, an order of injunction was filed, enjoining all creditors of the intestate, Godbold, from suing, etc.

In April, 1871, the plaintiffs filed their complaint, in nature of a bill of revivor, against the executors of J. Gadsden Gregg, to wit, Timmons and Pearce, and also against Asa Godbold, Jr., the administrator of Asa God-

*489

bold, the intestate. And by an amend*ment, the defendants, Asa Godbold, Jr., E. B. Ellerbe, G. Berry, E. J. Moody and John H. Moody, were made parties defendants as sureties on the official bond of Asa Godbold, late Ordinary of Marion District.

To this complaint the defendants, Timmons and Pearce, executors of J. Gadsden Gregg, answered, setting up pretty much the same defense as their testator had done in his answer to the original bill.

The administrator of Asa Godbold also answered, denying liability of his intestate, alleging several matters of defense, and among others the injunction; that he could not be made liable in this action.

The sureties on the official bond of Asa Godbold, late Ordinary, parties defendants, answered the complaint, setting up various matters of defense; and N. E. Miller also answered.

The issues of law and fact were referred to A. Q. McDuffie, as Referee, who, after taking testimony, decided all the issues presented against the plaintiffs, except the question of injunction; and upon that he declined to express an opinion.

The plaintiffs filed the following exceptions to the report of the Referee:

1. In holding that Godbold's agency to Robert L. Singletary terminated when the land, the estate of Reynolds, brought one thousand dollars.

2. In holding that Godbold could bid at a sale made under his own decree as Ordinary and was not such a ministerial officer in a proceeding for the sale of real estate in his jurisdiction as made him an express agent for the plaintiffs and invested him with all the disabilities of a trustee and those occupying a fiduciary relation; the Referee, therefore, should have held the sale void, or voidable, at the option of the cestui que trusts, the plaintiffs in this action.

3. In holding that the payment of the notes in Confederate currency under the conditional agreement entered into by Gregg and Godbold was a payment and satisfaction of Gregg's bond given to the Ordinary for the purchase money of the land.

4. In giving his assent to the anomalous doctrine advanced in argument that the suit could not be entertained against Godbold's representatives and sureties, because it was said that Godbold's representatives had filed their bill to marshal assets and for injunc-

*490

*tion against his creditors. If the doctrine is admitted that a Court may enjoin itself, it is submitted in this case:

1st. There was no evidence of injunction.

2d. No evidence of the parties, plaintiffs in the so-called injunction, had complied with the prerequisites required by the practice of the Court, viz., in turning over the assets of the insolvent intestate to be administered by the Court.

3d. That the addition of the representative and sureties of Godbold as parties defendants to this cause was made by leave and order of the Court, is surely entitled to equal respect, and should be as effectual as an order of injunction.

The decree of the Court is as follows:

Townsend, J. S. M. Reynolds died intestate during the year 186 , leaving as his only heirs at law his widow, M. A. Reynolds, and two children, Sophia E. and Henry S., infants of tender years. He left a small personal estate, upon which R. L. Singletary, a brother of the widow, administered, and a tract of land containing eleven acres, with dwelling house and other buildings upon the same.

On the fifth day of January, 1863, M. A. Reynolds, the widow, filed her petition in the then Court of Ordinary against her two children, who were represented by their uncle, W. J. Singletary, as their guardian ad litem, praying for a partition of the real estate left by intestate. Under the proceeding an order for the sale of the same was granted by Asa Godbold, the then Ordinary. The land was bid off at the sale by Asa Godbold for the sum of eleven hundred dollars. He was authorized by R. L. Singletary to bid as high as one thousand dollars for him. One J. Gadsden Gregg, one of the defendants in this action, was desirous of purchasing the said land for his son-in-law, E. Miller, who had left funds in his hands for this purpose. Gregg contracted with Godbold to take his bid by paying him one hundred dollars and complying with the terms of the sale. The bid was accordingly transferred to Gregg and he paid the cash required and entered into bond to the Ordinary for one thousand and seventy-two dollars, the balance of the purchase money, on the second

(seventh) day of February, 1863. The condition of the bond was for the payment of one thousand and seventy-two dollars on or before the second day of February, 1864.

*491

*In January, 1864, some twelve or fifteen days before the maturity of the bond, Gregg called upon Asa Godbold, the Ordinary, and proposed to pay the bond. At first Godbold declined to take the money because the bond was not due, and it was doubtful if the parties in interest would accept the Confederate currency. Finally, he agreed to take the principal and interest up to the date of the maturity of the bond, and to turn over the bond to Gregg with the understanding and agreement that R. L. Singletary, who was supposed to be acting in some way for the parties in interest, was to be consulted in eight or ten days by Godbold, and if he was unwilling to take the money Gregg was to return the bond and to receive his money. On the 15th August, 1864, Godbold wrote to Gregg that R. L. Singletary would not accept the money and he must return the bond. There is no testimony as to the knowledge of Singletary, or the parties in interest, of the fact of the payment of the money by Gregg prior to this time: Godbold invested the Confederate currency received from Gregg on the 1st day of April, 1864, in a Confederate bond, for the benefit of the estate of S. M. Reynolds.

The original bill in this case was filed by the heirs at law of S. M. Reynolds against J. Gadsden Gregg. It contains no allegations as to the irregularity or invalidity of the sale of the land, and prayed that Gregg may be required to return his bond to the office of the Ordinary, or to pay the amount of principal and interest which may be found to be due thereon. In his answer to this bill, J. Gadsden Gregg alleges the payment of the bond to Asa Godbold, as Ordinary, and the existence of an agreement between them, which was not performed by Godbold, in his failure to notify him within the time stipulated of the non-acceptance of the Confederate currency paid by him, by the parties in interest or their supposed agents; and, further, that the payment of the money to the officer authorized to receive it released him from any further liability on the said bond.

The case was heard by his Honor Chancellor Carroll, at the February term of the Court of Equity, in 1867, who did not make a decree on the merits, but ordered Asa Godbold to be made a party.

After the date of this order, J. Gadsden Gregg and Asa Godbold died; a complaint was then filed by the same plaintiffs against W. B. Timmons and James F. Pearce, execu-

*492

tors of the last will and *testament of J. Gadsden Gregg, and Asa Godbold, Jr., administrator of the estate of Asa Godbold. This proceeding was amended by making Asa Godbold, Jr., Edward B. Ellerbe, G. W. Berry, Evander J. Moody and John H. Moody parties defendants, as sureties on the official bond of Asa Godbold, late Ordinary of Marion District. In the complaint and amended complaint, the plaintiffs pray that the bond given to Godbold, as Ordinary, by Gregg shall be canceled, and that the executors of Gregg may be decreed to pay to the plaintiffs the amount of principal and interest that may be found to be due thereon; and that on their failure to do so the plaintiffs may have the benefit of the statutory lien given by the Act of 1791, in the case of land sold for partition; and that in the event the sale made under the decree of the Ordinary be held to be illegal, that the premises be sold for the purpose of distribution among the plaintiffs. The further prayer is, that if this or any other relief against the representatives of J. Gadsden Gregg be disallowed, then that Asa Godbold, Jr., the administrator of Asa Godbold, late Ordinary, be decreed to pay the amount of the sale of the land or of the bond of Gregg, which he unlawfully received before maturity and in a worthless currency. The general prayer for relief is also inserted.

The defendants in their answers deny their liability as alleged in the bill and complaints, and submit that the Court cannot grant the relief demanded against them. The issues of law and of fact in the case were submitted to a Referee (special) for decision. A report has been submitted to the Court, in which it is determined that the plaintiffs are not entitled to recover against any of the defendants. Exceptions have been filed thereto. These raise the questions for the consideration of the Court.

The first exception alleges error on the part of the Referee "in holding that Godbold's agency to Robert L. Singletary terminated when the land belonging to estate of Reynolds brought over one thousand dollars." The Referee, in his report, says: "Before the sale R. L. Singletary, who, it seems, assumed to act for the plaintiffs, requested Godbold to bid off the land for him if it did not go beyond one thousand dollars. It sold for eleven hundred. Up to one thousand the bid of Godbold was as Singletary's agent; beyond one thousand dollars the bid was his own and he had the right to dispose of it as he chose, unless his relation to the parties was that of trustee." The conclusion of the

*493

Referee is fully sustained by the *testimony. R. L. Singletary says, in his testimony, he authorized Godbold to bid one thousand dollars. If he had bid more, Singletary was not bound, as his principal, to comply with the bid. There was no discretion given to Godbold; he had plain and positive directions and it was his duty to follow them. He did this up to the time the land was bid on to

the amount of one thousand dollars or less, but when more than one thousand dollars was bid his agency terminated. The first exception is overruled.

The second exception charges error on the part of the Referee "in holding that Godbold could bid at a sale made under his own decree as Ordinary, and was not such a ministerial officer in a proceeding for the sale of real estate in his jurisdiction as made him an express agent for the plaintiffs and invested him with all the disabilities of a trustee and those occupying a fiduciary relation."

Was Godbold permitted to bid at a sale ordered by him as Ordinary, to be made by the Sheriff, for the purpose of partition? If he was, he did not occupy a fiduciary relation towards the plaintiffs and was not invested with the disabilities of a trustee. Was the Ordinary prohibited by statute from purchasing at his own sale? The Act of 1791 prohibited the Sheriff and Master in Equity from purchasing at their own sales and declared all purchases so made by them null and void. At the time of the passage of this Act the Ordinary had no jurisdiction in cases of partition. The Act of 1824 conferred this jurisdiction upon that officer. After the passage of this Act the same prohibition as to Sheriffs, Masters and Commissioners in Equity was made in the Act of 1839 without including the Ordinary, who at that time had the power to order a sale in proceeding for partition. The failure to include the Ordinary in the Act and prohibit him from purchasing at his own sale evidences the intention of the Legislature not to prohibit him, for the reason that he did not make sales but only ordered them to be made by the Sheriff as provided by law. There was manifest in the prohibition of Masters and Commissioners in Equity and Sheriffs from purchasing at their own sales. If allowed to do so, they might have purchased at an under price, and in every case where they desired to purchase property they may have declared a sale to themselves without affording an opportunity to others to bid. There was no necessity of a prohibition of this kind as to the Ordinary, for the reason that he made no sales, could not have an opportunity thus to obtain property at an under value, and the

*494

*law had provided that his sales should be made by another officer, who was prevented by the Act from purchasing at his own sale.

There is no ground, therefore, to rest the assumption that by fair intendment the Ordinary was also prohibited by the Act from making purchases at his own sales. A Circuit Judge grants orders for the sale of property in proceedings for partition, and for other purposes, and it might be said with the same propriety that he is also included in the provisions of the Act of 1791. This proposition would not be seriously maintained, and yet it could be if the other (that the Ordinary is certainly prohibited from doing so) can be.

The jurisdiction of the Ordinary in cases of partition was carved out of that of the Court of Equity. If the Chancellor, who exercised a similar jurisdiction in such cases, was not prohibited from purchasing at a sale ordered by him, there is no reason why an Ordinary should have been. In either case an officer was authorized by law to make the sales ordered by the Court, and he was inhibited from making a purchase at the sale so as not to prevent a fair and free competition at the same. But it is said if the Ordinary was permitted under the law to purchase at sales ordered by him, to whom was the bond to be given by the purchaser? The Act of 1839 did require the Ordinary to take the bond after the sale had been made and the Sheriff certified to him the purchaser. And in case the bond was not given, the Ordinary was authorized to order a resale at the risk of the former purchaser. The Sheriff was required by statute to make the sale, and in such cases he was, therefore, the ministerial officer of the Court of Ordinary, as the Clerks and Commissioners in Equity were of the Courts of Common Pleas and Equity. If the Ordinary purchased at the sale ordered by him, or any other reason prevented the taking the bond for him, why may not the Sheriff have taken it, as the ministerial officer in the particular sale? And when it became payable, why may he not have enforced it by suit against the Ordinary? And if the Ordinary failed to comply, why may not the Sheriff have resold without any order from the Ordinary for that purpose. If the Sheriff could not have thus acted as the ministerial officer of the Court in such cases, what was to prevent the Ordinary from executing a bond in his individual capacity to himself as Ordinary? Suppose the Sheriff could not take the bond, or the Ordinary, individually, could not give it to himself, in his official

*495

capacity, and *the Ordinary purchased at a sale and refused to comply,—could not the Court of Common Pleas, through one of its law Judges, have compelled the Ordinary to pay the amount of his bid in cash, or execute bond for the same, by reason of its supervisory jurisdiction over all inferior judicial tribunals? And if complaint was made, could not the Ordinary have been forced to order a resale, if he refused to comply, in the way of an appeal taken from an order requiring a resale? These are inquiries suggestive of a mode of obviating supposed difficulties in the way of an Ordinary having purchased at a sale ordered to be made by him.

I am of the opinion that there was no statute in existence in this State previous to the late war which, by its express terms, or by implication, inhibited an Ordinary from mak-

ing purchases at sales ordered by him for partition. It appears from the testimony in this case that the Ordinary only bid, and did not purchase, at the sale of the land belonging to the estate of Reynolds. A sale is not complete until the terms of sale are complied with by the purchaser. The bid in this case was transferred, and Asa Godbold was not, therefore, the purchaser. The Act prohibits certain officers from making a purchase and declares the sale to be null and void. There is no provision made, therefore, as to the effect of a bid and the subsequent transfer bona fide of that bid. The sale was complete, by the defendant (Gregg) complying with the terms, and the purchase was, therefore, made by him, assuming that the Ordinary could not legally purchase at a sale ordered by him. Asa Godbold in this case did not violate the provisions of the law, and the sale could not, on this ground, be declared null and void.

Did the Ordinary act in his judicial or ministerial capacity in deciding to sell the real estate of Reynolds and during the sale made thereof by the Sheriff? In ordering the sale, it cannot be disputed that he acted judicially. The Act leaves it to his discretion to say whether land in a proceeding for partition shall be sold or not. When he makes a decision, it is a judicial act. In the discharge of his judicial duties, nothing short of willful default, amounting to corruption, would make him liable. In making the order of sale, he could not have been invested with the disabilities of a trustee.

In the sale, how did he act? Did he discharge mere ministerial functions, which made him an express agent for the plaintiffs, and imposed the liabilities and duties of a

*496

trustee upon him? The *statute prescribed who was to make the sale ordered by the Ordinary. The Sheriff was the officer designated, and he was thus required to act as the ministerial officer of the Court of Ordinary to perform ministerial duties in executing the judgment of the Court. The Ordinary had nothing to do with the sale; he was not the officer making it; another officer did so, and was responsible for his acts to the Court of Ordinary as its ministerial officer. The Act inhibited him from purchasing the property sold, and if he had done so the sale would have been null and void.

After the sale was made by the Sheriff, then the Act required a ministerial duty to be performed by the Ordinary. In discharging it as a ministerial officer, he might have been answerable in damages resulting from his neglect, though it did not amount to corruption or a willful default. From the time of the judicial act in ordering the sale up to the time of taking the bond, the Ordinary, by statute, is released from the performance of any ministerial duty and another officer is substituted in his place. When a sale was ordered by the Court of Equity, as soon as the judicial act was performed another officer was designated to make the sale in a ministerial capacity, and while this act was being performed the Chancellor was not performing any functions. So with the Ordinary while the Sheriff was acting under the statute as the ministerial officer of his Court.

The Ordinary was not, therefore, a ministerial officer during or at the time of the sale ordered to be made by the Sheriff; he was not a general agent for the plaintiffs, and could not have been invested with the disabilities of a trustee and others occupying a fiduciary relation. The Referee properly held that the sale made by the Sheriff of the lands of Reynolds was not void or voidable, upon the grounds indicated in the exception.

But let it be assumed that Godbold was a general agent at the time of the sale, and was invested with the disabilities attaching to a trustee, the sale, by reason of the bid, would have been either void or voidable at the option of the cestui que trusts. The plaintiffs in this case in their bill have elected to recognize the sale as valid and to pursue J. G. Gregg. This election, when once made, cannot be retracted. They are, therefore, bound by it, and the sale should be declared valid.

The second exception is overruled.

The third exception charges error on the part of the Referee "in holding that the payment of the notes of the Confederate cur-

*497

*rency, under the conditional agreement entered into between Gregg and Godbold, was a payment and satisfaction of Gregg's bond given to the Ordinary for the purchase of the land." Was the transaction between Gregg and Godbold a valid payment of the bond, which cannot now be set aside?

An Ordinary was required to take two classes of bonds—the one purely money bonds, for the purchase money of lands sold in proceedings for partition, and the other class bonds of administrators or persons acting in a trust capacity. He was authorized to receive money in the payment of the first class and to discharge the obligors thereof. The second class were bonds of a peculiar character, the condition of which required the faithful performance of certain acts on the part of the obligors, and these he was not empowered to settle and to discharge the obligors. This distinction should be regarded in the consideration of this case. There was no inflexible rule requiring Ordinaries and other officers to receive gold and silver in payment of debts owing to them in their official capacity. If one of these officers had received bank notes in payment of bonds due them, and they had suddenly perished by some calamity to the bank issuing them, they would not have been held

responsible for the loss. They were, therefore, invested with some discretion in this matter.

If Godbold, then, had authority to receive payment of this bond and to discharge Gregg, and was invested with a discretion as to the kind of money to receive, did the payment of the money by Gregg and the surrender of the bond to him by Godbold amount to a valid payment of the bond? But it is said that at the time of the payment of the money there was an agreement which made the payment of the bond conditional. It appears that there was an understanding between the parties. Godbold was to confer with Singletary, (R. L.,) and if he declined to take the Confederate currency the bond was to be returned by Gregg and his money restored to him. The conference with Singletary was to take place within eight or ten days, and if Gregg had no objection within that time he was to rest easy and to consider the condition of the payment removed. Gregg received no notice from Godbold of an unwillingness on the part of any one interested to receive the money until some time in August, 1864, when the payment had been made in February (January) of the same year. In April, Godbold had funded the money in a four per cent. Confederate bond

*498

for the *benefit of the estate of Reynolds. Was Gregg bound to return the bond in August, 1864, under and according to the terms of this agreement? He paid the money with the distinct understanding that it was to become an absolute payment if he was not otherwise notified in eight or ten days. It seems that Gregg considered time as an essential part of the agreement. It was material, too, that he should have done so. The Confederate money was constantly depreciating, and he, like others in making contracts in reference to it, did not look far into the future. It is not reasonable to suppose that he would have paid his money, and agreed to allow Godbold to retain it as long as he saw proper, and then exercise a discretion for himself and others whether he would receive it or not in payment of the bond. If time, then, was an essential part of the agreement, after the expiration of ten days without notice to Gregg, the payment was absolute; but it is said the time was not of the essence of the agreement, and if Godbold notified Gregg within a reasonable time it was a substantial performance of the terms of it. Time is not ordinarily of the essence of the contract when the parties can be placed in statu quo without injury, but this was impracticable in this case. Gregg would be damaged by disregarding it. The Confederate currency had depreciated considerably in August, 1864, and its employment in business transactions was difficult. The end of the war, with a disastrous termination, was contemplated. Public officers had at that time, under instructions from Chancellors and Judges, declined to accept it in payment of debts owing to them in their official capacity. Private individuals also refused it in discharge of obligations due them at that time. Gregg could not use it in payment of debts, whereas if it had been returned to him within the time agreed by Godbold he may have employed it for that purpose or others. The character of the money had been changed by Godbold; it was invested in a Confederate bond, which was not readily convertible into any thing else, in August, 1864. Time, therefore, was of the essence of the contract in this case.

The agreement, then, between Gregg and Godbold became executed after the expiration of the ten days. The default or negligence of Godbold may have contributed to this end, but this should not affect Gregg injuriously. He was not at all responsible for the official conduct of this officer. If the contract was executed without any fraud on the part of Gregg, there was unquestionably

*499

a *valid payment of the bond. There is nothing in the testimony to implicate in any way the defendant Gregg in anything like unfair dealing, collusion or combination with Godbold to injure the plaintiffs by the payment of the bond. It is true the money was paid before the bond was due, but this fact does not evidence bad faith on the part of Gregg. The interest was paid on the bond to its maturity. Gregg had communicated with Singletary, the supposed agent or friend of the plaintiffs, in reference to the payment of the bond and had no intimation of an objection on his part. His information was that Godbold was the party, as the agent of the plaintiffs, to receive the money in payment of the bond. This consultation through friends with Singletary evidenced a disposition on the part of Gregg to do nothing contrary to the wishes or interests of the plaintiffs. Knowing that Godbold held the bond, he applied to him to know if it could be paid, and paid the principal and interest due up to maturity on the single condition that if it was not agreeable to Singletary he should be notified in eight or ten days and the bond was to be returned and the money returned.

After the expiration of the ten days, the agreement or understanding between Godbold and Gregg was an executed contract, and, there being no fraud on the part of the obligor, it cannot be opened against him. If the sale of the land was valid and the bond of Gregg has been satisfied, there is no necessity of considering the question whether a statutory mortgage was created in favor of distributees in cases of the partition or sale of lands made by the Ordinary. There can be no such mortgage in this case, and the land now in the possession of E. Miller is

not subject to the payment of the purchase money.

The only remaining question is, can the estate of Asa Godbold and the sureties on his official bond as Ordinary be made liable to the plaintiffs for the amount of the Gregg bond and interest? In the answer and in the argument it is insisted that the plaintiffs cannot prosecute the suit against the administrator of Asa Godbold or his sureties for the reason that there is an injunction preventing them. The administrator of Asa Godbold, it appears, has filed a bill to marshal the assets of his intestate estate, and an order of injunction has been granted in that proceeding. The effect of such an order is to stay the hands of suing and other creditors except before the tribunal designated therein. The reason for the granting of an injunction in such cases is to prevent a

*500

multiplicity of *suits and a ruinous accumulation of costs against an estate. Sometimes the Court will suspend an injunction on application for this purpose when it is manifestly to the interest of all parties interested that it should be done. In the argument an intimation was thrown out that this course could be pursued in this case, and the ends of justice demand it. All the parties proper to be here are now before the Court, and to remand the plaintiffs to another tribunal would be doing them injustice when the very parties they would pursue have been ordered by the Court to be made parties to this proceeding. If remanded to another tribunal, the plaintiffs could not then make some of the defendants in the case parties who are necessary to a full understanding and an adjudication of the questions involved in it. The settlement, too, of the estate of Asa Godbold might be delayed, the funds belonging to it tied up and the creditors of some inconvenienced.

The claim is contingent, its character dependent as it is upon questions of law and fact, and can be adjudicated before this tribunal as speedily and satisfactorily as before the other indicated in the order of injunction. For these reasons the order of injunction is suspended for the purpose of a hearing of this case, but not so far as to allow the parties to enforce any judgment rendered in any other way than is provided in the order. There can be no doubt of the power of the Court to do this. The order was granted by the Court exercising equity jurisdiction, and this case is heard on the same side of the Courts.

It was further insisted upon in the argument that the Referee decided that Godbold, as Ordinary, is not responsible for the loss of the Confederate currency received by him to the plaintiffs, and there is no exception to this part of the report. The Referee did incidentally so hold in deciding as to the liability of Gregg, but distinctly announces that the plaintiffs are prevented from further prosecuting this suit against the estate of Godbold and their sureties by the injunction. This decision plainly implies that he did not give this question consideration and did not intend to announce in the report any decision upon it. Should the estate of Godbold and the sureties on the official bond be held liable for the amount of the Gregg bond because the payment was received before the bond became due in Confederate currency?

For any official default, the Ordinary was held liable to the parties injured. In the case of Polock v. Dubose, (7 Rich. Eq., 23,)

*501

*Chancellor Dunkin says: "In the discharge of his duty, no other rule can well be adopted than that an officer should exercise the same care, diligence and caution which a prudent man would employ in the management of his own funds."

Did Godbold exercise the care, diligence and caution which was required on the part of public officers? At the time of the sale, Godbold was the bidder. The Sheriff certified that he was the purchaser. The bid was transferred by Godbold to Gregg for the consideration of one hundred dollars. A profit was made by him out of the transaction. The party out of whom it was made complied with the term of sale by executing his bond to the person to whom the bonus was given. Here was an officer and a party out of whom he had made a profit of one hundred dollars entering into a contract—the one in his official and the other in his individual capacity. This isolated fact may not be significant, but it must be considered in connection with what subsequently followed. Before the maturity of the bond the obligor proposes to pay it; the officer acting as the agent of the plaintiffs, invested with a discretion, hesitated at first to accept payment in Confederate currency, but finally consented on the payment of the interest due up to maturity and the understanding that it was to be a conditional payment for a specified time. The fact of hesitation on the part of Godbold at first indicated that his judgment as a prudent man and careful officer was adverse to the reception of the money. The hesitation could not have proceeded from the fact of the offer of payment before the maturity of the bond, for the reason that the only condition of its being taken was that Singletary would receive that kind of money. Suppose it had been gold or silver, —would the officer have thought of consulting Singletary or any one else as to the reception of it before the bond was due? The reception of the Confederate money before the bond was due, taken in connection with the fact before mentioned of the profit made out of the obligor, is significant. Was the act of taking, particularly in the depreciated currency in circulation at that time, the act of a prudent man? In 1864, creditors were

often unwilling to accept payment of notes and other obligations when they were due. Most of them resorted to all kinds of expedients to avoid receiving payment from their debtors, and in many instances positively refused, especially when the debtor was solvent and a prosperous man. Asa Godbold, as Ordinary and a creditor, was indisposed to

*502

receive the money from *Gregg, and his hesitation to do so incontestably establishes the fact. If prudent, how then at that time refused to receive Confederate money in payment of debts owing to them? Asa Godbold, as Ordinary, did not exercise the care and prudence exercised by prudent men in the management of their own affairs. His hesitation at first to receive the money evidences that he did not act as a prudent man or as his own judgment as a man dictated. It is not known how much influence the persuasion or importunities of the obligor, to whom he had transferred his bid, had upon his mind. The only fact known is that, after hesitation, the money was received and the bond surrendered conditionally.

It appears that Godbold not only received the money but surrendered the bond to Gregg, after an agreement that if Singletary would take the money the transaction between them would amount to a valid payment of the bond. Was the surrender of the bond a prudent act? Most persons, and particularly public officers, would certainly have retained the bond and the money, after giving a receipt for the latter, until it had been ascertained if the parties entitled would accept the Confederate notes. This fact, taken alone, signifies nothing; but when considered in connection with the fact that the obligor had paid Godbold one hundred dollars to get the land for which the bond was given, and the additional fact of the receipt of the money before the bond was due, it raises a suspicion that there was willingness on the part of Godbold to aid Gregg in paying the bond in Confederate money, although he did not consider it exactly prudent. Why was Singletary to be consulted? There is no proof that he was the guardian or the authorized agent of the plaintiffs. It is in proof that Singletary was employed in a distant part of the State but was occasionally at Marion. The plaintiffs resided constantly in the County; they were accessible in a few hours. Yet the agreement was that Singletary was to be consulted. There is some evidence that Singletary had been communicated with by Gregg, and that he intimated that Godbold was the proper party to receive payment of the bond. These facts, taken in connection with the others, may throw some light upon the transaction. After the agreement was made, Godbold, by his neglect, allowed it to become executed after the expiration of the ten days. Godbold, according to the testimony, calculated the time within which he could see Singletary, and then specified the eight or ten days. It was his duty to have performed his part of the

*503

*contract, namely, to see Singletary; and if it was impracticable to do so within the time, Gregg should have been notified and an extension of time asked. Nothing of this kind was done by Godbold. Would a prudent man, acting for himself, have done as Godbold?

In April, 1864, Godbold funded the money, or purchased with it a Confederate bond for the Reynolds estate. Up to this time he had not seen Singletary. He must have considered the contract between him and Gregg executed at that time. If not, why was the money considered by him as that of the Reynolds estate and not Gregg's? The act of funding, therefore, on the part of Godbold, evidenced that he considered the condition of the reception of the money from Gregg removed and the contract between them as executed. The act is also an admission by Godbold that he had been in official default by not conferring with Singletary before and promptly notifying Gregg. The acts of Godbold and all the facts show he was guilty of negligence as a public officer.

Gregg was notified in August, 1864, that Singletary declined to receive the money. There is proof that Singletary, prior to that time, had become a little offended with Godbold about the payment of the bond.

Singletary's conduct and conversation no doubt prompted the note to Gregg written in August, 1864. At that time Confederate money was constantly depreciating, and most persons clearly perceived what was to be the result of the war. Godbold's apprehensions, as a public officer, were excited about the receipt of the Confederate money, and he desired to avert the possible consequence of his own carelessness as a public officer by insisting then upon a performance by Gregg of his part of the agreement, when Godbold had already recognized it as an executed contract.

When all the facts and circumstances are fairly considered, I cannot come to the conclusion that Godbold, as Ordinary, exercised such diligence, caution and prudence as was required of him. It may be said that at the time he received the money other public officers and many private parties were accepting it in payment of debts owing to them; and, further, that the land belonging to the estate of Reynolds was sold in 1863, and it was expected from this that the purchaser was to pay for it in Confederate money. It may be true that officers and others did receive Confederate money, but they were not in the habit of doing so on obligations not due, as before observed. The general disposition

*504

was to avoid the reception *of it after the maturity of the debt. The sale was made in 1863, during the time when there was no oth-

er money but that of the Confederate States in circulation. But it is a fact that the money was constantly depreciating, and it was not worth so much in value in 1864 as it was in 1863.

The Ordinary in this case was invested with a discretion in those times, and he was bound, in the exercise of it, to act prudently and cautiously. Suppose land had been sold in 1864, and the purchase money had fallen due in 1865, would the Ordinary have been faultless for receiving payment in 1865? If he exercised his discretion imprudently, he would have been held responsible for the act.

It may be said that the times when the transactions between Godbold and Gregg occurred were peculiar, and that they should be considered in deciding questions like the one before the Court. They should have due weight in connection with other things. But an officer should not now be released for a clearly incautious and imprudent act exclusively on the ground that it was performed in a "trying period." The case of McPherson v. Gray, (14 Rich Eq., 124,) has been cited as authority to show the rule in such cases as this, and for the further purpose that Gray in that case was relieved, and the case under consideration is very similar in many respects. This case has been decided by the highest Court in the State. Other cases involving the liabilities of trustees have also been decided by the same Court. In carefully reading the cases, it will be observed that there was a manifest disposition on the part of the Court to excuse for alleged official default whenever there was the slightest doubt or there was opportunity to relax the rule adopted for determining the liabilities of officers or persons occupying a fiduciary relation.

This was natural, for the war had not long been terminated, and the ruinous results of it had affected every citizen of the State, so far as his material interests were concerned. This may have been a justification of such a relaxation of the rule, and necessitated the application of it, as modified, generally; but there is not the same excuse now for such indulgences, and each case should be considered in reference to the established rule of law and the parts of the particular case.

The defense in the case of Gray was put upon good faith and the state of the times. He was excused, because, as it is said in the case, Confederate currency was the only kind

*505

in circulation, passed *as money and was received by prudent men in the payment of debts. In this case it is further said that Gray did not officially call in the bond, and never received one whimper of admonition from the parties interested not to receive the money, although the bond was past due. It will be observed there are differences between the case of Gray and the one under consideration. Godbold received the money before the bond was due; Gray received it after it was due. It was unnecessary to admonish Godbold until just before the bond of Gregg fell due. The parties interested may have intended to do so. They should at least have had an opportunity. The bond held by Gray was past due, and the parties interested had the opportunity of admonishing him. The decision of the Court was, in the case of Gray, that he acted in good faith in the line of his duty. Can the same be said of Godbold? His judgment was that the Confederate money ought not to be received. In taking it conditionally he exercised a discretion not to receive it on his own judgment; he failed to see Singletary or the parties in interest and get their approval of the receipt of it conditionally, and thereby received the money in payment of the bond against his own judgment. He did not, therefore, act in good faith, by exercising proper care, diligence and caution.

Looking at the act of Godbold, as Ordinary, in receiving the Confederate money in payment of Gregg's bond, in every aspect, the conclusion is forced upon me that he did not exercise the required care, diligence and prudence, and the act ought not to be sanctioned by the Court.

Shall the estate of Godbold and the sureties on the official bond be held liable for the amount of the Gregg bond and interest, or only the value of it, as ascertained by the Act of 1869? The land was sold in 1863, when there was no other currency than that issued by the Confederate States. It must have been regarded then as the medium of payment at the time of the sale. It appears that no announcement was made at the sale that it would not be accepted in payment. The land brought an inflated price. The plaintiffs petitioned for a sale of the land, and must have looked to Confederate currency as a medium of payment. All the circumstances of the case show that all the parties were dealing with reference to that currency at the time of the sale. If this were a contest between the plaintiffs and Gregg, the latter would be allowed to show what the interest of the portion was at the

*506

time the *sale was made and the bond was given. Godbold and his sureties should be allowed to do the same thing. As the parties dealt with reference to Confederate money, the value of the bond of Gregg must be determined by the Act of 1869. The value of the bond on the 2d day of February, 1863, as ascertained by the provisions of the Act of 1869, was five hundred and fifty-two dollars and sixty cents, and this amount, with interest from the 2d day of February, 1863, is the liability of the estate of Godbold and the sureties.

It is adjudged and ordered that the bill of complaint be dismissed as to the defend-

ants J. Gadsden Gregg and E. Miller, and that the defendants, Asa Godbold, Jr., as administrator of Asa Godbold, Sr., and Edward B. Ellerbe, G. W. Berry, Evander J. Moody and John H. Moody, as sureties on the official bond of Asa Godbold, Sr., late Ordinary of Marion District, are liable to the plaintiffs for the sum of five hundred and fifty-two dollars and sixty cents, with interest from the 2d day of February, 1863, and that judgment is hereby rendered against them for this amount and interest in favor of the plaintiffs.

The defendants appealed.

McIver & Wood, Sellers & Sellers, for Godbold and his sureties:

1. The bringing of this action against the administrator of Godbold, in the face of the injunction, was a contempt of Court.

2. The injunction ought not to have been suspended for the purposes of this action, inasmuch as no notice of any such application was given; nothing of the kind mentioned in the complaint, and no order of the kind asked for at the hearing.

3. To allow such an application in an action where the creditors of Asa Goldbold could not be heard, is calculated to work injustice to them, and ought not to have been done, especially when there was another action pending in the same Court to marshal the assets of the estate of Asa Godbold, in which, if anywhere, the motion to suspend the injunction should have been made, because there the creditors of Asa Godbold could have been heard.

4. If the action cannot be maintained against the administrator of Asa Godbold, neither ought it to be allowed against his sureties, as the only case in which an action of this kind can be brought against the sureties to a bond for the performance of official or other like duties is where the principal

*507

is beyond the jurisdiction of *the Court, which is not the case here.—Teague v. Dendy, 2 McC. Ch., 209; Glenn v. Conner, Harp. Eq., 267; McBee v. Crocker, McM. Eq., 485; Taylor v. Taylor, 2 Rich. Eq., 123; Gaydon v. Gaydon, McM. Eq., 435; Riddlespurger v. Riddlespurger, cited in McM. Eq., at p. 490, and Cole v. Cole, on same page; Wilson v. Waterman, 6 Rich. Eq., 523; Wright v. Eaves, 10 Rich. Eq., 582.

5. If, however, the foregoing propositions cannot be maintained, then we say that the judgment of the Circuit Court is objectionable on the ground that, although overruling all the exceptions taken to the Referee's report, which decided that the complaint should be dismissed, he proceeds to decide the case upon points not made in the pleadings and not appearing in the report of the Referee.

6. The Circuit Judge bases his judgment upon the ground that Godbold was guilty of bad faith in accepting payment of the bond of Gregg in Confederate money before it was due, while no such question was, or could be, made under the report of the Referee.

7. If this question could be considered, then the Circuit Judge has erred in matter of fact:

First, in saying that the bond was not due when it was paid—the terms of the bond being "on or before" 2d February, 1864, and not on 2d February.

Second. In assuming that Godbold hesitated to receive payment on account of the currency; whereas the evidence is that his hesitation arose from the fact that the bond was not due, as he supposed.

Third. In saying that public officers and most prudent men were then refusing to accept Confederate money, when there was no evidence to this effect.

And he erred in law in saying that Confederate money was depreciating rapidly from the time when the money was received to the 15th August, 1864, when the Act to determine the value of such currency shows that it was worth more in August than it was in January, 1864.—Rev. Stat., 315, § 2.

And he also erred in holding that Godbold was guilty of bad faith in receiving payment of the bond in Confederate money.—McPherson v. Gray, 14 Rich. Eq., 124; MSS. case of Tupper, Master in Equity.

8. If bad faith is to be imputed to Godbold, by reason of the profit of one hundred dollars, made on the sale of the land, as intimated by the Judge, this ought not to af-

*508

fect the sureties, as *they were not then on his bond, their bond being dated 7th December, 1863.

C. D. Evans, for plaintiffs:

The decree of His Honor the Circuit Judge makes Godbold, Ordinary, and the sureties on his official bond liable to the plaintiffs and a decree as to them is rendered. It is not proposed to add to the reasoning or to the authority of the Court below.

2. The bidding off by Godbold of the land under his order of sale was illegal and void or voidable as contrary to public policy.—Inquiry as to history of Ordinary, 2 Black. Com., 474; Acts 1824, vol. 6, 248; A. A. 1839, 7 Stat., § 32; intendment of Stat. 1791, vol. 7, 263. In taking bond acts ministerially.—Boggs v. Hamilton, 2 McC. R., 382; Simmons v. Watson, 2 Speer, 97; McRae v. David, 5 Rich. Eq., 475.

3. A fiduciary relation subsists between Godbold, Gregg and Miller.—Fox v. Macreth, 1 Leading Cases in Equity, 72; Butler v. Haskell, 4 DeS., 653, 765; Story, 315, 316; Hill's Trustees, 159; Story's Agency, § 20; 2 Story Eq. Jurisprudence, 1261; 4 Kent Com., 438; 1 Leading Cases Equity, American edition, 159; Ex parte Wiggins, 1 Hill Chancery, 353; Sallee v. Croft, 7 Rich. Eq., 43. As to joint and several liability of Gregg and Miller, see Hill on Trustees, 520.

4. Liability of Gregg on his agreement to restore the bond: time not essence of contract generally.—2 Story, § 776; 2 Story, § 771; A. A. 1869, regulating value of Confederate currency comparison of January and August, 1864; Neeley v. McFadden, 2 S. C., 469; Husman v. Wallace, 2 S. C., 208.

Johnson & Johnson, (for Wm. B. Timmons and James F. Pearce, executors of will of J. Gadsden Gregg:)

1st. Asa Godbold, Ordinary, had the right to receive payment of the bond of Gregg in any way that he might see proper and thereby to extinguish the same. Bush v. Kilcrease, 1 Strob., 419.

2d. That the Referee held as a matter of fact that the bond of Gregg had been paid by him to Godbold, and the presiding Judge concurred in the opinion; and in such cases the testimony must be clear and overbearing before this Court will interfere.—1 Hill Ch., 76; Blackwell v. Searls, 1 S. C., 116; Austin

*509

v. Kinsman, 1 S. *C., 97; Hinton v. Kennedy, 3 S. C. On an appeal from the concurring judgment of the Commissioner and Chancellor, upon a question of fact, the onus is on the appellant to show from facts in evidence that there is no reasonable doubt of the error.

3d. That time in this case was material and entered into the essence of the agreement.—1 Parsons on Contracts, 565, and 2d, 659 and 660; Chitty on Contracts, 336; Story's Equity, 776, bottom of marginal note 4.

4th. It was impossible for Godbold, in August, to place Gregg in the same condition he was in January, from the fact that one-third of the money had been repudiated by the funding Act, and that particular money had been funded by Godbold for the benefit of the estate of Reynolds.—Townsend, Arnold & Co. v. Stephenson & Walker, 4 Rich., 59.

May 2, 1876. The opinion of the Court was delivered by

WILLARD, A. J. The conclusions of the Circuit Court are in accordance with the judgment of this Court, but the propositions upon which those conclusions rest appear to require modification.

The Circuit Judge holds that the transfer by Godbold of his bid, on the purchase of the property to a third person had the same effect as it regards the rights of Godbold and his purchaser as if the purchase had been originally made in the name of such third person.

The grounds upon which this conclusion is placed are not clear to our minds. Assuming that Godbold was competent to bid at a sale ordered by himself as Ordinary—an assumption that we think we are bound to make in the position of the case before us—then he became liable for the purchase money. He certainly could not discharge himself from this liability by any act of his own except payment. Selling his bid to a third person for a profit to himself could work no such change in his obligation in his favor. Taking security to himself either individually, or as Ordinary, for the payment of the purchase money, while it might increase the sources to which the parties entitled to the money might be enabled to look, could not diminish his own individual liability. It was clearly the duty of the Ordinary to have the amount of the purchase money in hand at the time the credit for the purchase money expired. He could, as Ordinary, offer no excuse based upon his individual default for not having the money in hand at that time.

*510

*The plaintiffs are not in any way affected by the transactions of Godbold with Gregg. They are not bound as assenting to any of those transactions. If Godbold undertook to hold Gregg's money until a time when the plaintiffs might be compelled to receive it, and before that time the money became lost or otherwise unavailable, that cannot prejudice the plaintiffs, who were not parties to such transaction.

It is clear, then, that Godbold and his sureties were properly adjudged liable for the credit portion of the purchase money.

The objection that the decree virtually violated an injunction restraining the prosecution of suits against the personal representative of Godbold, issued in an independent action, is not well taken.

The Circuit Court, having all the necessary parties before it, had complete control over that injunction, so far as it affected proceedings in this case.

MOSES, C. J., and WRIGHT, A. J., concurred.

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